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SECOND SERIES

37 Cal.2d 522

TOSSMAN v. NEWMAN.

L. A. 21805.

Supreme Court of California, in Bank.

July 3, 1951.

Action by Max Tossman against Alfred Newman for injuries resulting from a collision between plaintiff's motorcycle and defendant's automobile at intersection. The Superior Court, Los Angeles county, Caryl M. Sheldon, J., gave judgment for the defendant and plaintiff appealed. The Supreme Court, Gibson, C. J., held that the court did not err in refusing to give certain instructions requested by plaintiff.

Judgment affirmed.

Prior opinion, 222 P.2d 945.

1. Automobiles 🔑244(47)

In action by motorcyclist against motorist for injuries resulting from a collision which occurred when motorcyclist, although having unobstructed view of highway, did not see automobile until it began to turn left off of highway onto private road, evidence was sufficient to support verdict for motorist.

2. Automobiles 🔑171(12), 246(9)

Statute providing that driver of vehicle intending to turn left at intersection should make turn so as to leave intersection to right of roadway being entered, applies only to turning at intersection of public highways, and refusal to give instruction that statute controlled at intersection of public highway and private road, was not error. Vehicle Code, §§ 81, 86, 540.

3. Negligence 🔑6, 121(1)

Disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a rebuttable presumption of negligence arises on proof of such violation. Vehicle Code, § 540(b).

4. Automobiles 🔑246(60)

Requested instruction that, if defendant, intending to turn left at intersection, failed to approach in portion of right half of roadway nearest center line, jury must find him negligent, was properly refused, since it did not properly limit presumption of negligence arising from violation of statute. Vehicle Code, § 540 (b).

5. Trial 🔑260(8)

Where instructions, concerning statutory duty of motorist to yield right of way to approaching vehicle when turning, were substantially covered by other instructions given by court, refusal to give motorcyclist's requested instructions was not error. Vehicle Code, § 544.

6. Appeal and error 🔑205

No offer of proof is necessary in order to obtain a review of rulings on cross-examination.

7. Appeal and error 🔑1058(2)

Trial court's refusal to permit motorcyclist to ask questions which had been substantially covered by previous testimony on cross-examination was not prejudicial error.

8. Appeal and error 🔑201(2)

Where trial court told motorcyclist's counsel that there was nothing on which to cross-examine, and he did not object to the comment, the point cannot be raised for first time on appeal.

◆

Alvin G. Greenwald and Leonard G. Ratner, Los Angeles, for appellant.

Roger E. Kelly and Bauder, Gilbert, Thompson, Kelly & Veatch, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff appeals from a judgment for defendant in an action for personal injuries resulting from a collision between plaintiff's motorcycle and defendant's automobile. He contends that the evidence does not support the verdict and that the court erred in giving instructions and in limiting the scope of cross-examination.

The collision occurred May 3, 1948, during daylight in clear weather on Sunset Boulevard, which, at that point, is an east-west, two-lane open highway in Los Angeles County and is intersected from the south by a private road which leads to a number of homes located in a small valley nearby. Plaintiff, with a companion seated behind him on his motorcycle, was traveling east on Sunset at a speed of at least 35 miles per hour. Defendant was driving his automobile west on the same highway, and as he approached the point where the private road entered the highway, he decreased his speed from about 30 to about two miles per hour. He then signaled for a left turn, looked in both directions without seeing plaintiff, and commenced to turn left into the private road. Although plaintiff had an unobstructed view of the roadway for a distance of 300 feet before the point of impact he testified that he did not see defendant's car until it had begun its left turn and that he was then only about 35 feet away from it. Plaintiff increased his speed, swerved to the right and attempted to pass in front of defendant's car. The motorcycle collided with the left front fender of the car, and plaintiff suffered a broken leg and bruises about the head and shoulders.

[1] The evidence is sufficient to support the verdict since the jury could have found either that defendant was not negligent or that plaintiff was guilty of contributory negligence which was the proximate cause of the accident.

[2] Plaintiff claims that the court erred in refusing to give an instruction requested by him as follows: "Section 540 of the Vehicle Code provides: 'The driver of a vehicle intending to turn left at an intersection shall approach in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection, the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered unless otherwise directed by markers, buttons, or signs.'" The purported quotation, while not entirely accurate, substantially sets forth subdivision (b) of section 540 as it then read. It is true that there was evidence which, taken most favorably to plaintiff, tends to show that defendant commenced to make his turn before starting to cross the near boundary of the intersection. There was no error, however, in refusing to give the requested instruction because it incorrectly informed the jury that section 540 was controlling, whereas that section applies only to the intersection of public highways and not to the intersection of a private road and a public highway. Vehicle Code §§ 540, 86, 81.

[3, 4] Plaintiff also requested an instruction which told the jury that if defendant, intending to turn left at the intersection, failed to approach in the portion of the right half of the roadway nearest the center line, the jury "must find" him "negligent as a matter of law." By this request plaintiff in effect sought to have the court apply the substance of section 540(b), which, as we have seen, is applicable only to a public intersection. Even if we assume that the court should apply the same traffic rules to private intersections as are made applicable by statute to public intersections, a driver's failure to follow those rules at a private intersection should not subject him to greater consequences than would result from his violation of the statute at a public intersection. It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse. See Ornales v. Wigger, 35 Cal.2d 474, 477 et seq., 218 P.2d 531; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588 et seq., 177 P.2d 279. The instruction requested by plaintiff was not so limited, and the court was under no

duty to revise it to make it state the law correctly. Estate of Dopkins, 34 Cal.2d 568, 575, 212 P.2d 886; Nelson v. Southern Pacific Co., 8 Cal.2d 648, 653, 67 P.2d 682; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 15, 47 P.2d 462; Hart v. Farris, 218 Cal. 69, 75, 21 P.2d 432.

[5] It is also contended that the court erred in refusing to give certain instructions on the duty of a driver to yield the right of way. The requested material, however, was substantially covered by other instructions given by the court. The jury was told that section 544 of the Vehicle Code provides that a driver should not turn from a direct course "unless and until such movement can be made with reasonable safety", and the court explained that under this section the driver must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn can be safely made. Although the court did not phrase its instruction in terms of yielding the right of way, it covered the rule set forth by section 544, and, in our opinion, sufficiently informed the jury of defendant's statutory obligation with respect to any approaching vehicle.

[6] The next contention is that plaintiff's right to cross-examine defendant was improperly limited by the trial court. Defendant asserts that plaintiff cannot properly complain of the rulings at this time because he failed to make an offer of proof. Questions on cross-examination, however, are largely exploratory, and it is unreasonable to require an offer of proof since counsel often cannot know what pertinent facts may be elicited. Cf. Lawless v. Callaway, 24 Cal.2d 81, 91, 147 P.2d 604. Hence no offer of proof is necessary in order to obtain a review of rulings on cross-examination. See Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218–219, 75 L.Ed. 624; Powhatan Mining Co. v. Ickes, 6 Cir., 118 F.2d 105, 110. Any intimation to the contrary in Heinz v. Heinz, 73 Cal.App.2d 61, 66, 165 P.2d 967, and In re Bewick, 49 Cal.App.2d 287, 291–292, 121 P.2d 815, is disapproved.

[7] Plaintiff argues, with regard to the ruling on cross-examination, that the trial court committed prejudicial error in sustaining an objection to a question which he asserts was designed to fix the time that defendant looked for approaching vehicles in relation to the time he made his left turn. The question was: "And was it after you had looked or during the time that you were looking that you made, started to execute your turn?" The substance of the question, however, was covered by previous testimony on cross-examination. Immediately before the question was asked, defendant testified that he looked westerly on Sunset either when he came to practically a complete stop or just afterward when he first crossed the center line, which, of course, was prior to entering the lane in which plaintiff was approaching. This testimony was in response to a question concerning two points which defendant had marked on a map to show where he stopped and where he started to cross the center line. The points indicated about where defendant began to turn, and defendant thus testified in effect that he looked at approximately the time and place that he commenced his turn. We cannot say that the trial court abused its discretion by refusing to permit plaintiff to ask a question which had been substantially covered by a previous question in cross-examination.

[8] There is no merit to plaintiff's claim that the judgment should be reversed because of a remark made by the trial court in sustaining an objection in the course of cross-examination. The court told plaintiff's counsel, in substance, that there was nothing on which to cross-examine. Plaintiff did not object to the comment, and since it is clear that any improper implication could have been cured by an appropriate instruction, the point cannot be raised for the first time on appeal. Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 299, 153 P.2d 705; Hughes v. Hartman, 206 Cal. 199, 205–206, 273 P. 560.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 430

KING v. MORTIMER, Building and Loan Com'r, et al.

S. F. 18331, 18332.

Supreme Court of California, in Bank.
June 28, 1951.

Rehearing Denied July 26, 1951

Wesley King brought an action against Frank C. Mortimore, as Building and Loan Commissioner of the State of California, and Pacific States Savings and Loan Co. (a corporation) to recover the difference between face value of defendant corporation's investment certificates and the amount paid plaintiff's assignors, on the ground that the purchases were illegal and procured by fraud. The Superior Court, San Francisco County, Edward P. Murphy, J., sustained a demurrer to the complaint without leave to amend and plaintiff appealed. The Supreme Court, Shenk, J., held that the amended complaint did not allege facts sufficient to support a conclusion that the transactions were void and that plaintiff had not sufficiently alleged right to equitable remedy of rescission or in the alternative, a right to recover damages.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 224 P.2d 733.

1. Building and loan associations 🔑40

Purchases by building and loan association of its investment certificates at a discount on an open market were not contracts of waiver within statute placing limitations on investor's withdrawal of funds prohibiting association from making a contract waiving provisions of the statute. Gen.Laws, Act 986, §§ 6.01, 6.02, 9.01, 9.02.

2. Building and loan associations 🔑40

Under statute providing that violation of Building and Loan Association Act would not make violative agreement void, purchases by building and loan association of its investment certificates at a discount on open market were not invalid even if purchases were contrary to Act as unlawful use of association's funds. Gen.Laws, Act 986, §§ 6.02, 14.05, 14.07.

3. Constitutional law 🔑154(2)

Where at time plaintiff's assignors became investors in state building and loan association, state constitution provided that all laws concerning corporations and all such future laws might be altered from time to time or repealed, Legislature could make a subsequent change in legal effect of a future violation of the Building and Loan Association Act by the association, without violating contractual rights of investors. Gen.Laws, Acts 986, §§ 14.03, 14.04, 14.07; Const. art. 12, § 1; U.S.C.A. Const. art. 1, § 10.

4. Fraud 🔑62

Where a party seeks to rescind for fraud or to recover damages, the objective in equity being to place the rescinding party in his former position, collectibility of debt or judgment has no bearing on amount recoverable.

5. Building and loan associations 🔑41(9)

Where at time building and loan association purchased its own investment certificates from plaintiff's assignors at discount on open market there were not any matured claims or debts due assignors, but sale value of certificates was affected by general economic depression, only damages to which plaintiff's assignors would be entitled was difference between price at which they sold and greater amount which market would have brought save for alleged fraudulent conduct of association in purchasing certificates and where no facts in that connection were alleged or relied on, plaintiff was not entitled to any relief. Civ.Code §§ 1691, 3343, Gen.Laws, Act 986, §§ 6.01, 9.01, 9.02.

6. Building and loan associations 🔑41(2)

Where plaintiff's assignors sold their investment certificates in building and loan association to association on open market at time when widespread economic conditions depressed market generally, and plaintiff alleged that if assignors had not been induced by alleged fraud of association to sell their certificates they would have been paid full amount of their certificates during liquidation, assignors could not retain consideration received on sale and at same time be reinstated nearly 20 years later and share in property and assets in preservation of which they declined to continue their support. Gen.Laws, Act

986, §§ 6.02, 14.05, 14.07; Civ.Code, § 3343.

7. Building and loan associations ⚷40

Relationship between holders of investment certificates of building and loan association and association is that of debtor and creditor. Gen.Laws, Act 986.

8. Building and loan associations ⚷41(2)

The relationship between building and loan association and holders of investment certificates being that of debtor and creditor, plaintiff was not entitled to recover deficit between face value of investment certificates and amount paid plaintiff assignors by association when association purchased certificates on open market, on ground that fiduciary relationship existed between association and certificate holders. Civ.Code, § 1691; Gen.Laws, Act 986, §§ 6.01, 9.01, 9.02, 14.05, 14.07.

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Morse Erskine, Alden Ames, Erskine, Erskine & Tulley and Erskine, Pillsbury & Tulley, all of San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher and James Farraher, all of San Francisco, for respondents.

SHENK, Justice.

The plaintiff sued as the assignee of 250 former investment certificate holders of Pacific States Savings and Loan Company to set aside the sales of their certificates and for reinstatement as certificate holders, or for damages. The action is based on alleged illegal acts and fraud of the defendant corporation. The Building and Loan Commissioner of the state was joined as a defendant. A judgment was entered on an order sustaining the defendants' demurrer to plaintiffs' amended complaint without leave to amend. The plaintiff appealed.

This is the second appeal in the case. The first appeal also was by the plaintiff from a judgment entered on an order sustaining the defendants' demurrer to the original complaint without leave to amend. That judgment was reversed on the ground that leave to amend should have been granted. King v. Mortimer, 1948, 83 Cal.App.2d 153, 188 P.2d 502.

The amended complaint was filed on April 27, 1948. That pleading and the decisions in prior cases involving the affairs of Pacific States Savings and Loan Company (herein also referred to as the association) give the historical background leading to the present action. See Pacific States Savings & Loan Company v. Hise, 25 Cal. 2d 822, 155 P.2d 809, 158 A.L.R. 955; King v. Pacific States Savings & Loan Co., 26 Cal.2d 333, 158 P.2d 561.

Pacific States was organized as a building and loan association in 1889. Operations of the association continued in good financial condition until 1929, when due to the world-wide economic depression its affairs became involved by the necessity to foreclose on real property holdings and because of excess demands for withdrawals by investors. On March 4, 1939, the Building and Loan Commissioner took possession of the association's property, business and assets. It is alleged that beginning in 1931 to the date of the commissioner's possession, the association through its agents engaged in a course of conduct designed to acquire outstanding investment certificates at less than their face value; that it commenced the sale of foreclosed properties to acquire funds for that purpose; that there was a market for its investment certificates by reason of the fact that holders were offering their certificates for sale and that they were being purchased; that the association had the power to and did within limits control the bid prices for the investment certificates although it could not fix prices so low that holders would not be induced to accept the prices offered; that the association was always able to fix prices on the market at substantially less than the face amount. The association purchased investment certificates aggregating $26,500,000 face value for approximately $17,500,000, representing a difference of approximately $9,000,000 between the face amount of the certificates and the amount for which they were purchased. The plaintiff's assignors in the present action represent and seek to recover $690,646.78 of that difference. The action was commenced on

October 18, 1943. It will be assumed that the present complaint sufficiently indicates that claims for the amount sought were theretofore duly presented to the Building and Loan Commissioner and were rejected.

The original complaint was framed to recover the stated difference on the theory that the alleged course of conduct rendered the purchases by the association illegal and void. In holding on the prior appeal that the plaintiff should have been permitted to amend the District Court of Appeal said [83 Cal.App.2d 153, 188 P.2d 505.]: "It must be conceded that the complaint does not plead sufficient facts upon which the transactions complained of could be held void." After mentioning the former case of King v. Pacific States Savings & Loan Co., supra, 26 Cal.2d 333, 158 P.2d 561, the court continued: "The case we have here is also founded upon charges of fraud. Unless the plaintiff can amend his complaint to show affirmatively wherein the contracts involved were void and not merely voidable, we must assume that if the plaintiff can recover at all it must be on the theory that the transactions complained of were voidable because of the fraudulent misrepresentations which brought them about. On this theory it would become necessary for him to rescind the transactions and restore everything of value which he had received, or to plead facts showing that plaintiff's assignors were entitled in any event to retain what they had received," citing section 1691 of the Civil Code.

The amended complaint was an attempt to comply with the declared requirements. The questions to be determined are whether the complaint as amended contains allegations of fact sufficient to support a conclusion that the transactions were void; and if not, whether the plaintiff has brought himself within the provisions of section 1691 of the Civil Code by alleging restoration of or offer to restore benefits received, or facts showing the right to retain them in any event. The plaintiff has also added alleged causes for the alternative relief in damages in the event he has failed in the other respects. See Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445.

The plaintiff contends that the facts alleged in the amended complaint show a violation of section 6.02 of the Building and Loan Association Act as in effect during the times involved (Stats.1931 p. 483; 1933, pp. 309, 1098, 1101; 1935, p. 800; Deering's Gen.Laws, Act 986). The section placed limitations on investors' withdrawals of funds by defining matured withdrawal claims (See sec. 6.01 for requirements to file notice of intention to withdraw by certificate holders), preferred claims, and "free money"; by stating when available funds are free money, when an association is on notice, or on a pro rata basis and by regulating when free money may be used and for what purpose. It is claimed that the alleged use of association funds was contrary to that section and was also prohibited by sections 9.01 and 9.02 which regulated the investments and loans that the association might make.

Section 6.02 prohibited the association from making a contract waiving the provisions of the section and provided that any such contract should be null and void. Section 14.05 declared the wilful violation of any provision of the Act to be punishable as a criminal offense. Section 14.07 stated that except as "otherwise expressly provided in this act, no violation of any of the provisions of this act shall render invalid any agreement, contract, stock, share, investment certificate, note, trust deed, mortgage or other instrument."

[1] The plaintiff argues that the purchases of the certificates were void as contracts of waiver. Manifestly the transactions sought to be avoided were themselves not contracts of waiver of the provisions of section 6.02. They were purchases of the certificates on an admitted open market. No contracts of waiver are alleged. Thus the transactions were neither contracts of waiver nor pursuant to such contracts.

[2] If the purchases on the market were contrary to the Act as unlawful use of association funds, it may be assumed that they were violations but, pursuant to section 14.07, they were not thereby rendered invalid. That express prohibition against invalidity of the unlawful acts prevents the

application of the general rule relied on by the plaintiff that when a statute prohibits or attaches a penalty to the doing of an act, the act is void. See Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Stevens v. Boyes Hot Springs Co., 113 Cal.App. 479, 482–484, 298 P. 508, for statement of the general rule.

[3] The act of 1931 was a continuation of prior law (Sec. 14.03) with additions including saving clauses (sec. 14.04). The plaintiff contends that since section 14.07 was an addition in 1931 and therefore was not the law at the time the assignors became investors (or so we shall assume), it should not apply. He thereby invokes another general rule, namely, that the provisions of the law in force at the time the contract was made constitute a part of the contract. He argues that the addition of section 14.07 in 1931 was a subsequent material change which would unconstitutionally affect the assignors' vested contractual rights (Sec. 10, Art. 1, U.S.Const.). It is unnecessary to consider what weight this argument might have if it were directed to purchases of assignors' certificates occuring prior to August 14, 1931, the effective date of section 14.07. None of the alleged transfers was made prior to that date. When the assignors became investors section 1 of Article XII of the state Constitution provided that all laws concerning corporations and all such future laws might be altered from time to time or repealed. Thus it was not a contractual right of investors that the legislature could not make a subsequent change in the legal effect of a future violation of the Act by the association. The further argument that the provisions of the Act are for the protection of the investor and that the court should so apply them even to the exclusion of those deemed undesirable to that end is obviously not valid. The question of what balance should be maintained between individual investors and the association as a whole in the protective measures to be included is the concern of the legislature. It was a matter for that body to consider what might be the disastrous possibilities if unlawful acts of such associations were to be held void. It was for the legislature to determine whether in a proper case the investor should be held to the equitable remedy of rescission. It follows that the amended complaint does not allege facts sufficient to support a conclusion that the transactions were void.

The next question is whether the plaintiff has sufficiently alleged the right to the equitable remedy of rescission; or, in the alternative, the right to recover damages.

Pursuant to section 1691 of the Civil Code the assignors' duty was to rescind promptly upon discovery of the alleged fraud and to restore or offer to restore everything of value received under the contract sought to be rescinded, namely, the price paid for their certificates.

Even if it be assumed that the alleged notices of rescission were sufficient from a standpoint of intention and timeliness, yet admittedly there was neither a restoration of nor an offer to restore the amounts received on the sale of the certificates. The plaintiff contends that the assignors are entitled to retain in any event the amounts they received on the sales. This contention may be deemed correct only if under the alleged alternative cause the measure of the damages is the difference between what the assignors received and the face amount of the certificates. For, if what the assignors received on the sale of their certificates was part of an undisputed larger claim or debt then due, that measure would control at law, and in equity would determine the right to retain the benefits received. Gilson Quartz Min. Co. v. Gilson, 47 Cal. 597; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667; Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Taylor v. Hopper, 207 Cal. 102, 105, 276 P. 990; MacIsaac v. Pozzo, 26 Cal. 2d 809, 815, 161 P.2d 449.

To substantiate his contention that there was an undisputed claim then due in the face amount of the certificates sold, the plaintiff looks only to the face amount of the certificates. He likens the face amount to an unpaid judgment for the recovery of a specified sum of money and argues that the possible insolvency of the association at the time the assignors sold for less than the amount "due" does not affect the measure of the damages recoverable on account of the alleged fraud.

[4, 5] Since the objective in equity is to place the rescinding party in his former position, the collectibility of a debt or judgment has no bearing on the amount recoverable. Campbell v. Birch, 19 Cal.2d 778, 790–793, 122 P.2d 902; Bank of America v. Greenbach, 98 Cal.App.2d 220, 219 P.2d 814. Here it is true that the condition of the association and the *measure* of the damages are unrelated, but it does not follow that the correct measure is the one invoked. The fallacy in the plaintiff's argument is the assumption that at the time of the sale of the certificates there was an undisputed claim due in the face amount of the certificates or in any amount. The situation might have been comparable to the cases relied on involving fraudulent settlement of existing judgments, if the assignors had matured claims for withdrawal in the amounts of their certificates and they were by fraud induced to take less. Contrary to the plaintiff's assumption however the complaint fails to show that there was any matured claim or debt due to the assignors from the association at the time they sold their certificates.

In the final analysis neither the alleged cause for rescission nor that for damages may be premised on an assumption that the certificates had an undisputed value in the face amount. The pleading discloses the unquestionable fact of the existence of an open market for the investors' certificates; that due to association losses sustained by necessary real property foreclosures, and the insolvency or threatened insolvency of the association because of the widespread economic conditions which materially depressed values generally, the sale value of the certificates offered in the open market was also affected. The plaintiff's assignors sold in this adverse market. Therefore the only measure of their damages is that provided by section 3343 of the Civil Code, namely, the difference between the price at which they sold and any greater amount which the market would have brought save for the alleged fraudulent conduct of the association. No facts in this connection are alleged or relied on.

[6] It must follow that the plaintiff has not shown sufficient facts to support a recovery on either of the alternative grounds. As to damages, the material facts by which the proper measure may be applied are lacking. The only measure offered is contained in the allegation that if the assignors had not been induced by the alleged fraud to sell their certificates but had retained them, they would have been paid during liquidation the full amount of their certificates; that therefore they were damaged in the amount of the difference between the face amount and the amount paid, or $690,646.78. All that the plaintiff is saying is what might have been had rescission been accomplished. As to rescission, the facts alleged do not disclose the assignors' right to retain the consideration received on the sale of their certificates and at the same time be reinstated in the position of the investors who retained their certificates pending liquidation and eventually participated in the increased values of the association's assets following the second world war. It would be impossible now to compute what the outcome would have been had liquidation proceeded with the assignors in the position of continuing certificate holders pursuant to an accomplished rescission. It would also be highly inequitable at this stage of the proceedings, nearly twenty years after the alleged activities, for the court to make unprecedented exceptions to the rules applicable in rescission by permitting the assignors to share in property and assets in the preservation of which they declined to continue their support by failing to comply with equitable requirements at the time of their attempted rescission. The court may not thus secure for them a continuing choice to be out or in, depending on whether the fortunes of economics took a turn for worse or better. To do so would be in effect to treat the alleged sales as void rather than voidable, a result expressly prohibited by the statute.

[7, 8] Nor is there ground for extending relief on the basis that a fiduciary relation-

ship existed between the association and the certificate holders. There is nothing in the investment contract, in the statute, or in the facts alleged indicating the creation of that relationship. No case so holding is cited and the treatment in pertinent cases is a recognition that the relation is that of debtor and creditor. See In re Pacific Coast Bldg. & Loan Ass'n, 15 Cal.2d 134, 99 P.2d 251; Bureau of Welfare, California Teachers' Ass'n v. Drapeau, 21 Cal. App.2d 138, 146, 68 P.2d 998; Zottarelli v. Pacific States Savings & Loan Co., 94 Cal.App.2d 480, 502, 211 P.2d 23. The duties and obligations of the association are set forth in the statute; the statute provides what penalties shall follow from violations thereof, and prohibits resulting contracts to be treated as void.

The insuperable obstacle which the plaintiff faces is that, conceding a possible cause for relief, he or his assignors failed to take the necessary steps to secure for themselves the only remedy by which they could again be made whole. As a consequence of this failure the plaintiff cannot recover what he seeks, namely, the difference between the price at which his assignors sold their certificates and the face amount thereof.

The amended complaint does not meet the requirements which were held on the prior appeal to be essential to a sufficient statement of a triable cause. And the foregoing also compels the conclusion that such a cause cannot be stated.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I am of the opinion that plaintiff's amended complaint stated a cause of action for fraud and that the demurrer thereto should not have been sustained.

As I pointed out in my dissent in King v. Pacific States S. & L. Co., 26 Cal.2d 333, 158 P.2d 561, the evidence produced in that case was more than sufficient to show fraudulent conduct on the part of Pacific States in buying the certificates held by various investors for less than their face value. I also pointed out that the trial court in the case of Pacific States Sav. & L. Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809, 158 A.L.R. 955 (where the propriety of the seizure of Pacific States by the Building & Loan Commissioner was challenged) had found that misrepresentation and coercion had been resorted to by Pacific States in the acquisition of its outstanding shares. This Court, in the Hise case, did not disapprove those findings but on the contrary found it not necessary to determine the sufficiency of the evidence on which they were based. These three cases have their bases on the same set of facts. In the second case, King v. Pacific States S. & L. Co., the majority held that there was no evidence of fraud, either actual or constructive, to support plaintiff's charge. The majority here, in the third case, holds that plaintiff has stated no cause of action, nor can he do so. And yet the facts are the same. As I read the majority opinion, it appears to be conceded that plaintiff would have stated a cause of action had he or his assignors taken the necessary steps to effect a recission—namely, an offer to restore the consideration which had been received or facts showing the right to retain that amount. All of the relevant information with respect to the certificates was made part of the amended complaint.

To hold that it would be inequitable at this time to allow plaintiff's assignors to retain the benefits received and recover the difference between that amount and the face value of the certificates is to hold that form is more important than justice. To my mind Mr. Justice Bray of the District Court of Appeal correctly disposed of this point and I hereby adopt that portion of his opinion which refers to Counts 3 and 4:

"These two counts are based on allegations of fraud and rescission, the only difference between the third and fourth being that plaintiff alleges that a fiduciary relationship existed between his assignors and Pacific States. Plaintiff incorporates by reference in both counts the proof of claim which, pursuant to notice, he filed with the commissioner. This states that 'the facts in support of Claimant's demands are set forth by the testimony and exhibits introduced in the case of "Wesley King v. Pacific States Savings & Loan Company," No. 277,900, in the Superior Court of the State of California, in and for the City and County of San Francisco, and in its case of "Pacific States Savings and Loan Company v. Evans, Commissioner," in the same Superior Court, to which testimony and exhibits reference is hereby made as though set forth at length and made a part of this demand; * * *'

"Defendants claim that plaintiff has not alleged a true rescission, because there was no notice of rescission and no offer to restore.

"Notice of Rescission.

"The only allegation concerning any notice of rescission is the following: 'On or about February 3rd, 1938, plaintiff gave Pacific States written notice as follows: that the last mentioned assignors had assigned to him their claims to recover from it said balances of their deposits shown on said Exhibit "C"; that plaintiff was demanding payment of the last mentioned claims from Pacific States; and that if Pacific States did not pay the last mentioned claims, plaintiff would commence suit to enforce their payment.'

"This allegation is repeated as to other lists of assignors. As said in McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36, 38: 'It is not necessary that the notice to rescind shall be formal and explicit; it is sufficient that notice shall be given to the other party which clearly shows the intention of the person rescinding to consider the contract at an end. It has been held in other states that the mere bringing of an action is a sufficient disaffirmance of a sale.'

"Applying this test, it is obvious that the notice given clearly shows the intention of plaintiff to consider the contract, that is, the sale of the certificates for the price received, at an end. The notice was sufficient unless plaintiff was required to offer to restore the purchase price.

"Was Offer to Restore Necessary?

"This depends upon what the true measure of damages was at the time of the sale, for if plaintiff was entitled in any event to retain the purchase price, no offer to restore was necessary. 'It is settled by our decisions that one attempting to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain. See Matteson v. Wagoner, 147 Cal. 739, 743, 82 P. 436, and cases there cited. This is upon the theory that the defendant could not possibly have been injuriously affected by the failure to restore, and the plaintiff might be, for he might not be able to again collect the amount from the defendant, if it should be so restored to the defendant.' California [Farm & Fruit] Co. v. Schiappa-Pietra, 151 Cal. 732, 740, 91 P. 593.

"Defendants contend that the measure was that set forth in section 3343 of the Civil Code, namely, the difference between the actual value of the certificates and the amount paid. Plaintiff contends that it is the measure set forth in Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902, and Bank of America v. Greenbach, 98 Cal.App.2d 220, 219 P.2d 814, namely, the difference between the face value of the certificates and the amount paid. Ordinarily, the measure of damages for fraud is that set forth in section 3343 of the Civil Code. But there is an exception to that rule. Campbell v. Birch, supra, 19 Cal.2d 778, 122 P.2d 902, sets forth that where the claims compromised through the fraud are not disputed as to their amount, or as to their existence, the one defrauded is entitled to their face value. In that case, due to fraudulent representations as to his lack of financial responsibility, Birch induced Campbell to compromise an indebtedness of $9,412.59 including over $6000 of judgments, and to agree to a reduction in the rental payments of a five year lease from $1000 to $500 per month, all for a payment of $6000. Later, discovering the fraud, Campbell sued in fraud and deceit to recover the indebtedness including the face value of the judgments, and the accrued rental. The court held that where there is an *undisputed* claim the defrauded party does not have to prove collectibility, distinguishing the facts of its case from Westerfeld v. New York Life Insurance Co., 129 Cal. 68, 58 P. 92, 61 P. 667, which held that where the compromised claim was a disputed claim, there must be proof of collectibility. The court then said, referring to the compromised claims: 'In effect, the cause of action is one where the damage suffered by the defrauded party is fixed and certain—just as fixed and certain as if the defrauded party had technically rescinded. Obviously, if no compromise had been made, plaintiff would have been entitled to a judgment or judgments for the unpaid rent. The judgment in the present case is exactly in the amount the plaintiff would have been entitled to if no compromise, induced by defendants' fraud, had been negotiated. What other measure of damages would compensate the defrauded party under such circumstances? The only way the defrauded party can be made whole is to return to him the amount to which he admittedly would be entitled had the fraudulent compromise not been secured. To urge that the defrauded party must show that the undisputed liability was in fact collectible in the sense that the defendants were financially responsible is to bring in a false issue. Courts in rendering judgments are not interested in whether the plaintiff can collect the same—they are concerned with the amount of the damage suffered. The collectibility of the compromised judgments and claims and the collectibility of the present judgment, are matters which are entirely beyond the issues in this case. When the plaintiff proved the claims were fixed, definite and admitted as to their existence and amount he proved they were "collectible" as that term is used in such cases.' 19 Cal.2d at page 793, 122 P.2d at page 910.

"Defendants contend that on rescission all plaintiff would be entitled to was a return of the certificates. If this were true, then in the Campbell case, all the plaintiff would have been entitled to was the compromised claims rather than what the court held he was entitled to, their face value. Likewise, on such a basis, plaintiff in the Bank of America case would have been given back his judgment only, and not damages in its face value. Here, the claim (the face value of the certificates), and its existence could not be disputed. True, the question of whether it would be collectible was uncertain, but so were the judgments in the Campbell case. Here, the relation between the certificate holders and defendants was that of creditors and debtors. The amount of the debt was the face value of the certificates, and their value, as said in the Campbell case, is 'prima facie the difference between the amount paid on the compromise and the face amount of the fixed and certain claim.' 19 Cal.2d at page 793, 122 P.2d at page 910.

"In Bank of America v. Greenbach, supra, 98 Cal.App.2d 220, 219 P.2d 814, we held that where a creditor had been induced by fraud to settle a judgment for less than its full amount, the creditor was entitled to restoration of the full judgment (less the amount paid) rather than a judgment for the creditor's pro rata share of the debtor's assets at the time of the fraud. 'There is no authority cited, and no logical argument made, that support the conclusion that a creditor, fraudulently induced to enter into a settlement of his claim upon material misrepresentations as to assets, can or should be limited, in a rescission action, to a judgment for the pro rata share of the assets of the debtor as they existed on the date of settlement. The cancellation of an agreement of settlement necessarily has the effect of placing the parties where they were before the settlement was made. It is as if the settlement had never been made. Authorities are legion and uniform to the effect that the legal effect of a rescission is to restore both parties to their former position as far as possible. 3 Pomeroy, Equity Juris. 5th Ed. 578; 3 Black on Rescission and Cancellation, p. 1660, § 700; 15 Cor.Jur.Sec. (Compromise and Settlement) § 43, p. 767. The authorities also agree that, concurrent with the award of rescission, the trial court may award money damages or order such other relief as justice may require. 4 Cal.Jur. p. 797, § 29. In the present case the court cancelled the settlement agreement. It should then have reinstated the original judgment. The amount of that judgment is fixed and certain.' 98 Cal.App.2d at page

238, 219 P.2d at page 827. To hold otherwise in this case would put a premium on fraud.

"The mere fact that the debt of Pacific States to the certificate holder as evidenced by the certificate, was not immediately due or payable, does not make the amount of that debt any less fixed, definite or admitted. There is no logical distinction between the indebtedness in the Campbell case and the judgment in the Bank of America case, and the certificates in this case. Here there were no *disputed* claims as there were in Westerfeld v. New York Life Ins. Co., supra, 129 Cal. 68, 58 P. 92, 61 P. 667. On demurrer we must accept the allegations of the complaint as true. It is alleged, among other things, that the Pacific States fraudulently depressed the market so that it might induce holders to sell their certificates. If the measure of damages was the difference between the amount received and the then actual value of the certificates (the depressed market value) the defendants would be in the position of saying, in effect, 'True, we fraudulently induced you to sell your certificates, but, as we had succeeded in holding their value down to the amount we paid you, there is nothing you can do about it.' They would be profiting by their own fraud, and the courts would be standing helplessly by, permitting them to reap the harvest. The same would be true as to the actual value, as distinguished from the market value.

"Thus, the measure of damages being the difference between the face value of the certificates and the amount paid, and the former being greater than the latter, plaintiff was entitled to retain the latter and therefore was not required to offer to restore. While the testimony and exhibits in Pacific States Savings and Loan Company v. Evans, Commissioner, referred to in plaintiff's proof of claim (this case on appeal is entitled Pacific States Sav. & L. Co. v. Hise, supra, 25 Cal.2d 822, 155 P.2d 809, 158 A.L.R. 955, indicate that the company was insolvent at the time of the alleged fraud and that the investment certificates were not worth their face value, the situation is no different from that in the Bank of America case, supra, where the court found that if at the time of the fraud all the debtor's assets had been liquidated, the $88,050.66 judgment would have brought only $29,300. Nevertheless, it was held that the measure of damages was the face value of the judgment. In our case, whether the certificates ever would be worth their face value was problematical, depending on the manner in which the company operated its affairs, and later, on the manner in which the building and loan commissioner operated them. However, if at that time, plaintiff proved the fraud, he would be entitled to a judgment for their face value. Nor would such judgment have placed him in substantially a better position than the certificate holders who kept their certificates. He would have been a creditor on a par with them. These certificates are 'a type of unsecured note or debenture', In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal. 2d 134, 141, 99 P.2d 251, 254, and hence the relationship between the holder and the company is that of creditor and debtor. See Bureau of Welfare, etc., Ass'n v. Grapeau, 21 Cal.App.2d 138, 68 P.2d 998. If the company was actually insolvent, his attempt to collect the judgment would have forced the commissioner to take the company over, and he would be paid only a pro rata of the assets together with the other creditors, including the other certificate holders. True, there would have been one difference between the judgment holder and the certificate holders. His judgment would be due and payable immediately. If the company were a going concern, the certificate holders would have to file the necessary notices to enable them to withdraw their deposits, and wait the statutory period for payment. If the company were insolvent, this delay would mean nothing as the judgment could not be paid. If the company were not insolvent, there would be sufficient funds to pay both the judgment and the deposits, so that the short period which the certificate holders would have to wait would be only a minor distinction from the position of the judgment creditor. Practically speaking, the latter would have no advantage over the former. The fact that there was a market value for the certificates at the time of the sale does not affect the measure of damages. Particularly is this so where as alleged here defendants had fraudulently depressed that value. To hold that a building and loan company can by manipulation as charged depress the market, frighten the depositors, to whom there must necessarily be owed the duty of not misrepresenting the status of their deposits, into disposing of their certificates at the depressed market value, where, had they held on to them, they, like the others who did hold, would have received their full face value, and then for the courts to refuse to give relief because the holder had been paid that market value, would be making a mockery of justice.

"As to one of the lists of assignors' plaintiff alleges that the assignments of their certificates were obtained after plaintiff had given notice of rescission concerning all the other assignors and after said notices had been ignored and impliedly, refused, and that it would have been futile to give notice on behalf of the later assignors. Under the circumstances of the case, the giving of such notice would have been futile and therefore unnecessary." Cal.App., 224 P.2d 733, 738.

From the foregoing it is obvious that counts 3 and 4 of the amended complaint allege sufficient facts to state causes of action based upon fraud and rescission and the majority opinion departs from settled principles of law in arriving at a contrary conclusion. Considering the background of this case, the result reached by the majority is indeed unfortunate since the records of this court disclose an orgy of fraudulent conduct on the part of the defendant unparalleled in the history of California as a result of which thousands of thrifty investors were mulcted out of their life savings. While justice to these certificate holders has long been delayed it is a grievous and regrettable travesty that it should now be denied. I cannot stultify my conscience as well as my concept of justice by concurring in such a result.

I would therefore reverse the judgment.

KRULL v. KRULL.

No. 14651.

District Court of Appeal, First District,
Division 1, California.

June 25, 1951.

Rehearing Denied July 13, 1951.

Hearing Denied Aug. 23, 1951.

Action by Francis Krull against Agnes Krull for divorce on the grounds of extreme cruelty wherein the defendant answered alleging recrimination and cross-complained for separate maintenance. The Superior Court in and for the City of San Francisco, Thomas M. Foley, J., granted plaintiff an interlocutory decree of divorce, a motion for new trial by defendant was denied and defendant appeals. The District Court of Appeal, Bray, J., held that the evidence supported findings of extreme cruelty in favor of the plaintiff, that the findings were sufficient and that the interlocutory decree must be construed as providing for termination of the homestead claim of the wife and requirement that she remove from the premises as not to be effective until entry of a final decree of divorce.

Judgment affirmed.

1. Divorce 🔑184(6)

In action for divorce where the trial court saw the witnesses and chose to believe plaintiff's version of the evidence as against defendant's, that was its province.

2. Divorce 🔑130

Evidence justified divorce to husband on the ground of extreme cruelty of the wife.

3. Divorce 🔑124
Evidence 🔑571(2)

In action for divorce the trial court was not required to accept defendant's plausible explanations of incidents referred to in the testimony of plaintiff nor was it bound by the testimony of a psychiatrist with respect to alleged delusions of plaintiff.

4. Divorce 🔑184(10)

In divorce action the appellate court is not permitted to weigh the testimony and determine as to where the preponderance lies, and where the testimony is conflicting, the determination of a trial judge as to facts is conclusive.

5. Divorce 🔑127(4)

In divorce action it is not necessary that acts of cruelty be corroborated and it is sufficient if there is corroborative evidence of one or more facts which are sufficient to show cruelty.

6. Divorce 🔑150(2)

In action for divorce on ground of extreme cruelty of the wife findings of the trial court were sufficient to support judgment for plaintiff.

7. Divorce 🔑147

Whether in a divorce action there has been inflicted grievous mental suffering is a question of fact to be deduced from all the circumstances, keeping in view the intelligence, refinement, and delicacy of sentiment of the complaining party.

8. Divorce 🔑124

In action by husband for divorce evidence did not sustain wife's defense of recrimination.

9. Divorce 🔑254

In divorce action where wife recorded a declaration of homestead on the apartment house property of plaintiff, which was his separate property, interlocutory decree ordering the homestead terminated and ordering the wife to remove from the apartment and property must be construed as providing that termination of homestead and requirement of removal should not be effective until entry of a final decree of divorce in the appellate court.

G. C. Ringole, San Francisco, for appellant.

M. Anderson Thomas, San Francisco, for respondent.

BRAY, Justice.

Plaintiff husband sued for divorce on grounds of extreme cruelty. Defendant wife answered, denying all charges and alleging recrimination. She also cross-complained for separate maintenance, alleging extreme cruelty. The court granted plaintiff an interlocutory decree of divorce, terminated a homestead declared by the defendant on plaintiff's separate property, and denied defendant all relief. A motion by defendant for a new trial was also denied. Defendant appeals.

Questions Presented.

1. Insufficiency of evidence to support findings of extreme cruelty and lack of recrimination.

2. Findings not sufficient.

3. Alleged error in terminating the homestead.

Evidence.

When the parties separated on June 7, 1948, they had been married two and three-quarters years. At the time of the marriage plaintiff was 73 years of age; defendant 54 or 56. There is neither issue nor community property. At the time of marriage plaintiff owned, and still owns, an apartment house in San Francisco, one apartment of which was occupied by the parties, and a small home in Indio, California. Plaintiff testified that shortly after the marriage he realized he had made a mistake as defendant was constantly after him about a will and that she tore one will to pieces; that she had a terrible temper and would frequently fly into a tantrum; that on many occasions she called him a "senile old fool." She would not acknowledge presents his sister sent her, and told him he could not have his sister visit them. However, when the sister did visit, he admitted defendant treated her "very nicely." Defendant opened his bank statement on one occasion and tore up his checks. On another occasion she swung a candlestick at him and then punched him in the back of the neck. She called him a Jekyll and Hyde and said he lied. In front of his nurse and doctor she said, "Why, you ought to be in Napa." Plaintiff had to do most of his own cooking. She had an inordinate vanity and he had to play up to it. He could not cross her in anything. She hid things of his such as candlesticks and a picture of which he was very fond. Often she went through his pockets and opened his letters. She had a psychiatrist come to the house to examine him without telling him about it. At first, he though she had brought the doctor there to examine her. A number of other charges were made by plaintiff.

There were four incidents which were corroborated and were specifically found by the court. These follow. (1) About November 24, 1948, the parties were at Indio. Plaintiff testified that he then told defendant he was coming to San Francisco to look after the apartment house. She did not want him to come. "She said that I was coming to consult Dr. Rubenstein, who was giving me dope. He was using dope, and I could not get along without it. She became very angry, and called me a senile old fool, and that I was insanely jealous of her." This conversation was corroborated by plaintiff's sister, who also testified that defendant told her she was going to the medical board and have the doctor's license taken away for giving plaintiff dope. (2) In the spring of 1948 occurred the so-called "Finney incident." Finney is the first name of the husband of a woman friend of both parties. They evidently were very fond of her. Plaintiff did not like Finney. Shortly after the death of Finney's wife, and while plaintiff was at Indio and defendant at their San Francisco apartment, Finney came to the apartment. Plaintiff first learned of the Finney incident about a year after it had happened. Mrs. Frances Brackett, a friend of both parties, phoned the apartment to talk to defendant. Defendant was out of the apartment and plaintiff answered the phone. In the course of the conversation Mrs. Brackett told plaintiff substantially what she later testified, namely, that late one night she was awakened by a phone call from defendant, who said that she was in an awful predicament; that Finney had come in drunk "and I am solely alone. I don't know what to do." Defendant put him in plaintiff's bed and he messed it. (Later defendant told Mrs. Brackett that she had no right to relate the incident to plaintiff.) Immediately plaintiff asked defendant about it. Defendant admitted Finney was there, but said that a Mrs. Durance brought him in and said he was going to commit suicide; that defendant's brother and a Mrs. Benton were present. Finney started to cry and defendant told him to go in the bedroom and cry it out. Finney went in, got in bed, slept for a while, befouled the bed, and woke up. Defendant told him to take a bath, which he did, and then left. Plaintiff did not believe defendant's story; he thought his wife had a "yen" for Finney. Defendant told plaintiff that the reason she kept the incident secret was because her brother told her to do so.

(3) Plaintiff testified that defendant ignored plaintiff's sister, refused and neglected to acknowledge presents received by her from the sister, and told plaintiff the sister could not visit him at the San Francisco apartment and angrily objected thereto. Most of this was corroborated by the sister.

(4) Plaintiff testified that on numerous occasions defendant called him "a senile old fool" and treated him with contempt and disrespect. Plaintiff's sister testified that more than once defendant angrily called him a senile old fool in her presence and also told her in his absence that plaintiff was a senile old fool; that she was always nagging at him about something—always wanting money and being angry when she did not get it; that this conduct affected plaintiff's health.

Defendant testified that plaintiff became a changed person after he met Dr. Rubenstein; denied tearing up the will or keeping after him about one. She either denied or explained all of the charges made by plaintiff. She explained the "dope" incident by saying that the shots Dr. Rubenstein gave plaintiff (Dr. Rubenstein testified he occasionally gave plaintiff injections of digitalis and also vitamin B Complex as plaintiff was suffering from a form of myocarditis) so elevated plaintiff that he was a changed personality and defendant felt they were bad for plaintiff's health; "* * * the reaction from the shots was simply terrific." Defendant denied that she ignored plaintiff's sister and stated that plaintiff had told her she need not write and thank the sister for the presents as he would do it. Defendant denied calling plaintiff a senile old fool except on the occasions when he brought up the Finney incident, doubted her version of it and charged her with sleeping with Finney.

As to recrimination, defendant testified that plaintiff was penurious and became angry whenever she asked him for money to run the house, when needed above the $100 per month allowance; that he had dragged her by the hair; that he falsely accused her of intimacy with Finney. Corroboration of defendant's version of most of these matters was given by her brother, a Mrs. Baccari, and defendant's sister. Dr. Bonfilio testified to red marks on defendant's neck which defendant claimed plaintiff caused.

Sufficiency of the Evidence.

[1-4] This was a bitterly contested case. The testimony was directly conflicting. Plaintiff's main corroboration came from his sister. Defendant, in number of witnesses, had more corroboration of her story. However, the trial court saw the witnesses and chose to believe plaintiff's version as against defendant's. That was its province. Plaintiff's testimony and that of his sister was ample to support the findings. Defendant's main contention on this point seems to be that as defendant gave plausible explanations, the trial court must accept them. The court, of course, was not bound to do so. Nor was the court bound by the testimony of the psychiatrist who testified that plaintiff had delusions and could not be considered competent to be a witness. The record indicates that plaintiff was a competent witness and that the alleged delusions were not delusions at all. For example, one of the claimed delusions was plaintiff's belief that defendant was unduly interested in Finney. In view of the information Mrs. Brackett gave plaintiff, he was justified in believing this, even though his wife denied it. "Considering the question as to whether the evidence is sufficient to sustain the findings of the court as to the facts upon which the decree of divorce is based, we are not permitted to weigh testimony and determine as to where the preponderance lies, for, in the presence of a conflict such as appears here upon most of the issues, the determination of the trial judge as to facts must be deemed conclusive. The evidence then must be viewed from the standpoint that will give to it the strongest weight in sustaining the findings of the court." Van Camp v. Van Camp, 53 Cal.App. 17, 20, 199 P. 885, 886. As to most of the contentions made by defendant herein, the language of Allin v. Snavely, 100 Cal.App.2d 411, 415, 224 P.2d 113, 116, is most appropriate: "She argues as though the court had adopted her evidence which is not the fact." The evidence fully supports the findings.

Corroboration.

[5] Apparently defendant contends that in a divorce action all of the acts of cruelty must be corroborated. This is not the law. "It is true that some of the charges made by respondent were not corroborated, but this is not required under the law of this state. A single act of cruelty, if corroborated, even where it consists of making an unfounded charge or false imputation, in sufficient. See cases collected 9 Cal.Jur. p. 661, § 34. It is not required that the evidence be corroborated as to every fact and circumstance appearing in the record. If there is corroborative evidence of one or more facts which is, or are, sufficient to show cruelty, that is sufficient. See cases collected 9 Cal.Jur. pp. 737 and 738, §§ 95 and 96." Ungemach v. Ungemach, 61 Cal.App.2d 29, 34, 142 P.2d 99, 101. See also Bradley v. Bradley, 94 Cal.App.2d 310, 210 P.2d 537, 211 P.2d 638.

Findings are Sufficient.

[6] The court found that for a period of approximately two years prior to the commencement of the action defendant wrongfully treated plaintiff in a cruel and inhuman manner, and that such acts on the part of defendant rendered the further continuance of the marriage relation impossible and intolerable; "that in part the defendant and cross-complainant has done the following enumerated acts and things" which constitute extreme cruelty. It then finds the four specific matters hereinbefore detailed. Defendant takes each one of these four specific findings, points out her explanation of it, and then contends that the findings must fall. Thus, on the dope incident she contends that she was in good faith in saying that Dr. Rubenstein was administering dope to plaintiff, as the evidence shows he was injecting medicine intravenously. The explanation, however, overlooks the significant point in plaintiff's version of the incident, which the court found as true, namely, that defendant was

accusing him of wanting to go to San Francisco just to get dope and that he could not get along without it. Although plaintiff was being treated by the doctor, there is no evidence in the case (not even defendant's explanation) to support defendant's accusation either that it was his only reason for going to San Francisco or that he could not get along without the injections.

The situation here is entirely different from that in Neason v. Neason, 48 Cal. App.2d 500, 120 P.2d 37, where the trial court held that the statement of the wife to her physician did not constitute cruelty towards the husband. There, admittedly, the husband prior to the marriage had taken treatments for a venereal disease. He claimed these treatments were merely precautionary. Almost a year after the marriage plaintiff learned that the wife was being given salversan shots by her physician. On asking the latter why these shots were given the physician stated that the wife had informed him that she had gone to the husband's doctor and by him had been informed that the husband had a 1 plus Wasserman. The physician said that he might have told her the husband had a 1 plus Neisserian fixation test. The appellate court held that the statement made by the wife to her doctor in confidence based upon her understanding of what the husband's physician had told was made only for the protection of herself and her unborn child, and not for the purpose of injuring the husband or his reputation—obviously an entirely different situation than the one in the case at bar. Here defendant was accusing plaintiff in effect of being a dope addict.

Again, as to the Finney incident—assuming that there were present at the apartment the witnesses who claimed to have been there (the court did not have to believe them in view of the testimony of Mrs. Brackett that defendant called her the night of the incident, told her she was alone with Finney and asked her advice as to what to do)—the important thing is that defendant concealed this incident from plaintiff. Defendant attempts to make light of it because, during cross-examination, plaintiff, who all along was not convinced that defendant was truthful in saying that the brother was present, finally stated that he now believed the brother to have been present. This does not change the fact that defendant, knowing that plaintiff disliked Finney, failed to make a disclosure of the incident until plaintiff found out about it elsewhere.

Plaintiff was grievously hurt by defendant's attitude towards his sister. Defendant contends that there was a cordial relationship between her and the sister. This is based on the fact that when the sister actually visited the parties defendant treated her, according to plaintiff, "very nicely." However, that fact did not overcome the effect on plaintiff of defendant's real attitude towards the sister. It may be that a wife is not required to exhibit any great fondness for a husband's relative and that this incident must be entirely disregarded in determining the question of cruelty. If so, other grounds remain which amply support the court's finding.

[7] Defendant brushes off the court's finding that on numerous occasions defendant called plaintiff a senile old fool and treated him with contempt and disrespect, as being minor occurrences. This finding alone is sufficient to support the court's determination that defendant's actions towards plaintiff caused plaintiff mental suffering and constituted cruelty. The matters set forth in at least three of the four specific findings were sufficient to support the judgment. It must be remembered, too, that in addition to these four specific findings the court found that for approximately two years defendant wrongfully treated plaintiff in a cruel and inhuman manner and that the acts mentioned in the specific findings were only "in part" the acts upon which the judgment was based. "Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate

facts of its existence can be given. As said by Mr. Justice McFarland, in his dissenting opinion in Waldron v. Waldron [85 Cal. 251, 24 P. 649, 858, 9 L.R.A. 487]: 'Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts.'" Barnes v. Barnes, 95 Cal. 171, 177, 30 P. 298, 299, 16 L.R.A. 660.

Recrimination.

[8] Defendant contends that the defense of recrimination should have been sustained. While the defendant's evidence on this subject was such that had the court believed it, the defense would have been sustained, the trial court, exercising its prerogative in observing the witnesses did not believe it. Plaintiff admitted that on one occasion he had pulled defendant's hair. He explained that defendant would not let him in the apartment, and that the only way he could get in was to take her by the hair and pull her away from the door. He stated that in so doing he may have scratched her. Dr. Bonfilio testified that when he saw defendant shortly after this incident defendant had some red marks on her neck. The trial court evidently believed plaintiff's version of this incident. The incident was not sufficient to deny a divorce to one otherwise entitled to it. "The question as to whether the physical violence used by one spouse will bar that spouse from securing a divorce, or whether the provocation by the other spouse will excuse the physical violence, is primarily a question of fact. Each case must be determined on its own facts. The trial judge, having the opportunity to see and hear the witnesses, is best able to ascertain whether the physical violence used was induced by the other spouse, or whether, under the circumstances, it was out of proportion to the provocation." Popescu v. Popescu, 46 Cal.App.2d 44, 50, 115 P.2d 208, 211. "Appellant presents the further points that defendant should have been granted a decree of divorce on his cross-complaint, or at any rate that the evidence 'shows recrimination in bar of plaintiff's cause.' With reference to such matters, it need only be said that the entire evidence in this action was before the judge of the trial court, and that it was his exclusive province to determine where lay the truth. His findings of fact on the evidence were entirely against the contention of defendant. They are conclusive on this court." Sherman v. Sherman, 81 Cal.App. 406, 409, 253 P. 945, 946.

The evidence gives a picture of an elderly man of a rather proud disposition, married to a woman much younger than he, who was highly impatient with him, who constantly nagged him, and who believed that he actually was senile and treated him as such. The record shows that she had him examined for the purpose of having an insanity warrant issued, and later tried to have a guardian ad litem appointed to represent him in this action. On occasions she took articles of his which she knew he wanted near him and locked them in her room. Even under her testimony there was constant friction between them. A reasonable inference from the evidence, which undoubtedly the trial court drew, is that having married a man of considerable means, and although treating him in a manner causing him mental suffering, she did not want to let go of the security which his means gave her. This fact appears, even though during her married life she used the $3000 which she brought into the marriage, and did not draw, as she could have, on the joint bank account.

Homestead.

[9] Defendant recorded a declaration of homestead on the apartment house property, one apartment of which was occupied by the parties as their home. This property admittedly is the separate property of plaintiff. In the interlocutory decree the trial court ordered this homestead terminated and ordered defendant to remove from the apartment and the property. The decree does not specify when the termination is to be effective and when defendant must remove. As said in Leavitt v. Leavitt, 134 Cal.App. 145, 146, 24 P.2d 910: "The interlocutory decree is not a decree of divorce, nor does it dissolve the marriage.

The court, therefore, should not have limited appellant's right to the occupancy of the homestead until such time as the marriage shall be dissolved by the final decree." Therefore, the interlocutory decree must be construed as providing that the termination of the homestead and the requirement that defendant remove from the premises is not effective until the entry of a final decree of divorce herein.

The Judgment is affirmed.

PETERS, P. J., and AGEE, J., pro tem., concur.

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105 Cal.App.2d 173

BATEMAN v. LONG.

Civ. 18006.

District Court of Appeal, Second District, Division 1, California.

June 28, 1951.

Action by Idell A. Bateman against Samuel O. Long for cancellation of a promissory note and deed of trust wherein defendant filed a cross-complaint for foreclosure and declaratory relief. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, White, P.J., held that evidence was sufficient to support finding that defendant purchased note and trust deed in good faith, for value, and without knowledge of any claimed infirmity.

Judgment affirmed.

1. Evidence 🔑**588, 594**
Trial 🔑**141, 143**

Even though testimony of a witness which is not contradicted by that of any other witness may not as a general rule be disregarded and should be accepted by court or jury as proof of facts adduced by that witness, conflicts in testimony of witness must be resolved by trier of facts, and most positive testimony of witness may be contradicted by inherent improbabilities as to its accuracy and there may be circumstances which satisfy court of inaccuracy or falsity of that testimony.

2. Appeal and error 🔑**1012(1)**

An appellate court cannot control finding or conclusion of trial court denying the testimony credence, unless it appears that there are no matters or circumstances which impair its accuracy.

3. Mortgages 🔑**270**

In maker's action for cancellation of a promissory note and deed of trust, evidence was sufficient to sustain findings that holder purchased note and trust deed in good faith, for value, and without knowledge of any claimed infirmity. Civ.Code, § 3097.

4. Appeal and error 🔑**1011(1)**

In maker's action for cancellation of a promissory note and deed of trust, claimed contradictions or inconsistencies in evidence, presented questions for determination of trier of fact and trial court's conclusions thereon could not be disturbed on appeal if there was any substantial evidence to support them.

5. Mortgages 🔑**265**

Where holder purchased note secured by a trust deed, and trust deed in good faith, for valuable consideration and without knowledge of any claimed infirmity, in subsequent action by maker for cancellation, question of holder's good faith was one of fact. Civ.Code, § 3097.

6. Appeal and error 🔑**1008(1)**

District Court of Appeal is without power to disturb finding on question of fact made by trial court who sees and hears witnesses, observes their demeanor and manner of testifying.

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Marshall Denton, Jr., Los Angeles, for appellant.

David H. Cannon, and Cannon & Callister, all of Los Angeles (Reed E. Callister, Los Angeles, of counsel), for respondent.

WHITE, Presiding Justice.

Plaintiff brought an action for the cancellation of a promissory note and deed of trust. Defendant Samuel O. Long, into whose hands the instruments had passed, filed an answer, and by cross-complaint sought foreclosure and declaratory relief. Trial before the court, sitting without a jury, resulted in findings and judgment in favor of defendant and cross-complainant. Plaintiff has appealed from the judgment.

Appellant urges that the findings are not supported by the evidence; that the judgment is not supported by the findings; that the evidence does not support the judgment; and that the judgment is contrary to law. All of these contentions, upon examination of the record, resolve themselves into a single argument, to-wit, that the evidence does not support certain findings of fact. The trial court found that Samuel O. Long was a holder in due course of the promissory note secured by a deed of trust, and if this finding is supported by substantial evidence, appellant cannot prevail.

It appears that about April 6, 1948, plaintiff signed a promissory note for $3,600, payable to Golden State Construction Company, and secured by a deed of trust upon her property at 2717 Council Street, Los Angeles. These instruments were executed and delivered in connection with a contract between appellant and Golden State Construction Company for the remodeling of appellant's premises, which contract had been made about January 30, 1948. After signing the note and trust deed appellant left them with James H. Lewis, secretary of Golden State Construction Company in the office of that company. Appellant testified that the note and trust deed were to be placed in an escrow. She testified that she never acknowledged execution of the trust deed before a notary public.

The note and trust deed were assigned on April 16, 1948, by Golden State Construction Company, through Cordia F. Cotton as president and James H. Lewis as secretary, to Mortgage Discount Company, a partnership consisting of George A. Rubens and George L. Myers. It appears that this transfer was made as collateral security for the payment of a $1,500.00 note of Golden State Construction Company held by Mortgage Discount Company. On August 28, 1948, there was a balance of $1,316.06 due on the $1,500 note. On this date the $1,500 note was paid in full and the note and trust deed executed by appellant were transferred by Mortgage Discount Company to respondent, Samuel O. Long. The note and trust deed had been recorded in the office of the County Recorder of Los Angeles County on April 19, 1948.

The remodeling of appellant's premises was hampered by various delays, due chiefly to lack of funds. Between January 30, 1948, and October 13, 1948, appellant paid $3,000 to Golden State Construction Company and advanced another $1,500 to cover labor and materials. Appellant testified that the value of the work done did not exceed $2,500. On May 17, 1948, Cordia F. Cotton agreed in writing to reimburse appellant for loss of rent because of Golden State's failure to complete the contract on time, and made a second such agreement on June 21, 1948.

[1, 2] It is undisputed that appellant executed the note and deed of trust and left them in the office of Golden State Construction Company with an officer thereof. The court found that appellant left an unacknowledged deed of trust and promissory note with James H. Lewis, and that it was not true that there was any agreement that the documents should be placed in escrow and delivered only after completion of the repairs. It was further found that the defendants did not fraudulently procure the notarization of the deed of trust. Appellant attacks these findings apparently on the ground that the court was bound to believe appellant's testimony that she did not acknowledge the execution of the trust deed because it was uncontradicted. Assuming, but not deciding, that one in appellant's position, who has executed and delivered a note and trust deed, could urge a false acknowledgment as a defense against a holder in due course, appellant's contention with respect to the evidentiary question involved is answered by the language found

in Jordan v. O'Connor, 99 Cal.App.2d 632, 641, 222 P.2d 322, 327, as follows: "Appellant directs attention to the fact that appellant's testimony is not contradicted by that of any other witness and invokes the general rule that the testimony of such a witness may not be disregarded but should be accepted by the court of jury as proof of the facts adduced by that witness. This rule has its exceptions. Conflicts in the testimony of a witness must be resolved by the trier of the facts. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statements. There may be circumstances in evidence in connection with the matter which satisfy the court of the inaccuracy or falsity of that testimony. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard the witness' positive testimony as to a particular fact. It is the province of the trial court to determine what weight shall be given to the testimony of any witness. An appellate court cannot control the finding or conclusion of the trial court denying the testimony credence, unless it appears that there are no matters or circumstances which impair its accuracy. Young v. Tassop, 47 Cal.App.2d 557, 561, 118 P.2d 371."

Appellant's attacks upon various other findings are sufficiently covered in the following discussion, which has to do with the one real issue in the case—whether or not Samuel O. Long was a holder in due course of the note and trust deed here involved.

Appellant in her statement of facts asserts that Marshall Denton, Jr., received a telephone call from respondent between the 25th and 28th of August, 1948, in which respondent stated that he desired to buy the note and trust deed, and that respondent was then informed that the note had been executed upon an understanding that it was to be delivered out of escrow when the repair work was completed, and was advised not to make the purchase. The record, however, contains testimony by respondent contradictory of the foregoing assertion, from which testimony it appears that respondent talked with Mr. Denton (appellant's counsel) prior to purchasing the note, in which respondent stated that Mr. Cotton wanted him to buy a second mortgage on the property and asked Mr. Denton the amount of the first mortgage, to which Mr. Denton stated that it was $3,000 "and that there was some other small claim, but there were subsidiary means for taking care of that, and the $3,600.00 note should be good." Respondent testified that on the day he acquired the note and trust deed he paid $1,316.06 (the balance due on the $1,500 note), "and a thousand dollars and several other—I don't know just exactly—something over $3,000 it amounted to."

Appellant appears to make some point of the manner in which the sale to respondent was consummated. Mr. Cotton, accompanied by Mr. Long, appeared at the office of Mortgage Discount Company on August 28, 1948, and stated to Mr. Rubens that he was selling the trust deed and note to Mr. Long. Mr. Long inquired as to the amount of the first trust deed and also as to insurance. Mr. Cotton instructed the bookkeeper to make an assignment to Mr. Long. It appears to be appellant's contention that because the $1,500 note was paid, and the collateral security thereby redeemed the pledgee's special property in the pledged security became extinguished, and that therefore respondent could not be a holder in due course under an assignment from the pledgee. In this contention appellant overlooks two facts: first, that the assignment was made at the direction of an officer of the pledgor; second, that the assignment appearing on the note and trust deed to Mortgage Discount Company was absolute in form, and hence respondent Long was entitled to rely upon the facts that the instruments were in the possession of Mortgage Discount Company and were regular on their face. Thus, whether the transaction is viewed as in substance a transfer from Golden State to Long after redemption of the pledge or as a transfer by Mortgage Discount Company as the apparent owner of the note and trust deed, the result is the same so far as a holder in due course is concerned. "* * * where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed * * *." Civ.Code, sec. 3097.

Other contentions of appellant, including the argument that her transactions with Golden State Construction Company constituted payment of the note, can be answered by adopting the language of the trial judge in his remarks at the close of the trial, as follows:

"The lady (appellant) had known for some time, a couple of months at least prior to the time she first spoke to Mr. Denton, that the Mortgage Discount Company claimed to be the owner and holder of that note. She didn't go to Mr. Denton about it, she didn't give any notice; she was satisfied to talk on the phone to somebody. She then, according to her testimony, went to Mr. Denton, apparently around the middle of August or perhaps the 21st of August, according to his testimony, and thereafter nothing was done insofar as the Mortgage Discount Company was concerned; no notice given, no attempt to protect, no lis pendens, no action. But, according to the testimony, at the same time they were still dealing with Cotton and Lewis to have them complete the job, and in September and October, under her agreement with Cotton and Lewis, Mrs. Bateman did advance $1,500 more to the material men and labor men that were supplied or obtained by Cotton and Lewis. Now, that lends a great deal of credence to the contention or to the testimony as given that it was the intention of Mrs. Bateman to allow Cotton and Lewis to use this note and trust deed to raise money for the purpose of completing the job. And to use it, they would have to hypothecate it. Now, it may not have been her idea originally to do that, although the contract so indicates, but to the Court it appears that either originally or prior to August 28th, either she or Mr. Denton and she had come to the conclusion that the best thing for her interests was to get all they could out of Lewis and Cotton, get that job completed so it could be rented and bring in an income; whether or not the note and trust deed were not to be delivered until completion, to allow them to have it and to go on with their hypothecation. Otherwise I can't understand why Mr. Denton, as her attorney, did not immediately take proper steps to notify the Mortgage Discount Company and file whatever action might be necessary to protect the lady against someone being a holder in due course of the note and trust deed."

[3–6] There is substantial evidence in the record to sustain the finding that Long purchased the note and trust deed in good faith, for value, and without knowledge of any claimed infirmity. The note was not in default of payment at the time of his purchase. Claimed contradictions or inconsistencies in the evidence presented questions for the determination of the trier of fact and the trial court's conclusions in this regard may not be disturbed on appeal if there be any substantial evidence to support them. The respondent paid a valuable consideration for the note. The question of his good faith was one of fact, to be determined from a consideration of all the evidence, and is therefore governed by the familiar rule that this court is without power to disturb the finding made by the trial court who saw and heard the witnesses, observed their demeanor and manner of testifying, and determined that respondent acted in good faith. Harris v. Pollack, 101 Cal.App.2d 26, 31, 24 P.2d 824.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

105 Cal.App.2d 289

GARCIA v. GARCIA.

Civ. 18074.

District Court of Appeal, Second District, Division 3, California.

July 5, 1951.

Dan R. Garcia brought action against Doris Gaenz Garcia for divorce. After default by defendant, judgment was entered awarding divorce to plaintiff, and giving him custody of minor child and most of community property. The Superior Court of Los Angeles County, Edwin L. Jefferson and William B. McKesson, JJ., entered order and judgment denying motion of defendant to set aside default and to vacate judgment, and defendant appealed. The District Court of Appeal, Vallée, J., held that where motion was supported by affidavit that defendant was at no time represented by counsel and that she had been informed that she would be given one-half community property and custody of child, and defendant's affidavit further showed that she had defense and cause of action for divorce, denial of motion was abuse of discretion.

Judgment and order reversed with directions.

1. Divorce 🔑161

In action for divorce, trial court should set aside a default upon very slight showing, if application for relief be made in due time. Code Civ.Proc. § 473.

2. Divorce 🔑11

Action for divorce concerns not only parties immediately interested, but also the state, since marriage relation is the basis of the family, the foundation of society.

3. Divorce 🔑11

In divorce action, trial court has duty, as representative of the state, to guard strictly against fraud, collusion, or imposition.

4. Divorce 🔑184(1)

Where motion is made to vacate divorce decree obtained by default, appellate court will listen more readily to appeal from order denying relief than to one granting relief. Code Civ.Proc. § 473.

5. Divorce 🔑161

Where motion is made to vacate divorce decree obtained by default, even if showing is not strong, doubt should be resolved in favor of motion and decree should be set aside. Code Civ.Proc. § 473.

6. Divorce 🔑161

A default judgment by which a marriage is dissolved, property rights lost, character assailed, and children of tender years taken away from a parent, is harsh, and should, upon proper application, be vacated without hesitation, and failure to do so constitutes an abuse of discretion. Code Civ.Proc. § 473.

7. Judgment 🔑191

Sound policy favors determination of actions on their merits.

8. Divorce 🔑161

While trial court has discretion in ruling upon matters under statute providing for vacation of divorce decree obtained by default upon proper showing, such discretion is a legal, not an arbitrary, one. Code Civ.Proc. § 473.

9. Divorce 🔑161

Where default judgment was granted to husband awarding him divorce, most of community property and custody of minor child, and wife's motion to set aside default and to file answer and cross-complaint was supported by affidavit that she was at no time represented by counsel and that she had been informed that she would be given one-half community property and custody of child, and her affidavit further showed that she had defense and cause of action for divorce, denial of motion was abuse of discretion. Code Civ.Proc. § 473.

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Charles C. Morrison, West Los Angeles, for appellant.

Avery M. Blount, Lloyd F. Dunn, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant-wife from an order denying her motion under section 473 of the Code of Civil Procedure to set aside her default and to vacate an interlocutory decree of divorce, and from the judgment.

The chronology of the case is as follows:

August 19, 1949, plaintiff-husband filed an action for divorce against defendant. The complaint alleged that the parties married on August 17, 1940, and separated on April 17, 1949, and that there was one child, a boy, aged 4; the existence of community property, consisting of two parcels of real property, household furniture, and a truck; that defendant had been guilty of cruelty; that the boy "is now in the custody of plaintiff"; and that plaintiff is, and defendant is not, a fit person to have custody of the boy.

August 25, 1949, copy of complaint and summons was personally served on defendant.

January 27, 1950, defendant's default was entered.

March 8, 1950, interlocutory judgment of divorce was awarded plaintiff by Judge Jefferson, giving him the custody of the minor child, and all of the community property, except the household furniture and furnishing awarded defendant.

March 20, 1950, defendant served with copy of interlocutory decree.

April 3, 1950, defendant filed notice of motion to set aside default and default judgment on the ground of mistake, inadvertence, surprise and excusable neglect (Code Civ.Proc. § 473), and to file her answer and cross-complaint. The matter was heard upon defendant's affidavit, her proposed answer, and upon the counter-affidavits of plaintiff's attorney and one Nelson, a real estate broker. Plaintiff did not file a counter-affidavit.

April 21, 1950, motion to vacate and set aside default judgment and for leave to file answer and cross-complaint was denied by Judge McKesson.

[1-5] The principles which are applicable when a motion is made under section 473 of the Code of Civil Procedure to set aside a default judgment of divorce are concisely stated in Gregory v. Gregory, 92 Cal.App.2d 343, 345, 206 P.2d 1122, 1124: "As said in Rehfuss v. Rehfuss, 169 Cal. 86, 92, 145 P. 1020, 1022: 'The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. * * * The law is at all times very solicitous to preserve the integrity of the marriage relation. That relation is the basis of the family, the foundation of society. * * * An action for divorce concerns not only the parties immediately interested, but also the state. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together.'

"In Hambrick v. Hambrick, 77 Cal.App.2d 372, 377, 175 P.2d 269, 271, the court said: 'As has been said repeatedly: "* * An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *." 14 Cal.Jur. 1076; see, also, Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, supra, and cases cited; Brill v. Fox, 211 Cal. 739, 743-744, 297 P. 25. Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. 14 Cal.Jur. p. 1076.'" See, also, McBlain v. McBlain, 77 Cal. 507, 509, 20 P. 61; Wadsworth v. Wadsworth, 81 Cal. 182, 183, 22 P. 648; Landon v. Landon, 74 Cal.App.2d 954, 958, 169 P.2d 980.

[6] It has been held that a default judgment by which a marriage is dissolved, property rights lost, character assailed, and children of tender years taken away from a parent, as is the case here, is a harsh judgment and should, upon proper application, be vacated without hesitation; failure to do so constitutes an abuse of discretion. Mulkey v. Mulkey, 100 Cal. 91, 34 P. 621; Rehfuss v. Rehfuss, 169 Cal. 86, 89-90-91,

145 P. 1020; Landon v. Landon, 74 Cal. App.2d 954, 958, 169 P.2d 980. In the Mulkey case, the husband obtained a default divorce judgment on the ground of adultery. The husband was awarded the four minor children, three of whom were girls, the eldest being about eight years old, and was assigned all of the community property. The wife appealed from the order denying her motion to vacate and set aside the judgment. In reversing the order the court said, 100 Cal. at page 92, 34 P. at page 621: "The facts stated in the affidavit of defendant show either collusion between the parties, or that the defendant was grossly misled and deceived by her husband as to the ground of the proposed action; he having informed her, as she states, that it would be brought on the ground of desertion. In either case the court should have been prompt to set aside the judgment and allow the defendant to answer, so that the case might be heard and determined on its merits. The judgment is a harsh one, and fearful in its consequences. It deprives the defendant, among other things, of children, home, property, and character. To justify such a judgment the evidence should always be clear and convincing; and when obtained in an action of this character, under circumstances such as are disclosed by the record in this case, it should, upon a proper application, made by the defendant for that purpose, be vacated without hesitation, and a much slighter showing than the one here made would be amply sufficient for the purpose."

The facts stated in defendant's affidavit reveal that at no time was she represented by counsel. Although the counter-affidavit filed by plaintiff's attorney denied that fact, it is obvious that the facts in support thereof are too vague and indefinite to be given consideration, the affidavit stating the attorney had received telephone calls from "some person" and "another party" claiming to be defendant's attorneys and seeking information concerning the action, but whose names he did not take and does not remember although he furnished them with information. The uncontradicted fact remains that after service of complaint and summons upon defendant she went to the office of plaintiff's attorney and, according to the latter's affidavit, stated "she had certain interest in the community property, including household goods, a truck used by Mr. Garcia, and certain real property," and that she "desired to discuss the matters" contained in the complaint. Although the affidavit of the attorney states she was advised to seek legal advice, the fact remains that no attorney at any time appeared in the action for her. Defendant's affidavit further states, which facts are denied by the attorney, that she was informed by him it was unnecessary for her to engage counsel and that when the interlocutory decree of divorce would be granted she would be given at least one-half of the community property; that no one intended to take the custody of the minor child from her; that the child would remain in her custody, and plaintiff would agree to pay for the support of the child; that she had no knowledge the attorney intended to enter a decree "until these matters had been settled." No explanation is made in the attorney's counter-affidavit for the five-month delay in entering defendant's default. This fact would, in and of itself, lend support to defendant's statement that she believed nothing would be done "until these matters had been settled." Further support for her belief is added by the statement in her affidavit that in March of 1950 (appellant's brief corrects this date to February 20, 1950), in reliance upon the representation that a settlement of the rights of the parties would be made before an interlocutory decree was entered, she pledged her separate security and paid off a delinquency of $850 on an indebtedness existing against the real property of the parties. No denial was made in the counter-affidavits that defendant paid this $850; and, under the circumstances, it would appear inconceivable that she would have been so vigilant and paid this amount if she were not of the belief that a settlement of the property interests of the parties would be effected. Neither was it denied in the counter-affidavits that since the separation of the parties the minor child has been, and now is, in defendant's custody and that plaintiff has never, at any time, had the physical custody of the minor child. In addition to the foregoing, the proposed answer attached to defendant's affidavit reveals she has a good and sufficient defense to plaintiff's cause of action, and her affidavit states she has a good and sufficient cause of action for divorce in her own right, none of which facts is controverted in the counter-affidavits.

[7-9] Sound policy favors the determination of actions on their merits. While discretion is vested in the lower court in ruling upon matters under section 473, such discretion is a legal, not an arbitrary, one. Friedrich v. Roland, 95 Cal.App.2d 543, 552, 213 P.2d 423. Having in mind the foregoing legal principles and the circumstances here appearing, it was clearly an abuse of discretion to deny the relief sought by defendant.

Judgment and order reversed and cause remanded with directions to the court below to vacate and set aside the judgment, and to allow defendant to answer and file a cross-complaint, if she be so advised, within a reasonable time.

SHINN, P. J., and WOOD, J., concur.

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105 Cal.App.2d 294

GARCIA v. GARCIA.

Civ. 18185.

District Court of Appeal, Second District, Division 3, California.

July 5, 1951.

Dan R. Garcia brought action for divorce against Doris Saenz Garcia. Divorce was awarded plaintiff by default. Defendant filed motion to set aside default and default judgment, which motion was denied. The Superior Court of Los Angeles County, Elmer D. Doyle, Judge assigned, entered order awarding defendant costs and attorney's fees for purpose of prosecuting her appeal from the adverse judgment and order, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where judgment and order denying motion were reversed on appeal, defendant's appeal was taken in good faith, and costs and attorney's fees were properly awarded.

Affirmed.

Divorce 🔑**194**

Where wife's motion to set aside default and vacate judgment of divorce was denied but order was made awarding her costs and attorney's fees for purpose of prosecuting appeal, and on appeal judgment and order denying motion were reversed, appeal was taken in good faith, and costs and attorney's fees were properly awarded. Code Civ.Proc. § 473.

Avery M. Blount, Lloyd F. Dunn, Los Angeles, for appellant.

Charles C. Morrison, Los Angeles, for respondent.

VALLÉE, Justice.

This is a companion case to Garcia v. Garcia, Cal.App., 233 P.2d 23. It is an appeal by plaintiff from an order made after judgment awarding defendant costs and attorney's fees on appeal.

After the defendant had filed her notice of appeal in the companion case, she applied for, and an order was made awarding her, costs and attorney's fees for the purpose of prosecuting her appeal. This is an appeal from the latter order. The contention made is that the appeal in the companion case was not taken in good faith. As we have reversed the order in that case, it is manifest the appeal was taken in good faith.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

HURLEY et al. v. RUBIS et al.

Civ. 14736.

District Court of Appeal, First District,
Division 2, California.

June 25, 1951.

Rehearing Denied July 25, 1951.

Hearing Denied Aug. 23, 1951.

Action by George Hurley and others against Paul Rubis and others to test the validity of an election of an elementary school district to change its former vote and become part of a different high school district. The Superior Court in and for the County of Monterey, Honorable H. C. Jorgensen, J., gave judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that a second election, in one of two elementary school districts intending to unite and become part of a union high school district, was a nullity.

Judgment affirmed.

1. Statutes 🔑159

Where legislature does not expressly repeal statutory sections they remain in force unless absolutely repugnant to subsequent statute.

2. Statutes 🔑158

Repeal of statute by implication is not favored.

3. Statutes 🔑223.1

In comparative construction of statutes, they are to be harmonized as fully as may be, so as to give them complete and reasonable effect.

4. Statutes 🔑181(1)

Courts must construe a statute according to the intent of the legislature.

5. Statutes 🔑190

A court cannot interpret a statute unless it is ambiguous or uncertain.

6. Statutes 🔑206

Statutes should be construed so as to give effect to all their provisions.

7. Schools and school districts 🔑38

Where, by provision of Education Code, the singular number used therein included the plural and the plural the singular, the words "an election" used in an amendment to the code did not of themselves indicate an intent to restrict the School Board's power to calling but one election to form union elementary school district. Education Code, §§ 18, 3891–3898.

8. Statutes 🔑223.2(10)

Where by code provision the singular number used therein included the plural and the plural the singular, the words "an election" are not sufficiently clear, and to ascertain true intent of the law a court may look to contemporaneous and prior legislation on the same subject. Education Code, §§ 18, 3891–3898.

9. Schools and school districts 🔑38

Under provision of Education Code that where a new union district is formed from territory situated in two high school districts, the boundaries of the high school districts are not changed, provided that prior to first of February next succeeding formation of union, or within one year of date of election to form union any component district may elect to become part of any high school district, a portion of the territory of which is embraced within the union district, only one such election during the period is authorized. Education Code, §§ 3691–3694, 3891–3898; St.1949, p. 2717, § 5.

10. Schools and school districts 🔑38

Where two elementary school districts voted to form a union elementary district, and each elected to remain part of the high school district of which it had formerly been part, a second election in one of the elementary districts to become part of the other high school district, under a section of the Education Code which provided for elections to become part of high school districts any time within one year from election to unite, instead of pursuant to the section providing for exclusion from high school districts, was a nullity. Education Code, §§ 3691–3694, 3891–3898.

Noland & Lawson, Salinas, for appellants.

June D. Borina, Dist. Atty. of the County of Santa Cruz, Santa Cruz, John L. McCarthy, Deputy Dist. Atty., Watsonville, Wyckoff, Gardner, Parker & Boyle, Watsonville, for respondents.

NOURSE, Presiding Justice.

The two elementary school districts of Moss Landing and Springfield, both located in Monterey County, elected to form a union elementary school district on November 8, 1949. Prior thereto the Moss Landing District was a part of the Salinas Union High School District and the Springfield District was a part of the Watsonville Joint Union High School District. Acting under the provisions of section 3897 of the Education Code, an election in the Springfield District was held on December 29, 1949, at which election a majority of the voters elected to remain a part of the Watsonville Joint Union High School District and not to become a part of the Salinas Union High School District. Thereafter at an election held in the Moss Landing District the voters elected to remain a part of the Salinas Union High School District and not to become a part of the Watsonville Joint Union High School District. On January 24, 1950, a second election was held in the Springfield Elementary District at which time the electors voted to become a part of the Salinas Union High School District.

This action was instituted by the officers of the Watsonville Joint Union High School District to test the validity of the second election and to have it decreed that the Springfield District remain as a part of the Watsonville Joint Union High School District. The decision calls for an interpretation of sections 3891 to 3898 of the Education Code with such amendments as were made in 1949, Statutes 1949, Chap. 1529. The arguments of counsel are based particularly on the provisions of section 3897 as amended in 1949 which read in part: "Where a new union or joint union district is formed from territory situated in two or more high school districts or situated partly within a high school district and partly in no high school district, the boundaries of the high school districts involved are not changed; provided, however, that prior to the first day of February next succeeding the formation of the union or joint union, or within one year of the date of the election to form the union or joint union, any component district of such union or joint union school district may elect to become a part of any high school district, a portion of the territory of which is embraced within the union or joint union school district."

A more logical approach would seem to be that suggested in the opinion of the trial judge intimating that when the Springfield District on December 29, 1949, elected to remain a part of the Watsonville Joint Union High School District its status as such thereupon became fixed so that if it thereafter desired to be excluded from that District and to join the Salinas Union High School District it must follow the procedure for withdrawal outlined in section 3691 of the Education Code.

After a full hearing, the learned trial judge rendered an opinion in writing in support of the judgment, the portion of which relating particularly to the applicability of sections 3691 to 3694 of the Education Code we quote with approval as follows:

[1–3] "Now the Legislature did not expressly repeal sections 3691 to 3694 of the Education Code in its 1949 Session. Those sections are still in force. Repeals by implication not favored. It is only when two statutory provisions are absolutely repugnant to each other that the repeal of the earlier statute will be declared. People [ex rel. Wood] v. Sands, 102 Cal. 12, [36 P. 404]; Thompson v. Board [of Sup'rs], 111 Cal. 553, [44 P. 230]; Estate of Brewer, 156 Cal. 89, [103 P. 486]. In the comparative construction of statutes they are to be harmonized as fully as may be, so as to give them complete and reasonable effect. City of Los Angeles v. Los Angeles Pacific Co., 31 Cal.App. 100, 108, 159 P. 992.

[4] "It is also fundamental that the courts must construe a statute according to the intent of the legislature, the intent being the vital part and the primary rule of construction being to ascertain and give effect to that intent and to seek for the intent in every legitimate way. Blumenthal v. Larson, 79 Cal.App. 726, [251 P. 241]; Marshall v. Williams, 95 Cal.App. 507, 259 P. 970.

[5, 6] "It is a cardinal rule that a statute free from uncertainty and ambiguity needs no interpretations. A court may not by judicial construction substitute its idea of the intent of a statute when that intent is unmistakably expressed and when the statute is not ambiguous or uncertain; but if such uncertainty exists a necessity for construction follows. Statutes should be so construed as to give effect to all their provisions. Cory v. Cooper, 117 Cal.App. 495 at [pages] 500 and 502, [4 P.2d 581].

[7, 8] "The Education Code is to be liberally construed, with a view to effect its objects and to promote justice (Sec. 3). The singular number includes the plural and the plural the singular when used in said code (Sec. 18). Therefore it is not of much aid to construction to say the words 'an election' were used instead of elections in ascertaining the intent of the Legislature because the mere use of the singular does not of itself indicate an intent to restrict the School Boards and County Superintendents power to calling but one election on the subject. So that it may be said that the intent and purpose of the 1949 amendment to the section in question is not entirely clear. On such a case to ascertain the spirit, intentions and purpose of the law, a court may look into contemporaneous and prior legislation on the same subject that is to say by taking into account such matters as the history of legislations affecting the same or closely kindred subjects, Grannis v. Superior Court, 146 Cal. 245–247, [79 P. 891]; People v. Ventura Refining Co., 204 Cal. 286, [268 P. 347, 283 P. 60].

"The Court has endeavored to do this. The Court notes that in the Chapter amending said section 3897 the Legislature declared in the emergency clause that in the interest of public peace, health and safety 'it is necessary that the boundaries of such districts be determined as speedily as possible.'

"There is no record kept of the debates on the floor of the houses of the Legislature so that the history of legislation can only be derived from the various amendments to the law, from the various forms of the law during the course of its passage and from entries in the journals of the two houses, concerning the law during the course of its passage. So far as the court has been able to determine there is nothing in the Senate or Assembly Journal entries relating to the sections of the Education Code heretofore mentioned that reveals the intent of the Legislature on the issue here in question.

"So far as the Court can determine there is nothing in the legislature history of the sections of the Education Code here in question from their enactments as parts of the Political Code through the School Code to the present other than the above quoted words from the emergency clause of the 1949 amendment to said section 3897 that can assist a court in determining the intent of the Legislature.

[9, 10] "* * * After making such a choice by the first election held in December 1949 the electors of Springfield School District had exercised their right to so choose and elected to remain a part of Watsonville Joint Union High School District and thereafter if the electors of said Springfield School District desired to be excluded from the district it had theretofore chosen to become a part of they must proceed under section 3691 to section 3694 of the Education Code. Such a constructiton gives effect to all the sections of the School Code now in effect and pertinent to the question here involved. As this election was not called and held pursuant to said section under the law the court is compelled and does hereby declare it to be a nullity."

Amplifying the reasoning of the foregoing opinion we may add: The two elementary districts voted to unite on November 8, 1949. Under section 3897 of the Education Code they could vote to become a part of either high school district at any time "within one year" of that date. Under appellants' theory they could vote "yes" or "no" as many times during that year as the superintendent of schools might call an election. The result would cause uncertainty as to the status of both the elementary and the high school ditrict during that whole period causing doubt on the power to issue bonds or to levy taxes for necessary school purposes. It was to avoid this confusion that the legislature added the emergency clause to the 1949 statute reading in part (sec. 5, Chap. 1529, Stats.1949): "The need for additional high school facilities demands that bonds be issued and new facilities erected by the high school districts at the earliest possible opportunity. In order to determine the validity of such bonds and to settle all questions as to the liability of the elementary school districts for the bonds, *it is necessary that the boundaries of such districts be determined as speedily as possible* and it is therefore necessary that this act take immediate effect." (Emphasis ours.)

Manifestly the expressed purpose of this legislation could not be obtained if the boundaries of the high school districts were left undetermined throughout the taxing period of one year following the election with the right of the elementary district to vote "yes" then "no" and "yes" then "no" as many times during the year as the superintendent of schools chose to call an election.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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105 Cal.App.2d 208

PEOPLE v. LEWIS.

Cr. 2712.

District Court of Appeal, First District,
Division 1, California.
June 29, 1951.

John Henry Lewis was convicted in Superior Court, Alameda County, Donald K. Quayle, J., of forgery of checks, and he appealed. The District Court of Appeal of the State of California, Peters, P. J., held that the evidence was sufficient to support the conviction.

Judgment affirmed.

1. Forgery 🔑44(1)

Evidence was sufficient to sustain conviction for forgery of checks. Pen.Code, § 470.

2. Criminal law 🔑1159(4)

The jury pass upon questions of credibility of witnesses, and their determination cannot be upset by District Court of Appeal.

3. Criminal law 🔑613

In prosecution for forgery, granting of continuance to same afternoon upon defendant's request for continuance to bring in witnesses who had not appeared, was not error for defendant was not entitled to indefinite continuance and was not prejudiced by short continuance since defendant had full benefit of testimony of witnesses in question.

4. Criminal law 🔑1128(2)

Unsupported assertions of defendant, convicted of forgery and confined, to effect that he had learned while in prison that certain subpoenaed witnesses had not moved out of town as he had been told, could not be considered on appeal.

5. Criminal law 🔑370

In prosecution for forgery, admission in evidence of another check which was claimed to have been forged by defendant, supported by expert evidence that check was written by defendant, to show defendant's guilty knowledge, was not error though check had been basis of separate charge for forgery against defendant, which charge had been dismissed at preliminary hearing.

6. Criminal law 🔑370

A verdict of acquittal of a crime does not render evidence of that crime inadmissible on another charge, where the evidence of the other crime of which defendant has been acquitted is offered on the present trial to show guilty knowledge.

◆

John Henry Lewis, in pro. per.

Edmund G. Brown, Atty. Gen. of the State of California, David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Plaintiff was charged with and convicted of two violations of section 470 of the Penal Code. Each charge involves the forgery of a check. One of the checks is in the amount of $325, is made payable to "Robert Washington," is dated September 26, 1949, is signed as maker "Pauline Salisbury Co.," and is endorsed "Robert Washington." The other check, dated September 19, 1949, is in the sum of $65, is made payable to "Robert Washington, Jr.," is signed as maker "Pauline Salisbury Co.," and is endorsed "Robert Washington." Defendant was found guilty of forging both checks, and appeals from the judgment. He urges that the evidence is insufficient, that he was convicted on perjured testimony, that he was prejudiced by the refusal of the court to grant a continuance, and by its refusal to issue subpoenas for certain witnesses.

An examination of the record demonstrates that the evidence is ample to support the conviction, and that no error was committed during the trial.

Both checks were signed as maker, "Pauline Salisbury Co." It is admitted that there was a Pauline Salisbury, that she operated a furniture store in Oakland, that defendant knew her, and that he had had several business transactions with her in which she had issued to him at least three valid checks. On August 9, 1949, she purchased from defendant some secondhand furniture and gave him a $12.50 check as a deposit made out to his order and signed "Salisbury Furniture Co. Pauline Salisbury." On August 11, 1949, she picked up the purchased furniture and gave to defendant a check for $325 in payment for the furniture. This check named defendant as the payee and was signed the same as the $12.50 check. Mrs. Salisbury had difficulty in writing, and admittedly, at her request, defendant wrote out everything on this check except the signature. On this same date, August 11th, she purchased from defendant another piece of furniture for $12.50, and in payment therefor allowed him to keep the original $12.50 check given as a deposit. On September 20, 1949, she purchased some more furniture from defendant and gave him a check for $27 payable to him and signed as were the other two. All three checks were drawn on the Oakland Bank of Commerce. These three checks were all valid, and are not involved in the charges here under consideration.

A teller of the South Berkeley Branch of the Bank of America testified that he knew defendant as a customer of the bank. He further testified that about noon on September 26, 1949, defendant presented to him at the bank the $325 check dated September 26, 1949, and requested that it be cashed. This check was drawn on the Oakland Bank of Commerce, was payable to and endorsed "Robert Washington", and signed by "Pauline Salisbury Co." The teller was suspicious of the maker's signature because, on September 21, 1949, he had cashed, for some unidentified person, the $65 check dated September 19, 1949, payable to "Robert Washington, Jr.," signed "Pauline Salisbury Co." and drawn on the Oakland Bank of Commerce. That check had been returned to the Bank of America marked "Signature Irregular." For that reason, when the $325 check was presented, the teller told defendant, whom he recognized, that he had to consult a bank officer. When he returned to the teller's window defendant was gone and never did return to claim the check. When defendant was arrested in November, 1949, the teller, at the police station, identified defendant as the person who had tried to cash the check. Defendant did not then deny the accusation. When arrested defendant told the officers that he had no knowledge of the two checks and had never seen them before.

Mrs. Salisbury testified that she did not draw or sign the checks of September 19th or 26th, nor did she give permission to defendant to draw or sign them.

At the trial defendant stipulated that he had written the endorsement "Robert Washington" on the $325 check, and had written all the handwriting, including the signature of the maker and the endorsement, on the $65 check. He denied trying to cash or cashing either check. He told a most fantastic and wholly uncorroborated story of being kidnapped by four unidentified persons on the night of July 31, 1949, of being taken for a ride and robbed, and of being returned to his home, and, at gun point, being forced to endorse the $325 check and to make out and endorse the $65 check. He claimed that he immediately reported all of this to the Berkeley police. The police denied that any such complaint had been made. Apparently defendant selected the date of July 31, 1949, for this story, because on that night he had been engaged in an argument and fight with a Charlie Heard or Hard, and did complain to the police about that man, and did cause his arrest. Defendant admitted, however, that Heard or Hard had nothing to do with the kidnapping or checkwriting events, and that his fight with Heard or Hard occurred after he had been kidnapped. It is quite significant that on July 31, 1949, defendant did not know Pauline Salisbury, but met her for the first time on August 9, 1949, nine days later, when she purchased his furniture. He admitted that when he met her he did not tell her or any one else (except, as he claimed, the Berkeley police) that he had written her name on one check and endorsed the other one. He tried to explain this by testifying that a Berkeley police inspector had told him not to tell any one about those events. The inspector denied telling this to defendant, or of knowing anything about the kidnapping story.

In support of his denial that he had cashed the check dated September 19, 1949, for $65 on September 21, 1949, and had tried to cash the $325 check on September 26, 1949, defendant testified that he was not in Berkeley on those dates. He testified that, during the daylight hours of September 19th, 20th and 21st, he was in Hayward trying to secure employment with Tarmen & Bechtel Construction Co. This story is uncorroborated.

He also presented an alibi for September 26th. He testified that on Sunday night, September 25, 1949, he left Oakland by bus and went to Los Angeles, where he arrived at about 10:30 a. m. on September 26, 1949. His story is that he remained in Los Angeles, staying at the home of relatives, Mr. and Mrs. Burke, from the morning of September 26th until Friday, September 30, 1949, when he returned to Oakland. He testified that, on the day of his arrival in Los Angeles, September 26, 1949, he, in the company of Mr. Burke and a Reverend Peters a minister of the Baptist church, visited two hospitals and a funeral parlor. He also testified that he remembered that on the day of his arrival Mrs. Burke had had a tooth pulled.

The Rev. Peters testified that defendant was in Los Angeles in September, 1949, and verified defendant's story that defendant had accompanied him to the hospitals and to the funeral parlor. He could not fix the precise date this occurred, but was quite sure that it was towards the end of September, 1949.

Mr. Burke testified as to defendant's visit to the Burke home in Los Angeles, but he had no independent recollection of the precise date. He fixed the date of the start of the visit as September 26, 1949, because Mrs. Burke's dentist told him that she had had a tooth pulled that day, and he remembers that Mrs. Burke had had a tooth pulled the day that defendant arrived. He contradicted defendant as to the date of the visits to the hospitals and funeral parlor, fixing these events as several days after defendant had arrived.

Mrs. Burke had no independent recollection of the date of defendant's visit, but she too fixed the date as September 26, 1949, based entirely on the fact that she had had a tooth pulled the date defendant arrived, and her dentist told her that a tooth had been pulled on September 26, 1949. She admitted that she had had teeth pulled before and after September 26, 1949; that she was having her teeth removed preparatory to securing false teeth, and went to the dentist whenever she could get off work. She did not get her false teeth until some time after Christmas, 1949. It is a reasonable inference from the evidence that this visit to Los Angeles occurred about a week later than testified to by defendant.

When defendant was arrested in November, 1949, he was working for Tarmen & Bechtel Construction Co. under the name of William Draper. He testified that his real name was Draper, or Drapers, or Drappers, and that he had assumed the name of John Henry Lewis while boxing in the army. He testified that, although he had occasionally used the name Draper, he was usually known as John Henry Lewis. He got very confused over whether he knew or had ever heard of a Robert Washington. He first denied knowing such a person, but finally admitted that he had worked with and knew a man by that name. Although at first denying it, he finally admitted that he had worked on two jobs under the assumed name of Robert Washington. He claimed that Washington had given him his union card to use, and that is why he assumed that name. Washington denied this story.

Defendant admitted that he had been convicted in 1937 and served a term for grand theft in the state prison.

[1] The point need not be labored that the evidence is ample, sufficient and substantial to support the conviction. The jury just did not believe the kidnapping story. The alibi for September 21, 1949, was unsupported. The alibi for September 26, 1949, was not believed by the jury. The corroborating evidence of Peters and the Burkes was not satisfactory. The jury undoubtedly concluded that this visit occurred at least a week later than testified to by defendant. The defendant admits writing the endorsement on one check, and all of the handwriting, including the endorsement, on the other. The bank teller positively identified defendant as the one who tried to cash the $325 check. The jury has resolved these conflicts against defendant, and its findings are amply supported.

[2] The claim that he was convicted on perjured testimony simply amounts to the unsupported assertion that he told the truth, and the prosecution witnesses lied. The jury passed on this question of credibility, and its determination cannot be upset by this court.

[3] Defendant argues that he was prejudiced by a denial of a requested continuance. After the prosecution had rested its case, which occurred late one afternoon, defendant's counsel, the public defender, the next morning informed the court that Peters and the Burkes, although served with subpoenas, had failed to appear, and requested a continuance until they could be brought up from Los Angeles. The court issued an order for bench warrants for these witnesses. Counsel for defendant then requested a continuance to that afternoon. This request was granted. That afternoon the public defender put Lewis on the stand as his first witness. Later the three witnesses appeared and testified. It is obvious that defendant was not entitled to an indefinite continuance, and that he was in no way prejudiced by what occurred. He had the full benefit of the testimony of the witnesses in question.

[4] Defendant claims that he requested subpoenas for five witnesses and was told that they had moved out of town. Since being in prison, he alleges, he has received letters from these persons and that they have stated that they had not moved. There is no record to support these assertions. The point cannot be considered on this appeal.

[5, 6] These are all the points raised by defendant who appears *in propria persona*. There is one other point that perhaps should be mentioned. The prosecution, over objection, introduced another check for $10 which, it was claimed, was forged by defendant. This check was drawn on the Oakland Bank of Commerce, is dated September 27, 1949, names "Earle E. Remington" as payee and endorser, and is signed "Pauline Salisbury." This check was secured from an unidentified white man (the defendant is a Negro) who attempted to cash it by presenting it to Mrs. Salisbury. The expert evidence is that the face of this check, including the signature, was written by defendant. This check was apparently the basis of a separate charge of forgery against defendant, which charge was dismissed at the preliminary hearing. The admission of this evidence in the present trial, in spite of the dismissal, was not error. People v. Frank, 28 Cal. 507, 516; People v. Follette, 74 Cal.App. 178, 212, 240 P. 502. These cases hold that a verdict of acquittal of a crime does not render evidence of that crime inadmissible on

another charge where the evidence of the other crime of which defendant has been acquitted is offered on the present trial to show guilty knowledge. That is this case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

BLUMER v. KIRKMAN CORP. et al.

Civ. 14579.

District Court of Appeal, First District.
Division 1, California.
June 25, 1951.

Rehearing Denied July 13, 1951.

Hearing Granted Aug. 23, 1951.*

A. M. Blumer brought action against the Kirkman Corporation (a corporation) and Kirkman Nurseries (a corporation) to recover the purchase price of fertilizer sold by plaintiff to defendants. The Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., entered an order denying motion of defendants for change of venue, and they appealed. The District Court of Appeal, Bray, J., held that complaint and affidavits were sufficient to show venue.

Order affirmed.

1. Appeal and error 🔑912

Where motion of defendants for change of venue was heard and determined on allegations of verified complaint and affidavits and counter-affidavits of the parties, all conflicts were required to be resolved on appeal in favor of the plaintiff, as the prevailing party.

2. Venue 🔑7

Where sworn complaint alleged that defendants promised to pay at office of plaintiff in San Francisco for materials sold by plaintiff to defendants, and there was no denial of that allegation, and affidavit of plaintiff set forth letter confirming oral agreement and stating that it was understood that defendants might possibly send in payment, court properly determined that contract was to be performed in San Francisco and that superior court in and for the City and County of San Francisco was the proper court for action for breach of contract, and defendants' motion for change of venue was properly denied. Civ.Code, § 1489, subd. 2.; Const. art. 12, § 16.

3. Constitutional law 🔑29

Constitutional provision authorizing corporation to be sued in county where contract is made or to be performed, or where obligation or liability arises or breach occurs or in county where principal place of business of corporation is situated, is self-executing. Const. art. 12, § 16.

4. Constitutional law 🔑29

Even though constitutional provision is self-executing legislation may be enacted to facilitate its operation and may be desirable by way of providing convenient remedies for protection of rights secured or of regulating claim of right so that its exact limits may be known and understood, but all such legislation must be subordinate to constitutional provision and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.

5. Pleading 🔑205(1)

In action by seller against buyers of fertilizer to recover purchase price of fertilizer, allegations that buyers promised to pay seller a certain sum for the fertilizer when buyers marketed their next peach crop and they marketed such crop on a certain date, and that buyers were indebted to seller, and that though seller had frequently demanded payment thereof, buyers had refused and neglected to pay such sums or any part thereof, was sufficient, as against a general demurrer, to show nonpayment.

6. Pleading 🔑111.38

In action by seller against buyers to recover purchase price of fertilizer, allegations of complaint that seller had complied in all respects with provisions of law contained in certain division and chapter of the Agricultural Code were sufficient for purposes of venue. Agricultural Code, §§ 1023–1044.5; Const. art. 12, § 16.

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* Subsequent opinion 241 P.2d 17.

Mason Bailey, Madera, Walker Peddicord, San Francisco, Alfred Nelson, Piedmont, for appellants.

William H. MacKay, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from an order denying a motion for change of venue.

Question Presented.

Under the contract, was payment to be made in San Francisco?

Record.

Plaintiff filed an action in San Francisco against defendant corporations alleging that plaintiff sold and delivered to defendants at a place near Madera certain quantities of agricultural mineral flue dust for which defendants agreed to pay a certain sum to plaintiff at his office in San Francisco. Defendants moved for change of venue either to the County of Madera or to the County of San Joaquin, on the ground that neither defendant resided or had its principal place of business in San Francisco, and that the alleged obligation was to be performed and the contract was entered into in Madera County and that the principal place of business of both defendants was San Joaquin County. The motion was based on the affidavit of the president of both companies. After stating that the principal place of business of each corporation is in San Joaquin County, he stated that the agreement for the delivery of the dust was entered into in Madera County, the place where the dust was in fact delivered; that the order for it was verbal. In opposition plaintiff filed the affidavit of one Snow who stated that plaintiff's office and place of business was in San Francisco; that defendants' officers knew that fact; that the shipment of the fertilizer mentioned in the complaint was specified and agreed upon by the parties in a letter written and mailed by plaintiff to and received by defendants. A copy of the letter is attached. It states in part: "For sake of office record I hereby confirm having last week booked your order to commence shipping Agricultural Mineral Flue Dust, the Calcium-Potassium product, to your peach orchard near Madera at $17.50 per 2000 lbs. in bulk." The part upon which plaintiff mainly relies for venue follows: "It is understood that you will pay for above at the latest in the course of next year as you market your peach crop, and that you may possibly send in a payment on account in the course of this winter." The trial court denied the motion.

Place of Performance.

Admittedly the sole ground for retaining the case is San Francisco is the italicized portion of section 16 of article XII of the Constitution: "A corporation or association may be sued in *the county where the contract* is made or *is to be performed,* or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (Emphasis added.)

[1, 2] In considering the constitutional provision referring to the place of performance, the place where the obligation arises and the place where the breach occurs, we are concerned with that obligation of the contract the breach of which is the cause for the suit being filed. In this case "The defendant's breach of contract, if any, occurred at the place where payment was agreed to be made. * * *" Burr v. Western States Life Ins. Co., 211 Cal. 568, 576, 296 P. 273, 276. It is contended, and evidently the trial court found, that the last sentence of the letter required payment in San Francisco. "The motion was heard and determined on the allegations of the verified complaint and the affidavits and counter-affidavits of the respective parties; and under well settled rules, all conflicts must be resolved in favor of the prevailing party * * *" C. H. Parker Co., Inc., v. Exeter Refining Co., 26 Cal.App.2d 610, 611, 79 P.2d 1114. The sworn complaint alleged that defendants promised to pay for the material at plaintiff's office in San Francisco. There is no denial of that allegation. The only showing made by defendants is in the affidavit of their president. He does not deny this allegation.

He states that the order for delivery was "verbal and conditional," and that the contract was entered into and the dust in fact delivered in Madera County. Thus, we have a situation where a sworn complaint alleges an agreement to pay in San Francisco and no denial thereof. At this point, had the court passed on the matter, it would have been required to deny the change of venue. The plaintiff then filed the affidavit setting forth the letter which confirms the oral agreement, and which states that it is understood "that you may possibly send in" a payment. Does this language sufficiently show an obligation to pay elsewhere than in San Francisco, so as to overcome the sworn, undenied allegation and the court's finding, that the defendants promised to pay plaintiff there? Obviously it does not. Defendants contend that the proper construction of the letter, when considered with the usual practice of doing business, is that payments were to be mailed, and that the place of performance of the obligation of payment would be wherever the payment was deposited in the post office; or, at least, ordinary business practice would expect a corporation resident of San Joaquin County and doing business in Madera County to mail its check from one of those counties. But such a construction is not compelled, and if a valid conclusion (see, however, section 1489, subdivision 2, Civil Code, as to place of offer of performance in the absence of a provision in the contract) it would, at most, result in the raising of a conflict as to the factual issue of where the moneys were to be paid. The trial court resolved this conflict against the defendants. Moreover, a more reasonable construction of the letter is that "send in a payment" meant that the performance of the payment obligation was at plaintiff's office, which was in San Francisco. The trial court had the right to construe the letter in the light of defendants' president's statement that the agreement was oral, and in the light of the undenied, sworn allegation that payment was agreed to be made in San Francisco.

Defendants contend that the oral agreement, not the letter, was the contract, and that, as their affidavit shows the oral agreement was made in Madera County and was silent on the subject of payment, it must be presumed that payment was to be made there. Assuming such a presumption, nevertheless it was for the trial court to determine whether the letter brought the case under the provisions of section 1489, subdivision 1 of the Civil Code as a "place appointed by the creditor" for the payment to be made.

Defendants make a further contention. They say that section 1 of article XII of the Constitution provides that the Legislature shall have power by general laws to provide, among other things, for the regulation of corporations and to prescribe their powers and rights, duties and liabilities. Section 16, say they, took away from the Legislature certain powers with reference to designating the place of trial for corporation defendants. Then they urge an ingenious construction of section 395 of the Code of Civil Procedure. This section is a general section on venue, which provides, among other things, that the county where the obligation is incurred "shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." Defendants argue that this applies to corporation defendants, as being a legislative enactment under the authority of section 1 of article XII. They say that such a construction is the prescribing of a corporation right. This argument overlooks the fact that as to venue of corporations the Constitution has an express provision (art. XII, § 16). Any desired limitation on section 16 would have been done therein, rather than by a broad grant, in section 1, to the Legislature to regulate corporations and to prescribe their rights.

[3, 4] The limitation in section 395 of the Code of Civil Procedure is not contained in section 16 of article XII and if applied to corporations places it in conflict with the constitutional provision. As said in Hale v. Dolly Varden Lumber Co., — Cal.App.2d —, 230 P.2d 841, 848: "The constitutional provisions are self-executing. Buck v. James McClatchy Pub. Co., 105 Cal. App. 248, 254, 287 P. 364; Miller & Lux v. Kern County Land Co., 134 Cal. 586, 587, 66 P. 856. Notwithstanding that a constitu-

tional provision is self-executing, legislation may still be enacted to facilitate its operation and may be desirable by way of providing convenient remedies for the protection of the rights secured '"or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."' Chesney v. Byram, 15 Cal.2d 460, 463–464, 101 P.2d 1106, 1108. To apply the particular provision of Section 395 we are discussing to corporations would certainly result in narrowing and embarrassing the purpose of the constitutional provision. We fail to see how the legislation under discussion in any way furthers the purpose of the constitutional provision with respect to corporations and the venue of actions against them. The constitutional provision is clear and needs no legislation in its aid either in the way of interpretation of its meaning or the application of it to cases as they arise. We further think that to give this particular legislation application to corporations would tend to narrow and embarrass the exercise of the constitutional privilege. We believe it was never intended by the legislature that this particular provision should apply to corporations. This is not to say that the section may not in other respects so apply, but is to say that so long as the Constitution gives the right to a plaintiff in a suit against a corporation to sue it where the obligation is to be performed the right must be fully accorded."

In Heffernan v. Bennett & Armour, 63 Cal.App.2d 178, 146 P.2d 482, 486, it was contended that the words in section 16, article XII of the Constitution, "subject to the power of the court to change the place of trial as in other cases", made section 395 of the Code of Civil Procedure applicable to corporations. (The point involved was not the same as here.) The court held that such was not a proper construction of the language of the constitutional section, and that it meant "'not merely that an action against a corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment where commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county. (Citing cases.)'" 63 Cal.App.2d at pages 186–187, 146 P.2d at page 486. "This is a personal or transitory action wherein the sole defendant is a California corporation, therefore, section 395 of the Code of Civil Procedure does not apply and resort must be had to the provision of the Constitution which governs the venue in such actions." Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 363, 99 P.2d 678, 679.

In Bohn v. Better Biscuits, Inc., 26 Cal. App.2d 61, 78 P.2d 1177, 80 P.2d 484, cited by defendants, there is language to the effect that section 395 of the Code of Civil Procedure applies to corporations. However, the point under consideration here is not discussed, nor was it considered. There the action was brought against the defendant corporation in San Francisco on the theory that it, being a foreign corporation, had no place of residence in California. The corporation moved for a change of venue to Alameda County, the county designated by it in accordance with the law as its principal office within the state. The contract sued on was not made, or to be performed in San Francisco, nor did the obligation or liability arise or the breach occur there. At that time section 395 of the Code of Civil Procedure did not contain, so far as actions in excess of $300 were concerned, the sentence under consideration here. The court held that for purposes of venue, under section 395 the residence of a foreign corporation, like that of a domestic corporation, is its principal place of business. Later, in De Campos v. State Compensation Ins. Fund, 75 Cal.App.2d 13, 170 P.2d 60, 61, in which it was contended that the defendant, "a political subdivision of the State of California", should be considered on a motion for change of venue as a private corporation, the court approved the holding in the Bohn case that the provisions of section 395 as to residence applied to corporations. With reference to the sentence in question here the court said (although it was unnecessary to the decision as it was conceded that if section 16 of article XII did not apply to the defendant political subdivision—and the court held it did not—the defendant was entitled to a transfer to the county of its residence): "In the case before us there is no provision in the policy of insurance designating the county in which obligations thereunder are to be performed. While, as above stated, respondents have not made any argument regarding the proper construction to be given section 395, they do assert that the contract was to be performed in Placer County, and that 'the liability arose' there—which might be construed as an allegation that the obligation was incurred there. Appellant meets both of these statements by pointing out that this contract was in fact entered into in the City and County of San Francisco, and that its obligations were to be performed in San Francisco." 75 Cal.App.2d at page 21, 170 P.2d at page 65.

Thus, the decisions in the Heffernan and Bohn cases are not a holding that that portion of section 395 of the Code of Civil Procedure requiring a special contract in writing modifies section 16 of article XII of the Constitution.

[5] In defendants' closing brief they raise a new contention, namely, that the complaint does not state a cause of action, and based on that contention they claim a right to a change of venue. Defendants' demurrer to the complaint was overruled. A claimed deficiency in the complaint is that it does not allege non-payment. After alleging that plaintiff sold and delivered to defendants a certain quantity of flue dust and that defendants promised to pay plaintiff therefor a certain sum when defendants marketed their next peach crop and that they marketed said crop on a certain date, the complaint alleges that defendants are indebted to plaintiff in said sum, and that although plaintiff has frequently demanded payment thereof, defendants have refused and neglected to pay said sums or any part thereof. While these allegations might be subject to special demurrer (none was filed herein) they sufficiently show nonpayment as against a general demurrer and hence the complaint states a cause of action. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 P. 811; see also Fancher v. Brunger, 94 Cal.App.2d 727, 211 P.2d 633.

[6] Defendants further contend that the complaint does not state a cause of action because it fails to show compliance in detail with certain sections of the Agricultural Code from section 1023 through section 1044.5. The complaint alleges that plaintiff has complied in all respects with all the provisions of law contained in division 5, chapter 7 of the Agricultural Code. This chapter contains all of the sections referred to by defendants. The allegations are sufficient for the purposes of venue. Defendants rely on Meadows v. Emett & Chandler, 99 Cal.App.2d 496, 222 P.2d 145; Clary v. Basalt Rock Co., 99 Cal.App.2d 458, 222 P.2d 24, and Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594, for their contention that the complaint must state a perfect cause of action in order to prevent a change of venue to the county of a defendant's residence. Those cases do not so hold. They hold only that it must clearly appear from the complaint that plaintiff's cause of action is of the type which entitles the action to be tried in a county other than that of defendant's residence. The complaint in the case at bar definitely alleges that the defendants agreed to pay the purchase price at plaintiff's office in San Francisco and meets the requirements of those cases.

The order is affirmed.

PETERS, P. J., and AGEE, J. pro tem., concur.

105 Cal.App.2d 65

YOUNG v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO.

No. 14957.

District Court of Appeal, First District,
Division 1, California.

June 25, 1951.

Hearing Denied Aug. 23, 1951.

Proceedings in certiorari by Robert C. Young against the Superior Court of the State of California, in and for the City and County of San Francisco, wherein petitioner sought review of an order of the court finding him in contempt for failure to pay support and maintenance of the minor child of petitioner and his ex-wife in accordance with the provisions of a written agreement annexed to the divorce decree. The District Court of Appeal, Bray, J., held that the Superior Court had acted without and in excess of its jurisdiction for the reasons that the interlocutory decree contained no order for payment and that therefore petitioner had not violated any order of the court.

Order finding petitioner in contempt annulled.

1. Divorce 🔑269(1)

Where property settlement agreement is merely referred to in divorce decree, or approved by court but not actually made part of decree and performance of any of its provisions ordered, provisions of agreement cannot be enforced by contempt proceedings, but if agreement or any of its provisions are actually incorporated in decree and decree orders performance of such agreement or such provision or provisions, then agreement or provision, or provisions so incorporated are merged in decree and may be enforced but only as order of court.

2. Contempt 🔑20

Contempt is extraordinary proceedings, and to invoke it there must be court order which has been violated.

3. Contempt 🔑20

One who violates duty to support his wife or child cannot be punished for contempt of court unless he likewise violates court order requiring him to support either or both.

4. Divorce 🔑297

Exercise of authority of court in divorce action to make necessary orders for maintenance and support of minor children of marriage cannot be limited or abridged by parties by property settlement, oral agreement or otherwise.

5. Divorce 🔑269(1), 311

Where divorce decree recited that written agreement theretofore entered into by parties respecting their property rights and care and maintenance of minor child of parties and a copy of which was attached to the decree, was approved, ratified and confirmed by court and made part of decree, but interlocutory decree contained no orders for payment, enforcement by contempt proceedings would not lie.

◆

Walter H. Duane, San Francisco, for petitioner.

Allan L. Sapiro, San Francisco, for respondent.

BRAY, Justice.

By this proceeding in certiorari petitioner seeks to review an order of the superior court finding him in contempt for failure to pay support and maintenance of the minor child of the parties.

Question involved.

Does the interlocutory decree order payment of support for the child so that a failure to make such payment may constitute contempt of court?

Facts.

The only reference in the interlocutory decree of divorce, entered in June , 1945, (the final decree makes no order concerning the matter) to support for respondent and the minor child and the property settlement between the parties is as follows: "It is further ordered, adjudged and decreed that the written agreement heretofore entered into by plaintiff and cross-defendant and defendant and cross-complainant respecting their property rights and the care and maintenance of the minor child of the parties hereto, a copy of which is annexed hereto, is, and each and every provision thereof, approved, ratified and confirmed by this Court and made a part of this decree." The agreement provides that petitioner pay respondent the sum of $75 per month for her maintenance and support and $50 per month for the support and maintenance of the child.

Subsequent to the entry of the decree petitioner reduced his payments from the $125 per month agreed to $75 per month. He contends that this was under an oral agreement with respondent to continue until his financial condition had improved. Plaintiff denied the agreement. On January 17, 1951, petitioner was brought before the superior court on an order to show cause why he should not be punished for contempt for alleged failure to comply with the provisions of the interlocutory decree. At the hearing the trial court found him in contempt for failure to pay for the support and maintenance of the child, directed him to pay respondent the sum of $1000 (the amount he was in arrears) at the rate of $25 per month and the further sum of $100 as attorney's fees in the contempt proceedings.

Was there an order for support?

[1–5] Petitioner contends that the superior court acted without and in excess of its jurisdiction for the reason that the interlocutory decree contains no order for payment and therefore petitioner did not violate any order. We agree with this contention.

In Shogren v. Superior Court, 93 Cal.App.2d 356, at page 364, 209 P.2d 108, at page 113, after reviewing most of the cases on the subject in California (upon practically all of which respondent relies) and pointing out the apparent confusion that existed, we said: "A fair summation of the rule as it exists today is the following: (1) If a property settlement agreement is merely referred to in the divorce decree, or approved by the court but not actually made a part of the decree and the performance of any of its provisions ordered, then the provisions of the agreement cannot be enforced by contempt proceedings. (2) If the agreement or any of its provisions are actually incorporated in the decree and the decree orders the performance of such agreement or such provision or provisions, then the agreement or the provision or provisions so incorporated are merged in the decree and may be enforced only as the order of the court."

The situation in the Shogren case, so far as the terms of the decree are concerned, was practically the same as in the case at bar. There the decree ordered, adjudged and decreed that the property settlement agreement " 'a copy of which property settlement agreement is on file herein be and the same is hereby ratified and made a part of this decree as though the same were fully herein set forth.' " In our case the language is almost the same. The agreement "a copy of which is annexed, is, each and every provision thereof approved, ratified and confirmed and made a part of this decree." In the Shogren case, while the decree did not say, as here, that a copy was annexed, it appeared that it was attached. The following paragraph from the opinion in the Shogren case, 93 Cal.App.2d at page 364, 209 P.2d at page 114, is particularly applicable to the decree here: "Applying these tests to the decrees in our case, we find that the agreement did not become merged therein. While the decrees made the agreement parts thereof by reference and the agreement was physically attached to the interlocutory decree, there was no order made in either decree for the performance of the provisions of the agreement. Therefore, enforcement by contempt proceedings does not lie."

Respondent contends that this case differs from the Shogren case in that there no support for a child was involved. That fact, however, does not change the situation. Contempt is an extraordinary proceeding. To invoke it there must be a court order which has been violated. One who violates a duty to support a wife or child cannot be punished for contempt of court unless he likewise violates a court order requiring him to support either or both. There is no such order here. Respondent cites cases to the effect that the exercise of the authority of a court in a divorce action to make necessary orders for the maintenance and support of minor children of the marriage cannot be limited or abridged by the parties by property settlement, oral agreement or otherwise. There is no question but that is the law. Here, however, the court merely approved the agreement of the parties as to the support for the child without exercising its authority to order petitioner to pay either the agreed or some other amount. The statutory duty of a father to support his child during minority may be enforced in various ways but not by contempt of court, unless that duty has been embodied in an order. The trial court can, in this very proceeding, make such an order if called upon to do so.

The order finding petitioner in contempt is annulled.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

CONNER et ux. v. SOUTHERN PACIFIC CO. et al.

Civ. 7818.

District Court of Appeal, Third District, California.

July 3, 1951.

Rehearing Denied July 28, 1951.

Hearing Granted Aug. 30, 1951.*

Action by W. F. Conner, and wife, against Southern Pacific Company (a foreign corporation), and others, for wrongful death of minor son which resulted from injuries sustained when towed motorless automobile which was being steered by deceased was struck by locomotive at railroad crossing. The Superior Court, Tehama County, Arthur Coats, J., rendered judgment for defendants and granted plaintiffs' motion for a new trial and defendants appealed. The District Court of Appeal, Peek, J., held that granting new trial, on ground that the over all effect of instructions led jury to believe that the deceased, as operator of the towed automobile was subject to the same standard of conduct as the driver of self-propelled automobile under the same circumstances, was not an abuse of discretion.

Order affirmed.

1. Appeal and error 🔑977(1)
New trial 🔑6

The trial court is accorded a wide discretion on disposition of motions for new trial, and an appellate court may interfere only if there has been an abuse of discretion.

2. Appeal and error 🔑977(3, 5)

A stronger showing is required to justify interference with order granting new trial than with order denying new trial.

3. New trial 🔑41(3)

If trial judge is justified in believing that jury might have been misled by an instruction, granting of motion for new trial on such ground is not an abuse of discretion.

4. New trial 🔑41(3)

In action for wrongful death of minor son which resulted from injuries sustained when towed motorless automobile which was being steered by deceased was struck by locomotive at railroad crossing, granting new trial, on ground that over all effect of instructions led jury to believe that deceased as operator of towed automobile was subject to same standard of conduct as driver of self-propelled automobile under same circumstances, was not an abuse of discretion.

5. Automobiles 🔑204

Within the limitations of his ability to act, operator of towed automobile has duty to exercise ordinary care in steering and controlling of towed automobile, but operator is not in actual physical control of automobile.

6. Railroads 🔑327(1)

Where motorless towed automobile was struck by locomotive at railroad crossing, operator of towed automobile was in same situation as guest beside driver of self-propelled automobile except as to position to ascertain danger and give warning, as regards liability of railroad for death of operator.

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* Subsequent opinion 241 P.2d 535.

Glenn D. Newton, Redding, for appellant.

Alfred E. Frazier, Red Bluff, Duard F. Geis, Willows, for respondent.

PEEK, Justice.

This is an appeal from an order granting plaintiffs' motion for a new trial following a verdict and judgment in favor of defendants in a wrongful death action. Plaintiffs are the parents of the deceased, William F. Conner, who was seventeen and one-half years old at the time of his death.

The record shows that on the morning of the accident Conner and a school companion, Richard Benson, undertook to tow a Hupmobile car belonging to Benson to the latter's home. The motorless Hupmobile, which was being steered by Conner was towed by a Ford Model A pickup truck driven by Benson. As the two cars were crossing the tracks of defendant company the Hupmobile was struck by one of said company's trains which was on an unscheduled run and which consisted of only a locomotive, tender and caboose. As a result of the collision Conner received fatal injuries resulting in his death shortly thereafter. At the time of the impact the two vehicles were traveling at about five miles per hour, and the train was traveling approximately 25 miles per hour. Benson testified that he did not see the train until the rear wheels of the truck were on the tracks and that he then attempted to accelerate the truck as rapidly as possible but was unable to clear the tracks. The crossing was unobstructed and the day was clear. Further evidence was that the locomotive fireman saw the two cars when the train was approximately 250 feet away from the crossing—that he thought the cars would clear and therefore did not warn the engineer until the train was about 50 feet from the crossing. Although there was evidence that no whistle was sounded or bell rung, such testimony was directly contradicted by the engineer and the fireman.

Following the submission of the cause, the jury returned a verdict in favor of defendants. Thereafter plaintiffs' motion for a new trial was granted and this appeal followed. While the record does not disclose the grounds upon which the motion for new trial was granted, counsel, in their briefs, are in accord that the trial judge was of the opinion that the instructions given misled the jurors as to the standard of care required of the deceased.

Defendants' contention appears to be that the order must be reversed since the degree of care is greater in case of the occupant of a towed vehicle than that of a passenger, that therefore the instructions given by the court were correct, and hence the court abused its discretion in granting plaintiffs' motion for a new trial.

Plaintiffs, in their argument in support of the order, do not contend that the instructions were erroneous as a statement of the principles of law in a proper case: that is, as applied to the driver of a motor vehicle having complete control over the operation of the same, but as applied to the facts in this particular case they assert that the instructions were confusing, misleading and improper.

Under such circumstances it would appear unnecessary to quote in their entirety the numerous instructions given by the trial court, which plaintiffs now attack. Suffice it to say that essentially such instructions were that Benson was negligent as a matter of law but that his negligence could not be imputed to the deceased; that a person in charge of a towed vehicle is bound to exercise reasonable care in its operation; then, following general instructions relative to the duty of care placed upon a railroad in the operation of its trains, the court gave several instructions relating to the quantum of care of a driver of a vehicle approaching a railroad crossing, which instructions spelled out the specific precautions to be observed by such driver, including an instruction that a traveler familiar with a particular crossing has a greater responsibility for exercising ordinary care than one who is not familiar with such crossing. It is to be noted that all of the latter instructions were predicated upon the fact that the individual therein referred to had control of the vehicle.

[1–3] The rule is well established that the trial court is accorded a wide discretion on the disposition of motions for new trial; that an appellate court may interfere only if there has been an abuse thereof, and that a stronger showing is required to justify interference with an order granting a new trial than one in which a new trial has been denied. Ambercrombie v. Thomsen, 59 Cal.App.2d 331, 337, 138 P.2d 701; Gray v. Robinson, 33 Cal.App.2d 177, 185, 91 P.2d 194. It is the further rule that there is no abuse of discretion if the trial judge is justified in believing that the jury might have been misled by an instruction. Roberts v. Salmon, 66 Cal.App.2d 22, 151 P.2d 556.

[4] Applying the rules above enunciated to the facts and circumstances presented herein we conclude that the trial judge was fully justified in believing that the all over effect of such instructions led the jury to believe that the deceased, as operator of the towed vehicle, was subject to the same standard of conduct as a driver of a self-propelled vehicle under the same circumstances.

[5, 6] While it may be the rule that within the limitations of his ability to act, the operator of a towed vehicle has the duty to exercise ordinary care in the steering and controlling of the towed vehicle, Farrar v. Whipple, 65 Cal.App. 123, 223 P. 80 still for most purposes the person sitting behind the wheel of a towed vehicle is not in actual physical control of the vehicle. Fairman v. Mors, 55 Cal.App.2d 216, 220, 130 P.2d 448. The propelling force, both as to speed and direction, is supplied by the towing vehicle, and this is particularly true in a situation such as is presented in the present case where the two vehicles were approaching a railroad crossing. Under such circumstances the operator of the towed vehicle is effectively in the same situation as a guest seated beside the driver of a self-propelled vehicle, except that the guest may possibly be in a petter position to ascertain the danger and give warning.

We find no merit in defendants' contention that the motion for a new trial involved a departure from plaintiffs' original theory of the case, which was that the deceased was not contributorily negligent.

The order granting a new trial is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

105 Cal.App.2d 277

PEOPLE v. RENEK.

Cr. 4603.

District Court of Appeal, Second District, Division 1, California.

July 3, 1951.

Hearing Denied Aug. 2, 1951.

William Renek was convicted in Superior Court of Los Angeles County, Stanley Mosk, J., of keeping and occupying a store with books, papers, and paraphernalia for purpose of registering and recording bets on horse races, and from order denying motion for new trial defendant appealed. The District Court of Appeal, White, P. J., held that the evidence, though circumstantial, was sufficient to sustain conviction.

Order affirmed.

1. Criminal law 🔑1144(13)

On appeal by accused from judgment of conviction, the evidence is to be viewed in the light most favorable to the prosecution.

2. Gaming 🔑75(1)

A causal connection between paraphernalia found on premises and defendant must be shown in a prosecution for keeping premises with books, papers and paraphernalia for registering bets on horse races. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

Evidence, though circumstantial, was sufficient to sustain conviction of keeping and occupying a store for purpose of registering and recording bets on horse races. Pen.Code, § 337a, subd. 2.

4. Gaming 🔑98(5)

In prosecution for keeping and occupying store with books for purpose of registering and recording bets on horse races, purpose for which place was being used or occupied need not be established by direct evidence, but could be gathered from all the surrounding circumstances shown by the evidence. Pen.Code, § 337a, subd. 2.

5. Criminal law 🔑260(11)

If circumstances reasonably justify a finding of guilt by the trier of facts, District Court of Appeal's opinion that circumstances might also reasonably be reconciled with innocence of accused will not warrant interference with determination of trier of facts.

6. Criminal law 🔑1134(1)

The function of an appellate tribunal is to correct errors of law.

7. Criminal law 🔑260(11)

The trier of facts is the sole judge of the weight or intrinsic value of the evidence as well as of the credibility of witnesses

8. Criminal law 🔑1159(2)

Appellate tribunal is not empowered to review evidence unless, on its face, it is clearly insufficient to support ultimate issue, or is inherently improbable, in which case it is not a review of question of fact but purely one of law.

9. Criminal law 🔑1159(2)

On appeal, before evidence may be said to be unbelievable per se, it must involve a claim that something has been done which it would not seem possible could be done under the circumstances described.

10. Gaming 🔑75(1)

Where evidence established that accused occupied a room or place with paraphernalia for purpose of registering or recording bets, it was immaterial whether the contests upon which the bets were made were actually held, for applicable statute prohibits registering or recording of bets upon any contest or purported contest. Pen.Code § 337a, subd. 2.

11. Criminal law 🔑1043(3)

Where defendant accused of occupying premises with books, papers and paraphernalia for purpose of registering bets on horse races objected in trial court to introduction in evidence of betting paraphernalia found on the premises on ground that no corpus delicti had been established, defendant could not on appeal abandon such ground and urge instead the new ground that there was lack of foundation. Pen.Code, § 337a, subd. 2.

12. Criminal law 🔑1043(2)

To warrant consideration by an appellate tribunal of an objection to evidence, it is necessary that the precise ground for its exclusion must have been clearly specified to the trial court.

13. Gaming 🔑98(5)

In prosecution for keeping and occupying a store with books, papers and paraphernalia for purpose of registering and recording bets on horse races, proof of presence of all paraphernalia for registering and recording bets in the room or place occupied by defendant sufficiently established corpus delicti. Pen.Code, § 337a, subd. 2.

14. Criminal law 🔑404(4)

Scratch sheet introduced in evidence in prosecution for keeping and occupying a room with books, papers, and paraphernalia for purpose of registering and recording bets on horse races for purpose of establishing that the data on the betting markers were not without meaning, or part of a system used by bookmakers generally, was properly admitted. Pen. Code, § 337a, subd. 2.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of subdivision 2, section 337a of the Penal Code in that he did keep and occupy a store at 248 East Fifth Street in the city of Los Angeles, with books, papers, paraphernalia, etc., for the purpose of registering and recording bets on horse races.

Following a plea of not guilty and waiver of trial by jury, defendant was convicted by the court. His motion for a new trial was denied, proceedings were suspended and he was granted conditional probation. From the order denying his motion for a new trial defendant prosecutes this appeal.

Because it is urged as a ground for reversal that the evidence is insufficient to support the decision of the court and that the same is contrary to the law and the evidence, it becomes necessary to narrate the factual background which gave rise to this prosecution.

The record reveals that on August 8, 1950, Los Angeles police officers Chavez and Pendergast observed several men with scratch sheets and racing forms in their hands, in the immediate vicinity of a grocery store at the above address. The officers saw several men go into the store, talk with defendant and then leave. One man was observed going into the store where he handed the defendant, a clerk therein, "what appeared to be currency and also a piece of white paper". Defendant put the currency in his pocket, folded the piece of paper and placed it in a large box in the store. At different times, other men would enter the store, talk to defendant, and following each of these conversations and the departure of the men in question, defendant would go to the rear of the store.

After observing these activities for some forty-five minutes, Officer Chavez entered the store and ordered a Coca Cola from defendant. While Chavez was drinking the same the telephone in the back room of the store rang. Defendant thereupon went to the rear of the store. He returned in a few moments and put something in the same box in which he had previously placed the folded piece of paper. The officers examined this box and found it also contained rolls of toilet tissue. In the center tubes of two of the rolls were 38 individually folded pieces of paper, each of which was a betting marker.

It was stipulated that Officer Pendergast was an expert on bookmaking practice in Los Angeles County. On one of the 38 betting markers was the figure "3" and the letter "D", followed by the word "Tonita". On the same line and following the word "Tonita" was "XIX". In Officer Pendergast's opinion the figure "3" referred to the 3rd race, the "D" to Del Mar, "Tonita" to a horse, and the "XIX" to a one dollar place bet. According to a scratch sheet for August 8, 1950 there was a horse by the name of "Tonita" running in the third race at Del Mar on that date. On the second line of this same betting marker was the figure "8" followed by "S.A." and the word "Props." The word "Props" was followed by the figures "1–1" and the letter "X". Underneath this was the word "Joe" and the initial "M". Officer Pendergast stated that this second line was a one dollar to win and one dollar to place bet on a horse by the name of "Props" running in the 8th race at Saratoga. The word "Joe M." was the name of the bettor on the two races. That there was a horse by the name of "Props" running in the 8th race at Saratoga on August 8, 1950, according to a scratch sheet for that date, in the possession of the officer.

Officer Pendergast compared each of the 37 other betting markers found in the tissue rolls with a scratch sheet for August 8, 1950, and found that each horse listed on those markers was running at one of the various tracks in the country on that date.

Also in the store were scratch sheets and racing forms, a memorandum book, a notebook and 40 or 50 small pieces of blank paper. Defendant had two pieces of blank paper in his shirt pocket.

Officer Pendergast testified that some of the papers and devices commonly used by bookmakers are scratch sheets, racing forms, entries in the daily newspapers, pieces of paper, pens and pencils, and telephones. That the scratch sheets are issued daily on the races running in the United States. They contain the latest scratches, the names of the horses running in the various races at the various tracks, the names of the jockeys and their post positions, the probable odds, and tips on long shots. They also contain the previous day's results on the races throughout the United States. That bookmakers use these scratch sheets to see that the horses on which they accept wagers are running and to determine the race in which they are running in order that "they won't be past posted on a race".

That after a bookmaker receives a bet he records it by writing the name of the horse, the amount of the bet, the name, initials, or code name of the bettor, and whether the bet is to win, place or show, on a betting marker. That "If the bet is not too large and it doesn't seem like a sure thing they (the bookmakers) will hold their own action by hiding the betting markers" and later checking them against the results. In these cases the bookmaker will make the payoffs himself. However, if the bet he receives "is believed to be too large for him to handle, he phones it out to somebody else".

Defendant testified in his own behalf and denied that he carried on any bookmaking activities. He stated that he had been employed as a clerk at the store for approximately one month. He saw the officers remove the betting markers from the rolls of tissue but stated that he had never seen the markers prior to that time. However, the two tissue rolls in which the betting markers were found were on the top row of the box and he admitted that he had looked in this box on prior occasions. Defendant also admitted that the phone rang while Officer Chavez was in the store but denied that he answered it or went to the rear of the store. According to defendant's testimony, Officer Chavez answered the phone. Defendant said that the racing forms and scratch sheets in the store were for sale; however, the store did not sell newspapers or magazines.

[1–3] On appeal by an accused from a judgment of conviction the evidence is to be viewed in the light most favorable to the prosecution, People v. Carothers, 77 Cal.App.2d 252, 253, 175 P.2d 30; People v. Cayer, 102 Cal.App.2d 643, 228 P.2d 70. With this rule in mind, we conclude that the circumstances shown by the evidence above narrated reasonably justify the finding of the trial judge that appellant was occupying the premises in question for a purpose proscribed by subdivision 2, section 337a of the Penal Code. A causal connection between the paraphernalia found on the premises and appellant, which must be shown in a prosecution such as this, we are satisfied was established by evidence which would reasonably justify an inference that appellant occupied a place where such devices were utilized by him for the purpose of registering or recording bets. In this regard, it is significant that the blank pieces of paper found in appellant's shirt pocket were similar to the type of paper used for the betting markers, as well as being similar to the forty or fifty small pieces of blank paper found in the store.

[4, 5] The purpose for which the place was being used or occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence, People v. Newland, 15 Cal.2d 678, 683, 104 P.2d 778; People v. Barnhart, 66 Cal.App.2d 714, 721, 153 P.2d 214; People v. Ines, 90 Cal. App. 2d 495, 499, 203 P.2d 540. Appellant's argument that the circumstances shown herein may reasonably be reconciled with his innocence is unavailing because, if the circumstances reasonably justify a finding of the trier of facts, our opinion that they might also reasonably be reconciled with the innocence of the accused will not warrant interference by us with the determination of the duly constituted arbiter of the facts. People v. Newland, supra, 15 Cal. 2d at page 681, 104 P.2d 778.

[6–9] The function of an appellate tribunal is to correct errors of law. The trier of facts is the sole judge of the weight or intristic value of the evidence as well as of the credibility of witnesses. We are not empowered to review evidence, except where, on its face, it may justly be held to be insufficient to support the ultimate issue involved, or as inherently improbable, in which case it is not a review of a question of fact, but purely one of law. And, before evidence may be said to be unbelievable *per se*, it must involve, we think, a claim that something has been done which it would not seem possible could be done under the circumstances described. No such stricture can reasonably be placed upon the evidence herein relied upon by the prosecution. We find nothing in People v. Woods, 35 Cal.2d 504, 508, 218 P.2d 981, or People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433, relied upon by appellant, that militates against what we have herein stated when applied to the facts and issues with which we are confronted in the instant case.

[10] Appellant's contention that there was no proof of any horse races being run on the day in question is answered by the Supreme Court in the case of People v. Vertlieb, 22 Cal.2d 193, 197, 137 P.2d 437, wherein it was held that if it be established by evidence that the accused occupied a room or place with paraphernalia for the purpose of registering or recording bets, it is immaterial whether the contest or contests upon which the bets were made were actually held. The statute prohibits the registering or recording of bets upon any contest or *purported* contest. See also People v. Warnick, 86 Cal.App.2d 900, 902, 195 P.2d 552.

Appellant's next contention is that it was prejudicial error to admit into evidence all of the People's exhibits, consisting of the betting paraphernalia found on the betting premises and a scratch sheet. It is urged that there was no showing of any knowledge on the part of appellant of any of the papers contained in Exhibit 1 (small pieces of blank paper hereinbefore referred to, and similar to two pieces of blank paper found in appellant's shirt pocket). That "there was no showing of any handwriting—for aught he (appellant) knows, anyone from the street or anywhere else could have placed them there".

[11, 12] In the trial court appellant objected to the introduction of the foregoing exhibits only on the ground that no *corpus delicti* had been established. On appeal, for the first time, he urges their inadmissibility on a ground not presented to the trial court, namely, that there was a lack of foundation. An appellant may not abandon the objection he made in the trial court and demand a reversal on grounds raised for the first time in the reviewing court. To warrant consideration by an appellate tribunal of an objection to evidence, it is necessary that the precise ground for its exclusion must have been clearly specified to the trial court. People v. Goff, 100 Cal.App.2d 166, 223 P.2d 27; People v. Calliham, 81 Cal.App.2d 928, 933, 185 P.2d 342; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114.

[13] The objection that the *corpus delicti* was not proven is without merit. It was abundantly established by proof of the presence of all the paraphernalia for registering and recording bets in the room or place occupied by appellant, which constitutes the major element of the offense herein charged. People v. Mason, 37 Cal.App.2d 407, 409, 99 P.2d 567.

Appellant's objection, raised for the first time on appeal, that it was error to admit the exhibits because there was no showing of any connection with him, is untenable in view of the evidence received and our discussion heretofore of its sufficiency to sustain the conviction. The facts and circumstances present in the case at bar clearly distinguish it from the case of People v. Smith, 55 Cal.App. 324, 203 P. 816, cited by appellant.

[14] Finally, appellant contends it was erroneous to introduce into evidence the scratch sheet which Officer Chavez brought with him to court, and as appellant states, "on which he based his information as to the existence or non-existence of horseraces, or purported horseraces". The objection is grounded on the claim that there was no foundation for its admission. The exhibit was properly received in evidence, not for the purpose of establishing the truth of what was presented therein, but for the purpose of establishing that the data on the betting markers were not without meaning, but were part of a system used by bookmakers generally. Directly in point is the language used by the Supreme Court in People v. Vertlieb, supra, 22 Cal.2d at page 196, 137 P.2d 437.

For the foregoing reasons the order denying defendant's motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

105 Cal.App.2d 266

WOODS IRR. CO. v. KLEIN et al.

Civ. 7833.

District Court of Appeal, Third District, California.

July 2, 1951.

Rehearing Denied July 28, 1951.

Hearing Denied Aug. 30, 1951.

Action by Woods Irrigation Company, a corporation, against Jack Klein and S. D. Klein for declaration of rights under grant of easement to plaintiffs by previous owners of land now owned by defendants. The Superior Court of San Joaquin County, George F. Buck, J., entered decree in favor of plaintiff and defendants appealed. The District Court of Appeal, Peek, J., held that location of canals and ditches under grant of easement with acquiescence and consent of both parties as to such location precluded plaintiff grantee from thereafter, at its own pleasure, relocating ditches on defendants' lands.

Judgment reversed with directions.

1. Easements ⚩54

Where grant of easement is general as to extent of burden to be imposed on servient tenement, exercise of right granted in particular course or manner with acquiescence and consent of both parties fixes and limits right to particular course or manner in which it has been enjoyed and easement cannot be changed at pleasure of grantee. Civ.Code § 806.

2. Waters and water courses ⚩144½

Where landowners granted right to irrigation company to construct, maintain, police, extend, widen and repair series of canals for purpose of irrigation and drainage in consideration of agreement that company would operate and maintain system whereby landowners might receive water for irrigation and irrigation company exercised rights under grant and constructed canals and ditches, company could not thereafter, under same grant, relocate canals and ditches without consent of grantors or their successors. Civ.Code § 806.

3. Eminent domain ⚩29

Fact that right under easement to construct drainage canals and ditches on certain lands had been once exercised by irrigation company and was now determined as to location would not limit power of irrigation company as public utility to condemn lands for purposes of relocation or revision of existing system. Civ.Code § 806.

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Smith & Zeller, Stockton, for appellants.

Jones, Lane & Weaver, Stockton, for respondent.

PEEK, Justice.

This is an appeal by defendants from a decree in favor of plaintiff arising out of an action for declaratory relief.

The complaint alleged that plaintiff is a corporation engaged in the business of supplying irrigation and drainage services; that by virtue of a contract entered into on September 29, 1911 between plaintiff and the then owners of the lands involved herein plaintiff was granted in perpetuity the right to "construct, maintain, police, patrol, operate, extend, widen, and repair a series of canals for the purpose of irrigation and drainage, through, over and across" said lands. At the same time a second agreement was entered into between the same parties by which plaintiff agreed to furnish water for irrigation and to maintain drainage canals. It was further alleged that in order for plaintiff to supply drainage to certain parts of the tract which previously had required no drainage it has now become necessary for plaintiff to extend certain canals and ditches; that in order to do so it is necessary that a portion of one of the presently located irrigation canals be discontinued; that a part of said canal be converted into a drainage ditch, and that it be extended across the lands of defendants, the successors in interest of the original owners to a portion of lands included in the 1911 contract.

The answer of defendants alleges that the action contemplated by plaintiff amounts to a relocation of the main irrigation canal, and that it would divide defendants' lands, making it unfit for agricultural purposes. Defendants further allege that when plaintiff laid out, constructed and definitely fixed the location of the canals and ditches it exercised all of its rights under the original agreement and hence has no further right to burden defendants' lands with additional canals and ditches.

Upon the issues so formed the cause proceeded to trial, and at the conclusion thereof the court found, among other things, that it was not the intention of the contracting parties that the irrigation and drainage system would remain as originally established but rather that the parties intended the system to be a "dynamic" one; that in order for plaintiff to fulfill its obligations and satisfy demands of owners within the tract for such services it was necessary for plaintiff to extend its drainage and irrigation canals as proposed, which proposal was reasonable and did not impose an undue burden on defendants. From the judgment which was accordingly entered defendants have appealed.

The record shows that with possibly three exceptions the present system of canals and ditches is substantially the same to-day as it was when the agreements were entered into in 1911. However, the record is silent as to whether such changes were made with or without the landowners' consent.

Two of the present owners in the tract, W. P. Remonda and Peter G. Ohm have now demanded of plaintiff that it furnish drainage to their lands which at no time since the execution of the agreements have been supplied with such service. Ohm, who was called as a witness in behalf of plaintiff, testified that the particular land now owned by him had been owned by members of his family in excess of 35 years, and that now, because of inability to drain excess water and wash away the accumulation of salts, the lands are becoming more and more alkaline, and that if farming is to continue, some means for drainage must be worked out. The record is silent as to the condition of Remonda's property except that he likewise has made demands upon plaintiff for drainage service.

It is plaintiff's contention that under the two agreements executed in 1911 it has the right to proceed with its proposed plan. Specifically it relies upon the following portion of the first agreement: "That in consideration that the party of the second part will operate and maintain a canal system and a drainage system through which the parties of the first part may receive water for irrigation, and may dispose of drainage or waste waters, the parties of the first part do hereby grant in perpetuity the right to the party of the second part, to construct, maintain, police, patrol, operate, extend, widen, and repair a series of canals for the purpose of irrigation and drainage, through, over and across that certain land situated in the County of San Joaquin, State of California, and described as follows, to-wit:"

And the following portions of the second agreement:

"Third: The parties of the first part (Wilhoit and Douglass) further agree that the party of the second part (Woods Irrigation Company) may have the right of ingress and egress upon, over and across the above described land for all the purposes appurtenant to the management and care of its irrigation and drainage system.

* * * * * *

"The main canal and laterals, as constructed by the Company, shall be such as to furnish water to all of the land at such places as may be necessary to allow the subdivision of the land in tracts of 40 acres, being of the general dimensions of 10 by 20 chains, the lesser dimension bordering along the canal.

* * * * * *

"The Company shall construct and maintain drainage canals, pumps and appliances, sufficient to relieve the irrigated land of waste or surplus waters."

In further support of such contention plaintiff argues that the two agreements clearly show that when they were executed appellants' predecessors in interest contemplated the probability of subdividing the entire 3,500 acres; that with such thought in mind they made provision for the existence, construction, development and growth of a comprehensive system of irrigation and drainage involving the use of a series of canals and ditches, the exact number and extent of which was not, nor could not be, determined at the time of the execution of said agreements. Hence, in order for it to perform its obligation under the contracts it must necessarily have the corresponding right and authority to subject the lands described in the contracts to the burden of irrigation and drainage canals, and that to perform the dual purpose of the contracts, drainage must be supplied as well as irrigation.

Furthermore, respondent argues that what it proposes is in effect only an extension of its canals in accordance with the terms of the agreements.

Appellants, however, contend that the work contemplated is not an extension of the canals but is in effect a relocation of a portion of the system; that respondent at the inception of its contract elected to exercise the rights granted thereunder in a particular manner, and hence, having exercised its rights, it is limited thereby, and since the grant contained in the agreements could only be exercised but once it has now exhausted its rights thereunder.

Since it is not here contended that any easement in favor of respondent exists other than by grant, the rights asserted by it must be found in the agreements above mentioned.

[1, 2] Under Section 806 of the Civil Code, which defines the extent of all servitudes, the controlling factor is the terms of the grant. Fristoe v. Drapeau, 35 Cal.2d 5, 9, 215 P.2d 729. Here, the grant, which is general, is expressly related to the covenant of the Irrigation Company to operate and maintain a canal system for the purpose of supplying irrigation water and disposing of drainage for the lands over which the grant extends. Hence, at the start, all the rights granted respondent were limited to such exercise thereof as would be necessary to carry out its undertaking as to irrigation and drainage. Of particular import in the granting clause are the words "construct" and "extend". Respondent's right to construct irrigation and drainage ditches, which existed at the outset, was necessarily limited by the rule that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties in a particular course or manner fixes and limits it to the particular course or manner in which it has been enjoyed, so that it cannot be changed at the pleasure of the grantee of the easement. Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S. 851. Therefore, the ditches necessary to carry out respondent's obligations under the two agreements, once located, cannot be relocated. Any other rule would make the burden imposed by the easement a matter of perpetual speculation and subject the servient owners to continual uncertainty as to their rights in the use and enjoyment of their land.

[3] But, argues respondent, and the trial court so concluded, the grant here involved is unique in that it is part of a "dynamic" system for the irrigation and development of the land, which system contemplates change and expansion to meet the growing needs of all the servient owners. We think the grant is not that broad. While it entitles respondent to widen and extend ditches and construct yet unlocated ditches to meet the rightful demands of Remonda and Ohm it does not permit respondent further to burden the servient lands by relocating already established ditches or canals. This conclusion in no way limits plaintiff's power as a public utility to condemn lands for the purposes of relocation, revision or overhauling the existing system which the evidence shows to have been among the primary objects of the plan as proposed by respondent. Furthermore, said plan so proposed is not the only means of extending drainage to Remonda and Ohm. The record shows that appellants themselves proposed two alternative plans, each of which, according to plaintiff's own expert witnesses, would be effective to carry out the demands by said owners for drainage facilities.

Accordingly, the judgment is reversed with instructions to the trial court to enter a declaration of plaintiff's rights as prayed for in the complaint consistent with our decision herein.

ADAMS, P. J., and VAN DYKE, J., concur.

105 Cal.App.2d 107

MOODY INSTITUTE OF SCIENCE v. LOS ANGELES COUNTY et al.

Civ. 17249.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1951.

Hearing Denied Aug. 23, 1951.

Action by Moody Institute of Science, a corporation, against County of Los Angeles, a body politic and corporate, a political subdivision of the State of California, and another, to recover taxes paid under protest. The Superior Court, County of Los Angeles, Carl A. Stutsman, J., rendered a judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J., held that plaintiff was not entitled to an exemption from taxation of its property under a corporate charter permitting it to hold property for religious and for scientific and educational purposes.

Judgment reversed.

White, P. J., dissented.

1. Taxation 🔑196, 204(2)

Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond plain meaning of language of the law, but rule does not require narrowest possible meaning to be given to words descriptive of exemption, and fair and reasonable interpretation is all that is required.

2. Taxation 🔑211

If articles of incorporation permit not only a present use for but also ultimate and permanent diversion of corporate assets to nonexempt purposes, no tax exemption may be allowed.

3. Taxation 🔑244

Under the statutes permitting exemption from taxation of property irrevocably dedicated to religious purposes, irrevocable dedication is determined by powers of corporation as disclosed in its articles of incorporation, and there is no distinction between purposes and powers in determining exemption. Revenue and Taxation Code, § 214.

4. Appeal and error 🔑842(8)
Trial 🔑387(1)

In action by corporation to recover taxes paid on grounds that taxpayer was a religious and nonprofit corporation whose property was exempt, where no testimony was presented by county and city, and case was submitted and decided upon plaintiff's articles of incorporation introduced in evidence by plaintiff, findings were but conclusions of law and from them reviewing court could draw its own conclusions. Revenue and Taxation Code, § 214.

5. Taxation 🔑244

Under the statutes providing for exemption from taxation of property irrevocably dedicated to religious purposes, property of corporation incorporated to study relationship between science and the Bible, and hold money and property for religious as well as for scientific and educational purposes was not exempt. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

◆

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for appellants.

Mackay, McGregor, Reynolds & Bennion, A. Calder Mackay and F. Edward Little, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff filed its complaint, alleging that it was a religious non-profit corporation and, as such, its property was exempt from taxation, under the provisions of Section 1c, Article XIII of the Constitution of California, and Section 214 of the California Revenue and Taxation Code, and that the county tax collector had denied plaintiff's claim of exemption, requiring plaintiff to pay under protest $1,475.79 taxes for the year 1947.

The case was tried without a jury, resulting in findings of fact and judgment for plaintiff for the recovery of the taxes thus paid.

From this judgment the County of Los Angeles and the City of Los Angeles appeal.

Appellants state that the sole question involved is: "Was plaintiff's property properly taxed where it was not irrevocably dedicated to religious, hospital, or charitable purposes as required, but instead its Articles of Incorporation authorized diversion of its property to non-exempt educational purposes?"

Plaintiff's articles of incorporation empower it to study the relationship between science and the Bible, and to encourage a faith in and acceptance of that sacred volume; to spread and teach the results of its study and research by classroom instruction, books and pamphlets, by radio, television, and moving and still pictures; to receive and hold money and property for these purposes; "and for other religious, scientific and educational purposes."

Do the words quoted take this corporation out of the class defined by statute for exemption?

[1] Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language of the law. This rule does not require that the narrowest possible meaning be given to words descriptive of the exemption. A fair and reasonable interpretation is all that is required. Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045.

[2] If the articles of incorporation permit not only a present use for but also the ultimate and permanent diversion of its assets to non-exempt purposes no exemption may be allowed. Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 221 P.2d 62.

Property devoted to educational purposes is not exempt from taxation. Revenue and Taxation Code, Section 214(6).

Repondent contends: (a) That its articles of incorporation are divided into two parts, one, its purposes, and, two, its powers; that its purposes are such as to irrevocably devote its property to religious uses; and that the power to hold property for educational uses is controlled by the purposes. And, (b) in any event, the findings of the trial court are conclusive upon review.

[3] The statutory requirement of irrevocable dedication is determined by the powers of the corporation, as disclosed in its articles of incorporation. Pasadena Hospital Ass'n v. County of Los Angeles, supra. The cases do not support the proposition that to determine tax exemption there is a distinction between purposes and powers in articles of incorporation.

[4] Turning to plaintiff's argument with respect to the conclusiveness of the court's findings. The Clerk's Transcript shows that no testimony was presented by defendant, and the case was submitted and decided upon plaintiff's articles of incorporation, introduced in evidence by plaintiff. In such circumstances the findings are but conclusions of law. From uncontroverted facts a reviewing court may draw its own conclusions. San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416; Richter v. Walker, 36 Cal.2d 634, 226 P.2d 593.

[5] Applying the foregoing rules to the corporate power of plaintiff to receive and hold money and property for religious purposes, and "for * * * scientific and educational purposes," it becomes manifest that it was not entitled to exemption from taxation.

The judgment is reversed.

HANSON, Justice pro tem.

I concur in the judgment of reversal as I am of the view that in principle the decision of the Supreme Court in Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 221 P.2d 62, 64, controls here. It is true, as respondent contends, that there are differences of fact between that case and this but they do not appear to be of such character as to call for the application of a different rule. The decision in the Pasadena case turned on the fact that the articles of incorporation of the Pasadena Hospital stated that the objects and purposes were to "establish, maintain, and carry on * * * a hospital for the sick and injured * * * or any other lawful purpose where pecuniary profit is not the object thereof * * *." As the property under the articles could be used for "lawful purposes" other than "hospital purposes" it was held that there was not by the articles an irrevocable dedication of the property solely to hospital purposes. In the case before us the articles of incorporation of the Moody Institute set forth the objects and purposes under three sub-heads the last of which is 3(c) reading as follows: "To receive by gift or otherwise hold, invest, distribute, and expend moneys and property for the purposes stated in the foregoing paragraphs, and for other religious, scientific, and *educational purposes.*" (Italics supplied.)

From the foregoing quotation it is apparent that any property held by the Moody Institute is not by its articles "irrevocably dedicated" to religious and scientific purposes alone, but to "religious, scientific and educational purposes." Property which "is held by or used as an educational institution" is not accorded an exemption from taxation under the statute. As the articles of the Moody Institute would permit it to transfer the property to an educational institution to be held or used for educational purposes rather than religious or scientific purposes the articles do not irrevocably dedicate the property to the latter purposes. To achieve that result in the future Moody Institute will have to amend its articles at least to the extent of striking out the word "educational" as a part of its purposes. By so doing it may still carry on, as I see it, the work it is now doing, and yet be entitled to the tax exemption. The statute to be sure expressly excludes from its benefits educational institutions, religious or secular. However, I do not understand that such an exclusion applies to property used in educational work carried on as an incident to a scientific or religious purpose. The difficulty with respondent's articles is that they are too wide in their sweep under the holding in the Pasadena case. Were it not for the Pasadena case I would dissent on the ground that I believe that the language of the articles of a corporation is not alone the controlling factor, but that the use to which the property has been and is being put is equally as important, if not controlling. To my mind articles which can be amended overnight do not spell out "irrevocable dedication" as to objects and purposes. Inasmuch as the statute does not grant a perpetual exemption, but only a year's exemption upon annual applications the present use rather than a possible future use would seem to be the controlling factor.

WHITE, Presiding Justice.

I dissent: The parties have resolved their controversy here to turn principally and solely on the issue of whether plaintiff's property is "irrevocably dedicated to religious * * * purposes" or whether under plaintiff's articles of incorporation, diversion of its taxed property to educational (non-exempt) purposes is authorized.

In the case of Serra Retreat v. County of Los Angeles, 35 Cal.2d 755, 758, 221 P.2d 59, 61, the Supreme Court cogently says: "the rule of strict construction applies to the welfare exemption law and the institution seeking its benefit must clearly show that it comes within the terms thereof; *but adherence to this rule does not require so rigid and narrow an interpretation of the exempting language as to defeat the apparent design of the lawmakers. In short, there must be a strict but reasonable construction of this law as applied to the particular facts at hand.*" (Emphasis added.)

Therefore, it seems apparent and manifest that the exemption of property used exclusively for "religious * * * purposes" should be held to include any purposes which are incidental to and reasonably necessary for the accomplishment of religious purposes.

Defendant does not maintain that plaintiff is not now using its property for purely religious purposes, but seems apprehensive lest the latter's property may subsequently be put to an educational use, which does not qualify, and thereby abuse the exemption.

To me, this apprehension appears groundless and unwarranted. Such an exigency, should it arise, is provided for in the welfare exemption act itself. Under the terms thereof, Rev. & Tax. Code, sec. 254.5, it is provided that in order to qualify for exemption an application in affidavit form must be filed with the assessor on or before April 1 *each* year. If at any time plaintiff's property was diverted to nonexempt uses, its exemptions would be immediately eliminated or curtailed.

The material parts of plaintiff's articles of incorporation provide as follows:

"3. The purposes for which this corporation is formed are exclusively as follows:

"(a) To conduct studies by literary research, by laboratory research, by field research and any and all other appropriate means for the purpose:

"(1) of establishing the relationship between the facts and teachings of science and the facts and teachings of the Bible;

"(2) of encouraging a faith in and acceptance of the Bible as the infallible Word of God;

"(3) of preparing an able and adequate presentation of the facts and teachings of the Bible as an alternative to Godless materialism with a standard of accuracy and excellence that shall assure its acceptance by institutions of learning both Christian and secular; and

"(4) of devising ways and means of utilizing modern scientific devices and techniques as aids to the propagation of the gospel throughout the world;

and to this end to establish and maintain libraries and laboratories and to conduct field trips, and to do all other things appriate to the purpose hereinabove stated."

I am not unmindful of section 214 of the act, which provides that "This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade"; but this section plainly has reference to secular and not religious education. How would it be possible to disseminate a study of religion other than by the process of education? To hold otherwise would be to prohibit exemption of a religious institution maintaining Bible classes for education in religion. Plaintiff's articles of incorporation plainly irrevocably dedicate its properties to the teaching of a philosophy of religion—of man's utter dependability upon Almighty God in whatever achievements he may attain in the field of science. Whatever educational activities plaintiff may engage in under its articles of incorporation are solely and absolutely incidental to its religious purposes. If preparation and presentation "of the facts and teachings of the Bible as an alternative to Godless materialism" does not constitute an irrevocable dedication to religious purposes, it would be difficult indeed to conceive of a dedication that could be characterized as religious.

As I read the case of Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 221 P.2d 62, 64, relied upon in the prevailing opinion, I am persuaded that it is not controlling here. In the case just cited, the articles of incorporation stated the objects and purposes to be not only the establishment and maintenance of a hospital but "any other lawful purpose where pecuniary profit is not the object thereof", thereby permitting the property to be used for "lawful purposes" other than "hospital purposes"; while in the case now under consideration, plaintiff's articles of incorporation permit the use of its property for "educational purposes" only insofar as such educational activities refer and are incidental to the promulgation of its "religious purposes."

It therefore follows that the trial court properly concluded that plaintiff's property was entitled to the welfare exemption and the judgment should be affirmed.

Hearing denied; CARTER, J., dissenting.

105 Cal.App.2d 254

NETKOSKY et al. v. TIDE WATER ASSOCIATED OIL CO.

Civ. 18003.

District Court of Appeal, Second District, Division 1, California.

July 2, 1951.

George J. Netkosky and another sued Tide Water Associated Oil Company, a Delaware Corporation, Associated Division, for a declaration that a lease assigned to plaintiffs by the lessors was binding upon plaintiffs and defendant, as lessee, solely as a lease of the premises from month to month until terminated by either party upon 30 days notice to the other. The Superior Court, Los Angeles County, Arnold Praeger, J., granted defendant's motion for judgment on the pleadings, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that a mere reading of the contract in the light of the well established law on the subject revealed that plaintiffs' contentions were destitute of merit.

Affirmed.

Declaratory judgment ⚿326

In suit by lessors' assignees against lessee for declaration that lease was binding upon parties solely as lease of premises from month to month until terminated by either party upon 30 days' notice to other, where it appeared that property had been leased for period of five years with option granted lessee to renew for additional period of five years and that lease provided for rental based upon gasoline sales made by lessee on premises, but with a minimum rental of $100 per month to be paid in any event, trial court did not err in granting lessee's motion for judgment on pleadings in absence of allegations that lessee was not operating premises as contemplated by lease.

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Edward S. Cooper and John Boyce-Smith, Los Angeles, for appellants.

W. F. Kiessig, Edmund D. Buckley, San Francisco, Harrison Guio, Los Angeles, for respondent.

DORAN, Justice.

In this action for declaratory relief the court granted defendant's motion for judgment on the pleadings from which judgment plaintiffs appeal.

The record reveals that Aurelio Sancioni and Angelina Sancioni, his wife, as lessors, leased to respondent, Tide Water Associated Oil Company, certain property in the City of Los Angeles for a period of five years from August 1, 1947, with option granted respondent to renew for an additional period of five years. The lease provided for rental of 1½¢ for each gallon of respondent's first grade and premium gasolines, and 1¢ for each gallon of respondent's third grade gasoline, sold by respondent at the premises, "a minimum rental of $100.00 per month to be paid in any event." On March 23, 1949, the property was sold to appellants and the lease assigned to them.

Plaintiffs sought to have the court declare that the lease in question "is binding upon the parties solely as a lease of the premises from month to month until terminated by either party upon thirty days' notice to the other.

"2. That if the Court finds and declares that said purported lease Exhibit A is not valid as a lease for a term of five years or more; then in such event that the Court give judgment to plaintiffs; that said lease has been terminated or may be terminated as a month to month lease by proper notice from plaintiff to defendant." It is alleged, "That said premises are improved for operation as a gas station with office building and pumps".

It is noteworthy, as pointed out by respondent, that "appellants *do not allege* that respondent is not operating, or causing to be operated, the premises as a service station disbursing respondent's products; *do not allege* that appellants are not receiving, and have not received, a gallonage rental at all times in excess of the $100.00 per month minimum, and *do not allege* that respondent intends to or threatens to, cease the sale of its gasoline there, or cease the operation of a service station on the premises. Appellants do not allege these things because they cannot. The premises have been at all times operated as the lease contemplates, and the rental has always exceeded the minimum set forth in the lease. * * * Appellants are apparently dissatisfied with the contract made by their assignors, and wish to cancel it".

It is argued by appellant that the contract in question should not be construed as an "entire contract" but "should be construed as two or more severable contracts independent of each other" and that the contract "is severable and consists of a contract for a term of years at a rental based upon sales of gasoline and a separate contract for the minimum rental of $100.00 per month for every month which lessee occupies the premises." It is also argued that the contract "lacks mutuality" and is void "because in restraint of trade".

Appellants' contentions are destitute of merit as a mere reading of the contract in the light of well-established law on the subject will reveal; indeed the appeal could be regarded as frivolous.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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105 Cal.App.2d 102

In re GIRARD'S ESTATE.
LEWIS v. FRITZ.
Civ. 14896.

District Court of Appeal, First District,
Division 2, California.
June 25, 1951.

Proceeding in the matter of the estate of Frank A. Girard, deceased, by George W. Lewis, claimant, against Leore G. Fritz, as executrix of the last will and testament of Frank A. Girard, deceased, wherein the claimant moved in the probate court for an order directing the executrix to pay interest on a certain claim. The Probate Court denied the order and claimant appealed. The Superior Court in and for the City and County of San Francisco, Timothy I. Fitzpatrick, J., rendered judgment for defendant and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where executrix approved claim against estate, and claim was ordered paid, but interest on claim was not allowed, Probate Court's denial of order directing the executrix to pay interest on claim was not an order refusing to direct or allow payment of a claim within statute and therefore was not an appealable order.

Appeal dismissed.

1. Executors and administrators 🔑256(2)

Statute providing that an appeal may be taken from an order directing or allowing payment of debt, claim, or refusing to make such an order, provides for appeal from order directing or allowing, or refusing to direct or allow, payment of a claim previously allowed by executor. Probate Code, § 1240.

2. Executors and administrators 🔑236

The probate court does not act upon a claim before it is acted upon by executor or administrator, and probate court does not order payment of claim that has been rejected by personal representative, except by judgment in suit on claim. Probate Code, § 1240.

3. Executors and administrators 🔑256(2)

Where executrix approved claim against estate, and claim was ordered paid, but interest on claim was not allowed, probate court's denial of order directing executrix to pay interest on claim was not an order refusing to direct or allow payment of claim under statute providing that an appeal may be taken from order directing or allowing the payment of a debt, claim, or refusing to make such an order, and, therefore, was not an appealable order. Probate Code, § 1240.

4. Executors and administrators 🔑236, 256(2)

A probate judge has no jurisdiction to order paid a claim which has been rejected in whole or in part by administratrix, and order of probate court refusing to exceed its jurisdiction in this respect is not an appealable order. Probate Code, § 1240.

Myers & Carter, San Anselmo, for appellant.

Thomas H. Matimore, Ira S. Solomon, San Francisco, for respondent.

NOURSE, Presiding Justice.

On this motion to dismiss the appeal respondent contends that the order is not appealable within the terms of section 1240 of the Probate Code. A claim for $51,771.40 was approved by the executrix and ordered paid. The claim did not ask for interest and none was allowed. Thereafter the claimant moved in the probate court for an order directing the executrix to pay interest on the claim and his motion was denied. Section 1240 of the Probate Code provides, inter alia, "An appeal may be taken to the supreme court from an order * * * directing or allowing the payment of a debt, claim, * * * refusing to make * * *" such an order.

[1–3] This portion of the section has been interpreted in Estate of Flint, 15 Cal.App.2d 299, page 300, 59 P.2d 609, page 610, where the court said that the section "provides for an appeal from an order directing or allowing, or refusing to direct or allow, payment of a claim. Such an order would be one relating to a claim previously allowed by the executor. The court does not act upon a claim before it is acted upon by the executor or administrator, except in certain instances not applicable to the claim in question, nor does the court order payment of a claim that has been rejected by the personal representative, except by judgment in a suit on the claim. The order appealed from was not an order refusing to direct or allow payment of a claim within the meaning of section 1240, either in form or in effect, and therefore was not an appealable order." And in Miller v. California Trust Co., 15 Cal.App.2d 612, 616, 59 P.2d 1035, 1037, the court said: "But we note a distinction between an order *directing payment or allowing payment of* a claim and an order of the court merely *approving* or *'allowing'* the claim. We believe that the order which is appealable under this section is an order directing or allowing *payment* of a claim which has already been 'allowed.' * * * There is no provision in section 1240 of the Probate Code permitting an appeal from an order rejecting a claim in whole or in part, and the Supreme Court has said: 'Where, as here, there has been a partial rejection of the claim, the only recourse of the dissatisfied creditor is a suit. Section 1498, Code Civ.Proc.' In re Estate of Bette, 171 Cal. 583, 587, 153 P. 949."

[4] The settled rule is that the judge sitting in probate has no jurisdiction to order paid a claim which has been rejected in whole or in part by the administratrix. "[T]he only recourse of the dissatisfied creditor is a suit." Estate of Bette, 171 Cal. 583, 587, 153 P. 949, 951; 11a Cal.Jur. sec. 600. An order of the probate court refusing to exceed its jurisdiction in this respect is not an appealable order under the code section.

Appeal dismissed.

GOODELL and DOOLING, JJ., concur.

105 Cal.App.2d 36

CACHEVILLE ELEMENTARY SCHOOL DIST. et al. v. HIDDLESON.

Civ. 8047.

District Court of Appeal, Third District, California.

June 23, 1951.

The Cacheville Elementary School District, its Board of Trustees, and the Board of Supervisors of Yolo County brought a proceeding in mandamus to compel C. L. Hiddleson, as County Clerk and ex-officio Clerk of the Board of Supervisors, to countersign certain school bonds. The District Court of Appeal, Peek, J., held that clerical errors and irregularities in stating, in the trustees' resolution calling a school bond election and the notice of such election, that the bonds would run for 27 years, instead of the maximum 25 years authorized by statute, and in the notice of election that 41 bonds, instead of 38 bonds, as specified in the resolution, would

be issued, did not affect the district taxpayers' substantial rights and hence did not invalidate the election or the bonds, in view of the county board's subsequent resolution ordering that four of the bonds not be issued.

Writ granted.

Schools and school districts ⚷97(4, 7)

Clerical errors and irregularities in stating, in school district trustees' resolution calling school bond election and notice of election, that bonds would run for 27 years, instead of maximum 25 years authorized by statute, and stating in notice of election that 41 bonds, instead of 38 bonds specified in resolution, would be issued, did not affect district taxpayers' substantial rights and hence did not invalidate election or bonds authorized thereat, in view of county board's subsequent resolution ordering that four of bonds not be issued. Education Code, §§ 7401 et seq., 7403(g), 7407, 7461, 7463.

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E. L. Means, Dist. Atty., Yolo County, James F. Roach, Deputy Dist. Atty., Woodland, for petitioners.

C. L. Hiddleson, in pro. per.

PEEK, Justice.

This is a proceeding in mandamus by which the petitioners, the Cacheville Elementary School District, the Board of Trustees thereof, and the Board of Supervisors of the County of Yolo, seek to compel respondent Hiddleson as County Clerk and ex-officio clerk of the Board of Supervisors to countersign certain school bonds.

Pursuant to the provisions of Chapter 17, Division 3, of the Education Code, the Board of Trustees, on January 30, 1951, by resolution, called a school bond election to be held March 2, 1951. Said resolution provided that the notice to the electors should state, among other things, as follows:

"The said bonds hereby proposed to be issued and sold will be Thirty-Eight Thousand Dollars ($38,000.00) in aggregate principal amount, numbered consecutively from one (1) to and including Thirty Eight (38), of the denomination of One Thousand Dollars ($1,000.00) each and will bear interest at the rate of not to exceed five per cent (5%) per annum, which interest shall be payable annually for the first year said bonds are to run and semi-annually thereafter, and shall mature as follows, to-wit:

"One Thousand Dollars ($1,000.00) of said bonds shall mature in each of the years from and including 1952 to and including 1964, and Two Thousand Dollars ($2,000.00) of said bonds shall mature in each of the years from and including 1965 to and including 1978."

A notice containing the above language was posted within the district and was published in a newspaper of general circulation in the district once each calendar week for four successive weeks. The ballot for election, which was held on March 2, 1951, designated said proposal as Proposition 1 and stated: "Shall the * * * District * * * incur a bonded indebtedness in the sum of $38,000.00" for the purposes therein set forth. 108 votes were cast, 73 in favor of the proposition and 35 opposed. Thereafter the Trustees of the District certified said proceeding to the Board of Supervisors of said County. Upon discovery of the error in the original resolution and notice of election, wherein it was stated that the bonds were to run for 27 rather than 25 years, the said Board, on May 15, 1951, resolved and ordered that the bonds to mature in the years 1977–78, as provided in the resolution of the Trustees and the notice of election, not be issued, but rather that bonds be issued in the aggregate sum of $37,000.00. Because of the irregularity above mentioned, the respondent Hiddleson has refused to countersign the bonds which have been issued pursuant to the proceedings above described. Petitioners, by mandamus, now seek to compel the respondent to so countersign the bonds. The sole question presented is whether the clerical errors and irregularities in the proceedings served to invalidate the bonds so authorized to be issued.

The notice of election, as provided in the resolution of the Trustees of the District, while stating that the aggregate principal amount of the bonds would be $38,000.00, incorrectly computed the number of bonds to be 41 and prescribed that said bonds mature over a period of 27 years. There can be no question but that the error, which was not discovered until after the election had been held, was clerical. However, the mistake technically violated Section 7403(g) of the Education Code which provides that the notice of election must contain: "The number of years, not exceeding 25, the whole or any part of the bonds are to run."

Subsequently, the Board of Supervisors, by resolution, ordered that four of the bonds described in the notice of election not be issued. While Section 7461 of the Education Code empowers the Board of Supervisors to fix the time when the bonds shall be payable, under Section 7407, the supervisors must issue bonds of the school district in accordance with the election proceedings. However, Section 7463 of the Education Code provides as follows: "No error, irregularity, or omission which does not affect the substantial rights of the taxpayers within the district or the electors voting at any election at which bonds of any district are authorized to be issued shall invalidate the election or any bonds authorized."

It therefore appears that the action of the Board correcting the palpable error in the election proceedings, achieved an end result which gave substantial effect to the intention of the electors and hence comes squarely within the provisions of said Section 7463.

Essentially the same question is involved in Board of Supervisors, et al. v. Rechenmacher, Cal.App., 232 P.2d 514, where the notice of election contained an error as to the aggregate principal amount of the bonds and the table of maturities therefor. For reasons more fully stated in that decision, we conclude that the irregularities here involved likewise did "not affect the substantial rights of the taxpayers within the district."

Let the writ issue.

ADAMS, P. J., and VAN DYKE, J., concur.

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105 Cal.App.2d 284

DOUGLAS v. MALONEY et al.

Civ. 7878.

District Court of Appeal, Third District,
California.

July 3, 1951.

Action by Jennie G. Douglas against Frank Maloney and John Doe, individually and as co-partners doing business under the firm name of Frank Maloney Company, a co-partnership, for personal injuries suffered when plaintiff tripped over sill which formed base of scaffolding defendants had constructed to repair front of store building. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment upon jury verdict for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that the question whether contractor by compliance with order of Industrial Commission fulfilled contractor's duty to general public, or whether contractor still owed general public duty of further safety precautions was for jury.

Judgment affirmed.

1. Master and servant 🔑85
Negligence 🔑28

Safety orders of Industrial Commission do not establish a standard of duty which contractors owe to the general public, but affect only the relationship between employer and employee.

2. Municipal corporations 🔑821(18)

In action for personal injuries suffered by plaintiff who tripped over sill which formed base of scaffolding which defendant general contractor had constructed to repair front of store building in accordance with safety orders and rules of Industrial Commission, whether contractor's compliance with orders of Industrial Commission fulfilled contractor's duty to general public, or whether contractor still owed general public duty of additional safety precaution was for jury.

3. Negligence 🔑82

Where there is an ordinary object plainly observable with nothing to conceal its presence or outline, one who heedlessly collides with it with full and immediate knowledge of its presence will not be heard to say that the proximate cause of his injuries was the negligence of the person who placed the object there.

4. Municipal corporations ⚷821(25)

In action for personal injury suffered by pedestrian who tripped over sill which formed base of scaffolding which defendant general contractor had constructed to repair front of store building, evidence whether pedestrian saw sill before tripping on it and whether her failure to see sill was negligent conduct on her part was for jury.

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Russell A. Harris, Sacramento, By Leo M. Fitzwilliam, Sacramento, for appellant.

Archibald D. McDougall, and McAllister & Johnson, all of Sacramento, for respondent.

VAN DYKE, Justice.

This is an appeal from a judgment entered upon a jury's verdict awarding damages to plaintiff. Plaintiff's injury was caused by her tripping on a 2 x 4 sill which formed the base of a scaffold that defendant had constructed.

Defendant, as a general contractor, agreed to make certain repairs to the front of a building located at 320 K Street, Sacramento, California, the work consisting primarily of removing the fire wall. A permit to do this work was obtained from the city. As an incident to the performance of the work, the defendant constructed a scaffold in front of the building. It was 80 feet in length along the front of the building, was 36 to 40 feet high and was supported at the base upon two 2 x 4 sills resting on the sidewalk. Upright supports were attached to the sills, spaced 7 feet apart. The lowest cross members were 7 feet above the sills and the sills were 4 feet apart. The inside sill was 15 inches from the building. The sidewalk was 16 feet wide from the front wall of the building to the curb. Thus the scaffold occupied approximately ⅓rd of the width of the sidewalk and extended along in front of three or four stores. These stores remained open during the period the work was being performed. Persons entering and leaving these stores therefore were obligated to pass over the two sills.

The accident occurred about 7 P.M. on October 11, 1947. Plaintiff and her companion were walking east on the south side of K Street. They walked along the sidewalk outside the scaffolding for almost its entire length from west to east. Plaintiff was aware of the scaffold as she walked along. Near the east end of the scaffold her companion went into a store and plaintiff waited on the outside. She waited there for some few minutes until, in order to make room for other pedestrians passing along the sidewalk, she moved towards the building, tripped on the sill and fell toward the store entrance. She testified she did not see the sill before falling. The area was well lighted by street lights and store lights. The sill was covered with dust and was of the same general color as the sidewalk.

Appellant contends that the evidence is insufficient as a matter of law to establish negligence. It is first argued that appellant was required under the rules of the Industrial Accident Commission to construct continuous sills at the base of the scaffold as footings for the uprights and therefore, he having done so in compliance with the rules, negligence could not be predicated upon his acts in doing so. The safety orders of the Commission provide that "The uprights of the scaffold, when resting on a sidewalk, shall be secured at the bottom to a continuous sill to prevent slipping."

[1] We observe, first, that the safety orders of the Industrial Accident Commission do not establish a standard of duty which contractors owe to the general public. Such orders affect only the relationship between employer and employee. In Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 619, 195 P.2d 501, 516, the court said:

"Appellant next urges that the court erred in its rulings as to the non-applicability of certain sections of the Labor Code and in denying admission into evidence of certain safety orders promulgated by the Industrial Accident Commission.

"The rejection of these code provisions and safety orders was proper. They deal primarily and exclusively with the relationship of employer and employee. As heretofore pointed out, the premises were safe when leased to Noll and it was his use and occupancy thereof that rendered them unsafe and hazardous. The Industrial Accident Commission is without power to establish rules of law applicable between landlord and tenant.

"Section 21 of Article XX of the Constitution of California grants to the legislature power to delegate to the Industrial Accident Commission the authority to make regulations affecting only the relationship of employer and employee. That the Industrial Accident Commission is without authority to impose liability upon third persons for injuries was the unequivocal holding in Pacific Gas & Electric Co. v. Industrial Accident Comm., 180 Cal. 497, 501, 181 P. 788."

Furthermore, the safety orders establish only a minimum standard. The scope of the Commission's safety orders as to the construction of scaffolding was considered in Campbell v. Fong Wan, 60 Cal.App.2d 553, at page 557, 141 P.2d 43, 45, the court stating: "But the appellants contend that the safety orders of the Industrial Accident Commission establish the only standard for the construction of scaffolding. They argue that evidence of custom or usage may not be admitted to vary the express terms of a statute. This position is not tenable. California Jurisprudence states the rule: 'It does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence. One may act in strict conformity with the terms of an enactment, and yet not exercise the amount of care which is required under the circumstances.' 19 Cal.Jur. 634; Sickles v. Mt. Whitney Power & Elec. Co., 177 Cal. 278, 280, 179, [170] P. 599; Bush v. Southern Pac. Co., 106 Cal.App. 101, 108, 289 P. 190; Harper v. Northwestern Pac. R. Co., 34 Cal.App.2d 451, 454, 93 P.2d 821. Although we can conceive of regulatory statutes, compliance with which would be due care as a matter of law in the absence of other circumstances, * * * the regulations before us were not intended to be more than the minumum standard of care stated to meet the charge of wilful misconduct or of a criminal violation."

[2] Appellant argues further that since he was under an obligation to construct these sills, negligence, if any, occurred as the result of some act or omission after the construction of the sill. It may be conceded that the sill, taken by itself, was properly constructed and was a necesary part of the structure. But this does not mean that the full duty of defendant to the public has been met. As we have said, the safety orders are no more than a minimum standard and to fulfill the duty owed by the contractor to the general public additional precautions in the interest of the safety of the public may well be necessary. It was, of course, apparent to defendant that since the stores were to remain open many people would daily and hourly pass over the sills in entering and leaving these stores; that in doing so their attention might be measurably distracted by the displays in the store windows and the immediate presence of other members of the public passing along the sidewalk. Under such circumstances, whether or not compliance with the orders of the Commission had created a situation where it could be held that the contractor's duty to the public had been fulfilled, would remain a question of fact for the jury to determine.

[3, 4] Appellants point to the fact that the area was well lighted and that respondent observed the scaffolding when a block away from it and knew at all times of its existence. Where there is an ordinary object plainly observable with nothing to conceal its presence or outline one who heedlessly collides with it with full and immediate knowledge of its presence could not be heard to say that the proximate cause of his injuries was the negligence of the person who placed it there. But such is not the situation present in the present case. It was for the jury to say whether or not plaintiff saw the sill before tripping on it and whether or not her failure to

see it was negligent conduct on her part. The jury could have inferred that the sill was not easily seen, since the sill itself and the area of the sidewalk along which it ran were covered with dust. The question of whether or not plaintiff was negligent in her conduct was for the jury. It cannot be said as a matter of law either that the plaintiff was negligent or that the defendant was free from negligence.

No other points being urged, the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

ANDERSON et al. v. STANSBURY et al.

Civ. 17980.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1951.

Hearing Granted Aug. 23, 1951.*

Action by John P. Anderson and others against Benjamin M. Stansbury and others for declaratory relief, an accounting and declaration of trust. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that the first written disclaimer terminated plaintiffs' interest in the oil and gas prospecting permits.

Judgment affirmed.

1. Mines and minerals ⇨6

Where group was fully advised of their rights and obligations in renewing oil lease, but elected to give up rights and wrote out disclaimer of any interest inherited from parents in oil and gas prospecting permit, and other associates renewed lease and handled operations until leased to oil company, such action by disclaiming group resulted in the termination of their interest in permit. Mineral Lands Leasing Act, 30 U.S.C.A. § 181 et seq.

2. Frauds, statute of ⇨73

Alleged verbal agreement to repurchase interest in oil and gas prospecting permit, which involved incorporeal interests in real property, was unenforcible under statute of frauds. Code Civ.Proc. § 1973, subd. 4.

3. Frauds, statute of ⇨158(2)

Testimony to establish verbal agreement to repurchase interest in oil and gas prospecting permit was properly excluded. Code Civ.Proc. § 1973, subd. 4.

4. Frauds, statute of ⇨158(4)

In action on alleged oral agreement to repurchase interest in oil and gas prospecting permit, which involved incorporeal interests in real property, evidence was insufficient to sustain finding of such part performance after written disclaimer of interest as to take the agreement out of operation of statute of frauds. Code Civ. Proc. § 1973, subd. 4.

A. J. O'Connor, Los Angeles, for appellants.

Dunlap, Holmes, Ross & Woodson, Robert H. Dunlap and Kenneth A. Millard, all of Pasadena, for respondents.

DRAPEAU, Justice.

March 16, 1921 the federal government, through the Department of Interior, issued an oil and gas prospecting permit to explore for and develop oil and its products upon government land in Kern County. Rights and duties of the parties to oil and gas prospecting permits are defined by the Federal Mineral Lands Leasing Act of Feb. 25, 1920, as amended, U.S.C.A. Title 30, § 181 et seq.

The land is located in a district called Wheeler Ridge by oil men.

In 1922, by agreement among themselves, the following persons became joint owners of the permit: Henning E. Olund, named as the permittee, Alexander Anderson and his wife, parents of plaintiffs in this action, Benjamin M. Stansbury, one of the defendants in this action, and Silas Gillan. Mr. Anderson was to finance the venture up to $10,000, and he and Mrs. Anderson were to each have a one-eigth interest in the permit. The three others were to have a one-fourth interest each.

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* Subsequent opinion 242 P.2d 305.

The permit was assigned February 21, 1923 to General Petroleum Company, and an operating agreement was entered into between the permittees and the oil company, whereby the oil company was to take over permittees' obligation to develop the property. General Petroleum paid $162,905.19 bonus to the permittees.

January 10, 1924 a lease to General Petroleum was made by the Secretary of the Interior, to expire January 10, 1944. The operating agreement was continued.

General Petroleum drilled four wells upon the property. The wells did not produce oil in sufficient quantity to make the lease profitable. So no more were drilled. Two of the wells were put on the pump, and two were not separated.

General Petroleum pumped the operating two wells until the time approached to renew the lease in 1944. Then General Petroleum advised the permittees that it was not interested in continuing the lease, and would turn it back to them, on condition that they pay General Petroleum for its pumping equipment on the lease. The lease contained a preferential right to renew for successive periods of ten years.

In the meantime Mr. and Mrs. Anderson died, and their interest in the permit passed to their children in Minnesota.

So Mr. Stansbury wrote the heirs in 1944 that it was necessary for the permittees to raise money to purchase the pumping equipment and for the cost of procuring a bond required in connection with renewing the lease; and also that it was necessary to find a new operator to take over the lease and go on with the development of the property.

The heirs replied to Mr. Stansbury that "after an impersonal analysis of these properties as investments" they did not wish to continue "holding these interests;" and that they would disclaim their one-quarter interest in the permit. And plaintiffs did not join in the application to renew the lease.

Mr. Stansbury then arranged for defendant Mr. Hugh Gordon to take over the Anderson interest, and the heirs executed and sent a general disclaimer dated May 17, 1946 to Mr. Stansbury. The disclaimer reads that plaintiffs having "heretofore abandoned and hereby disclaim any and all interest and rights including royalty reserved" Mr. Olund or "any person or persons other than" plaintiffs may apply for renewal of the lease.

Mr. Gordon financed the purchase of the General Petroleum lease and pumping equipment for $3,357.00, and arranged for the bond required by government regulations. In 1947 the lease was renewed by the Secretary of the Interior to him as lessee. In 1948 Richfield Oil Company took over the lease, with an operating agreement with Mr. Gordon.

After the Anderson disclaimer Mr. Gordon, Mr. Stansbury, and Mr. Gillan were the interested parties in the ownership in the permit.

Mr. Stansbury diligently took care of the many details incident to the purchase from General Petroleum, operation of the property until it was leased to Richfield, and negotiations with the government and with Richfield.

Mr. Gillan contributed delay rental money, but would not enter into any agreement relative to renewing the lease. Later he attempted to share in profits, but was restricted to royalties only. See Gillan v. Stansbury, 97 Cal.App.2d 502, 217 P.2d 1016.

When counsel for Richfield examined the disclaimer of the Anderson heirs, Mr. Stansbury was advised that it was not satisfactory, and that an assignment would also be required. In 1947 Mr. Stansbury conferred in Chicago with the Anderson heirs. Later they executed and sent to him a second instrument, a disclaimer and assignment.

Richfield drilled wells in the area to deeper horizons of oil structures, demonstrated that the property described in the permit was potentially valuable, and paid the remaining permittees $100,000 bonus for the right to operate under the Gordon lease.

Thereafter the Anderson heirs filed this action, alleging that their instrument of disclaimer and assignment were secured by fraud and misrepresentation by Mr. Stansbury; that the second instrument, the disclaimer and assignment, was made because Mr. Stansbury told them it was only to clear title so Richfield would take on the obligations of the permit, and that they would still retain their one-quarter interest.

The complaint prayed for declaratory relief, and for an accounting; also that defendants be adjudged trustees for plaintiffs for the Anderson one-fourth interest.

No written memorandum was made of the agreement which the Anderson heirs claim Mr. Stansbury verbally made.

Mr. Stansbury is an attorney at law. His relations with Mr. Anderson Sr. were close and friendly for many years. Plaintiffs assert that this relationship was one of attorney and client, and carried over to them after their father's death.

When the trial court indicated that in his opinion the promise claimed by plaintiffs to have been made by Mr. Stansbury was within the statute of frauds and could not be established unless some written memorandum of it was presented, plaintiffs offered to prove the asserted verbal agreement by the testimony of several witnesses. To this offer defendants' objections were sustained.

The trial court held that there was no fraud, and that the purported verbal agreement was within the provisions of the statute of frauds, and granted defendants' motion for nonsuit. From the judgment which followed plaintiffs appeal.

Plaintiffs argue that there was evidence of fraud, especially involved in the relationship of attorney and client which they assert existed between them and Mr. Stansbury; that it was error to sustain objections to the offered testimony of the asserted verbal agreement between them and Mr. Stansbury; that there was evidence of sufficient part performance by plaintiffs of repurchase of an interest in the permit to take the case out of the interdiction of the statute of frauds; and that in any event, defendants are estopped to interpose the defense of the statute of frauds the evidence being sufficient to support a constructive or a resulting trust in their favor to a one-quarter interest in the permit.

No fraud appears in the record.

The relationship of Mr. Stansbury and Mr. Anderson Sr. was more in the nature of business men engaged in a joint venture than that of attorney and client. And in any event the record does not establish that there was any fiduciary relation between Mr. Stansbury and the Anderson heirs.

[1] Plaintiffs were fully advised by Mr. Stansbury of their right to participate in keeping the permit in force, and in the renewal of the lease; and of the contribution which they would have to make to do so. In fact he urged them to go along with the other permittees. They did not see fit to go on, and declined to pay any part of the necessary expenses.

They waited for a little over two years before sending their disclaimer to Mr. Stansbury. During this time it was only by the efforts of Mr. Stansbury and his associates that the permit was kept alive at all. The conduct of the heirs and their formal written disclaimer evidence the termination of their interest in the permit when it had little if any value. The heirs were through with it and with the obligations and were quite willing that someone else should go on with it. The second instrument, the disclaimer and assignment, does no more than the first one.

As Mr. Presiding Justice Shinn so aptly said in Gillan v. Stansbury, supra, 97 Cal. App.2d 502, 511, 217 P.2d 1016, 1022: "One who has had a fair and equal opportunity with his associates to act with them and who refuses to do so, but 'sits tight' waiting for the others to pull the chestnuts out of the fire, has no grounds for complaint if the efforts put forth by his associates fail, and he is left out of a new undertaking which they are obliged to launch. The purchase of the lease and undertaking to operate the property was a distinctly new enterprise and not a mere continuation of the original one."

[2, 3] The alleged agreement offered in evidence, if true, is barred by the statute of frauds, no memorandum of its terms having been prepared or subscribed by the parties. Objections to testimony relative thereto were properly sustained. Sec. 1973, Code Civ.Proc. Subd. 4. The rights asserted were incorporeal interests in real property. See La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546.

The first instrument, the disclaimer, being valid and binding, there is no need to discuss principles of equitable estoppel which plaintiffs assert should be applied to the execution and delivery of the second instrument, the disclaimer and assignment. As stated, the rights of plaintiffs in the permit terminated with the first disclaimer.

[4] There is no proof of part performance or of any conduct of defendants after delivery of the first disclaimer that would support a decree imposing a constructive or resulting trust in favor of plaintiffs. See Denio v. Brennecke, 6 Cal.App.2d 678, 45 P.2d 229.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

105 Cal.App.2d 129

HUNTER v. FREEMAN et al

Civ. 18011.

District Court of Appeal, Second District, Division 1, California.

June 25, 1951.

Action by Ophelia Hunter against Jake Freeman, and another, to recover damages for alleged injuries sustained by plaintiff when a gas heater exploded in an apartment rented from defendants. The Superior Court of Los Angeles County, Arnold Praeger and Clarence M. Hanson, JJ., rendered a judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the complaint sufficiently alleged a breach of implied warranty on the part of the defendant landlords.

Reversed.

1. Landlord and tenant 🔑48(1)

Complaint alleging that defendants rented certain premises to plaintiff together with furnishings including a detachable gas heater, that defendants impliedly warranted that furnishings were fit for use, that defendants breached warranty when plaintiff went into occupancy of apartment and the first time she had occasion to use the heater it exploded burning her severely, and that at the time of the letting defendants had actual knowledge of the defective, unsafe and dangerous condition of the heater and yet failed to disclose such condition to the plaintiff, sufficiently alleged a breach of implied warranty.

2. Damages 🔑145

A complaint pleading lack of present knowledge as to plaintiff's injuries and future loss of earnings but that she would request leave to insert such amounts in her complaint when ascertained, was sufficient to plead special damages.

3. Pleading 🔑34(1)

As against a general demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, and any ground of special demurrer for uncertainty will be resolved in support of the complaint and the demurrer overruled, when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication. Code Civ.Proc. § 452.

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Jacob W. Silverman, Los Angeles, for appellant.

William Dellamore and E. W. Miller, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff seeks to recover damages for alleged injuries sustained by her when a gas heater exploded.

On March 15, 1949, she rented a furnished apartment from defendants, the owners and operators of an apartment building. The explosion occurred on March 28, 1949, as plaintiff was lighting the heater for the first time during her occupancy of the premises. The flames which shot from the explosion severely burned her entire body.

General and special demurrers were sustained to the complaint and to the first amended complaint with leave to amend. Plaintiff having failed to amend the latter complaint within the time allowed, the court dismissed the action upon motion therefor made by defendants. This appeal is from the judgment of dismissal.

The first amended complaint contains three causes of action:

The first of these is based upon the breach of an implied warranty. It alleges that on and prior to March 28, 1949, respondents were the owners, operators, and in possession and control of the demised premises together with the furnishings, including "a detachable gas heater." That from March, 15, 1949, appellant occupied the said furnished apartment as a tenant of respondents.

It is further alleged "That by reason of the foregoing * * * defendants and each of them, did impliedly warrant unto plaintiff that said furnishings, including said gas heater, were fit for use.

"That unknown to plaintiff, defendants did breach said warranty in that, at said time when plaintiff went into occupancy of said furnished apartment, and subsequent thereto, said gas heater was not fit for use by plaintiff but actually was in a defective, unsafe and dangerous condition."

Further, that the first time appellant had occasion to use the heater, it exploded burning her severely. "That said accident and casualty and the resultant injuries to plaintiff were directly and proximately caused by said breaches on the part of defendants and each of them and said resultant defective and dangerous condition of said heater"; all to her damage.

The second cause of action alleges negligence of respondents in that:

"1. They did maintain and control said heater in a careless, negligent and imprudent manner.

"2. They carelessly, negligently and imprudently failed and neglected to put said heater in a condition fit for the living purposes of plaintiff, and

"3. They carelessly, negligently and imprudently failed to repair all deteriorations and defects thereof."

The third cause of action alleges that at the time of the letting, respondents had "actual knowledge" of the defective, unsafe and dangerous condition of the heater; that they failed to disclose such condition of to appellant, and that "said defects in said gas heater were unknown and unapparent" to appellant.

"That said accident and the injuries resulting therefrom were directly and proximately caused by said defects in said gas heater, the actual knowledge thereof by the defendants and each of them and their failure to disclose said defects to plaintiff at the time of the letting or at any time prior or subsequent thereto."

Appellants here rely upon the case of Fisher v. Pennington, 116 Cal.App. 248, 250, 2 P.2d 518, 520, wherein it is stated: "Furniture supplied to the renter of a furnished apartment imposes on the owner a liability 'for all damage caused to him by the defects or devices of the thing deposited.' Civ.Code, § 1833. In the renting of a furnished apartment there is an implied warranty that the furniture is fit for use or occupation." In the cited case, plaintiff was injured during the first month of the tenancy, when the door to which a folding bed was attached fell over the top of the bed.

In the late case of Wilson v. Ray, 100 Cal.App.2d 299, 303, 223 P.2d 313, 315, which involved an explosion of a gas range while plaintiff was lighting the oven, it was held: "It is the general rule that a landlord is not liable to a tenant or his invitees for defective condition or faulty construction in property leased, in the absence of fraud, concealment or a covenant in the lease. (Forrester v. Hoover Hotel & Inv. Co., 87 Cal.App.2d 226, 232, 196 P.2d

825; Shotwell v. Bloom, 60 Cal.App.2d 303, 309, 140 P.2d 728.) * * * In the present case there is no pleading or proof that defendants covenanted in their lease that the stove in question was not defective, that they perpetrated any fraud upon the lessee or concealed any material fact from the lessee." It was also stated that since the complaint in the cited case did not contain an allegation which would support the theory of an express or implied warranty, the case of Fisher v. Pennington, supra, did not apply.

In Forrester v. Hoover Hotel & Inv. Co., 87 Cal.App.2d 226, 228, 231, 196 P.2d 825, 826, an action based on negligence of the landlord when a folding bed fell and injured the tenant, it was said:

"The cause was submitted to the jury under instructions to the effect that the landlord was not liable for injuries resulting from defects which could be discovered by reasonable inspection, nor for latent defects unknown to him. * * * No instructions were given or requested upon the theory (hereinafter discussed) of breach of implied warranty that the furniture was fit for use. Fisher v. Pennington, 116 Cal.App. 248, 2 P.2d 518.

* * * * * *

"We are persuaded that to hold the landlord liable upon warranty for any injury resulting from a latent defect in the equipment or furnishings leased with a furnished apartment would be to make the landlord virtually an insurer of the safety of the tenant. We are satisfied that the correct rule, supported in this state by a long line of decisions, is that a landlord is not liable to the tenant for injuries due to a defective condition or faulty construction of the demised premises, in the absence of fraud, concealment or covenant in the lease, Shotwell v. Bloom, 60 Cal.App.2d 303, 309, 140 P.2d 728; Colburn v. Shuravlev, 24 Cal.App.2d 298, 299, 74 P.2d 1060."

This court in the cited case distinguishes Fisher v. Pennington, supra, as follows, 87 Cal.App.2d at page 232, 196 P.2d at page 828:

"It is to be noted that in the case of Fisher v. Pennington, supra, relied upon by respondents, the injury was sustained during the first month of the tenancy, while in the Massachusetts cases cited above application of the rule contended for by respondents is limited to the condition of the furniture or premises at the inception of the tenancy.

"In the case at bar the accident occurred some 14 months after the tenants went into possession, during all of which time the bed appeared to be in good condition and was safely usable. If, upon the authority of Fisher v. Pennington, supra, there be a liability attaching to the landlord upon an implied warranty * * * then we hold that such liability under the theories advanced in the last-cited case is confined to the condition of the premises at the beginning of the term and not to conditions which, unknown to the lessor, subsequently arise. In the case with which we are here concerned, as heretofore noted, respondents detected no defect in the bed, its construction or attachment to the door. Any defect was therefore latent, and according to the testimony was equally unknown to the appellant landlord."

As hereinbefore stated, the first cause of action herein avers that the explosion occurred the first time the tenant attempted to use the heater. This was only a few days after she moved into the apartment. In addition to alleging breach of the implied warranty of usability, appellant also alleges that the defective condition of the heater was unknown to her. The third cause of action alleges that respondents had actual knowledge of the defective condition of the heater, that they failed to disclose such fact to appellant, and that such defects were unknown to her. By virtue of these allegations concealment by respondents of the defective condition of the stove may be implied.

[1] While it must be conceded that this is not a model pleading, the first and third causes of action sufficiently allege a breach of implied warranty.

Appellant urges that the court erred in sustaining respondents' special demurrer as to the allegations regarding special damages. These were for future medical services for treatment of appellant's injuries, and for loss of earnings. As to all of these amounts appellant pleaded lack of present knowledge, but that she would request leave to insert such amounts in her complaint when ascertained.

[2] This manner of pleading special damages was held sufficient in Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914, and in Wilcox v. Sway, 69 Cal.App.2d 560, 160 P.2d 154.

[3] We reiterate the established rule that as against a general demurrer a complaint will be liberally construed with a view to substantial justice between the parties; that any mere ground of special demurrer for uncertainty will be resolved in support of the complaint and the demurrer overruled, when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication. 21 Cal.Jur. 54, sec. 30; section 452, Code of Civil Procedure.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

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105 Cal.App.2d 235

PEOPLE v. ROSS et al.

Cr. 2229.

District Court of Appeal, Third District,
California.

June 30, 1951.

Harry E. Ross, Robert V. George, and Roy R. Ross were convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of fraudulently subscribing false proof of loss in order to collect on burglary policy, and they appealed from order denying new trial. The District Court of Appeal, Deirup, J. pro tem., held that evidence on issue of whether two defendants, who had not signed preliminary claim of loss on which payment draft was issued, but who had subscribed proof of loss when draft was delivered, had guilty intent, was sufficient to sustain convictions.

Order affirmed.

1. Criminal law 🔑568

Intent to commit a crime may be proven by proof of surrounding circumstances and inferences drawn from proven facts.

2. Criminal law 🔑1159(2)

Convincing force of evidence is for trial court to determine, and conviction based on sufficient substantial evidence will not be set aside.

3. Insurance 🔑31

Evidence on issue of whether defendants, who had not signed preliminary claim of loss on which draft for payment under burglary policy was issued, but who had subscribed proof of loss when draft was delivered, had guilty intent, was sufficient to sustain convictions for fraudulently subscribing false proof of loss to collect on policy. Insurance Code, § 556.

4. Insurance 🔑555

Where one of insured partners signed false preliminary claim of loss on which draft for payment under burglary policy was issued, but insurer's adjuster was instructed to and did receive proof of loss subscribed by all partners before delivery of draft, insurer did not waive required filing of proof of loss. Insurance Code, § 556.

◆

Peter Mannino, C. K. Curtright, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

DEIRUP, Justice pro tem.

Defendants were jointly charged in the information with a violation of section 556 of the Insurance Code in that on or about January 15, 1948, they wilfully, unlawfully and feloniously, knowing the same to be false and fraudulent, subscribed a certain writing entitled "Proof of Loss" in the amount of $2,706.52, addressed to the Great American Indemnity Company and subscribed by all three defendants with the intent to present and use the same and to allow and use the same in support of a false and fraudulent claim for the payment of a loss under a contract of insurance. A jury convicted all three defendants. They applied for probation and moved for a new trial. The motion for a new trial was denied. Probation was granted for two years, the first six months of which was to be served in the county jail. This appeal is from the order denying a new trial.

The defendants were partners in the business of selling and repairing firearms and did business under the name of "Ross Brothers Firearms". They carried insurance against loss by burglary with the Great American Indemnity Company. They reported that their store had been burglarized in the evening of December 6, 1947. An adjuster for the insurance carrier investigated the loss. He visited the store about six times and at different times contacted all three defendants together. To determine the loss he worked with various of the defendants by going over their records, invoices and all the papers they were able to give him. From information thus gathered the adjuster made a list of the guns and parts which were claimed by the defendants to have been stolen. All of the defendants aided in determining the amount of the loss and an inventory was completed which the adjuster took with him. Later the adjuster transcribed it into a typewritten document which purported to be a proof of loss and claim for $2,706.52. Defendant Harry E. Ross alone signed this original document on December 22, 1947. On the original inventory the insurance company issued its draft in favor of all the defendants for the claimed sum of $2,706.52. It sent this draft and an official form of proof of loss to the adjuster with instructions to get the defendants to execute the proof of loss and deliver the draft. The official form was in blank excepting for the amount of the claim. Neither the original inventory nor the typewritten document was attached to it. Defendants signed and swore to the official form and received and cashed the draft. This was on January 15, 1948.

On November 1, 1949, police officers whose suspicions had been aroused searched the premises of defendant George and found in a shed a large box which contained several guns and gun parts and in his home a .45 caliber U. S. Army Model 1917 Smith & Wesson revolver, serial No. 923. They questioned defendant George, and he said that all three defendants were "present during the inventory that was turned over to the insurance company" and that, their financial condition being bad, they mutually agreed to pad the insurance report in order to get additional money to help carry on their business.

A comparison between the guns and parts found with those listed in the inventory showed that numerous guns and parts that had been listed had been found, particularly at the home of the defendant George. On the claim, some articles were grossly over-valued. In one instance the value of an article had been set up in the claim at five times its real value.

[1-3] The record is voluminous and the evidence is conflicting. It is contended that there is a complete lack of proof of intent in so far as two of the defendants are concerned in that they did not sign the preliminary claim of loss on which the draft was issued and that there was no evidence that they were familiar with the items in it or knew that articles which had not been stolen were included in the list. However, intent may be proven by proof of surrounding circumstances and the inferences drawn from the proven facts. There was evidence of such guilty intent, aside from the admission of the defendant George. The convincing force of the evidence was for the trial court to determine. "After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows, that upon no hypothesis whatsoever is there sufficient substantial evidence to support it." People v. Lindley, 26 Cal. 2d 780, 791, 161 P.2d 227, 233. "Obviously, reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly, it is for that reason that our constitution provides that the appellate courts are not authorized to re-

view evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is obviously not a review of a question of fact but purely one of law." People v. Ohman, 67 Cal.App.2d 467, 475, 154 P.2d 463, 467. There is sufficient direct evidence in the record to warrant an inference of intent on the part of all of the defendants to violate the law.

[4] Defendants contend further that they did not violate the statute for the reason that the filing of a proof of loss was waived by the insurance company. It is a fact that the loss was adjusted and the draft for the payment of the loss was signed on the basis of the inventory and the typewritten statement of the claim which was signed by the defendant Harry E. Ross alone. But the draft was sent to the adjuster to be delivered after the execution of the official form of proof of loss by all of the defendants. Other papers necessary to complete the official form, and already in the possession of the insurer, were to be attached. The execution of a proof of loss as required by the policy of insurance was therefore not waived; on the contrary, it was demanded as a condition for the delivery of the draft in payment of the claim, and though it did not in itself contain a list of the articles claimed to have been lost, it was intended by the insurer and the insured to be a sworn statement of the claim.

The order denying a motion for a new trial is affirmed.

ADAMS, P. J., and PEEK, J., concur.

104 Cal.App.2d 799

MAROGNA v. MITCHELL et al.

Civ. 18002.

District Court of Appeal, Second District,
Division 3, California.
June 18, 1951.

Action by Giovanni Marogna against Buford Mitchell and others for breach of a contract by which the defendants were to move a building of the plaintiff wherein the defendants filed a counterclaim. Judgment for defendants on the counterclaim in the Superior Court of Los Angeles County, Joseph W. Vickers, J., and the plaintiff appeals. The District Court of Appeal, Bartlett, J., pro tem., held that the evidence sustained the judgment for defendants, that plaintiff had the duty to construct the foundation for the house and to do that which was incidental thereto and that a contention not set forth in detail of the points which appellant would raise on appeal could not be considered.

Judgment affirmed.

1. Contracts 🔑175(3)

In action for breach of contract by which defendant was to move a tile house of plaintiff's in accordance with the best pratices of house moving in that vicinity and under which plaintiff agreed to place the necessary foundation and underpinning and to complete the foundation within a specified time, evidence supported findings that the plaintiff had the duty to construct the foundation and do that which was incidental thereto.

2. Evidence 🔑455

Under a contract by which the defendant agreed to "move" the hollow tile house of plaintiff in accordance with the best practices of house moving in that vicinity, the word "move" was not ambiguous so as to justify the admission of parol evidence but was manifestly used in conformance with the general understanding of the word. Civ.Code, §§ 1638, 1639, 1640.

See publication Words and Phrases, for other judicial constructions and definitions of "Move".

3. Appeal and error 🔑1056(1)
Contracts 🔑175(2)

In action for breach of a contract to move a house if alleged ambiguity in a contract existed, the court was justified in refusing admission of proffered testimony by plaintiff which did not tend to interpret the contract, explain any ambiguity or add anything to it, and hence the plaintiff could not have been injured by its exclusion.

4. Trial 🔑49

An offer of proof was properly overruled where its purport was to prove the same conversations that had previously been stricken by the court.

5. Damages ⚷191

In owner's action for breach of a house moving contract where under the contract plaintiff was to provide the foundation for the house, evidence justified judgment for defendant for $300 for rental of equipment where the plaintiff failed to comply with the contract with respect to providing the foundation.

6. Licenses ⚷39.43

The Business and Professions Code sections relate to the legality of contracts and penalties for failure to comply with the licensing requirements provided therein and do not deal with the jurisdiction of the courts in the premises. Business and Professions Code, §§ 7026, 7031.

7. Courts ⚷30
Licenses ⚷39.44

A general demurrer will be sustained to a complaint by a contractor on a contract specified in the Business and Professions Code statute which does not allege and prove that the contractor was licensed, but insufficiency of the complaint as to its allegations does not deprive the court of jurisdiction to try the action. Business and Professions Code, §§ 7026, 7031.

8. Appeal and error ⚷1078(1)

Where certificate of trial court showed that the appeal record was correct and appellant set forth in detail the points he would raise on appeal but did not mention the contention sought to be raised in the appellate court, such contention could not be considered. Rules on Appeal, rule 7 (a).

◆

Slane, Mantalica & Davis, Los Angeles and Albert J. Corske, Long Beach, Raymond R. Roberts, Los Angeles, of counsel, for appellant.

Mohr & Borstein, Los Angeles, for respondents.

BARTLETT, Justice pro tem.

By his second amended complaint, in his first cause of action, appellant alleged that he entered into a contract by the terms of which respondents were to move appellant's house to another designated position; that respondents agreed to perform all of their work in a good and workmanlike manner; that appellant performed all of the obligations he agreed to perform on his part but that respondents breached the contract in that the house was moved in such an unworkmanlike manner as to cause damage in the amount prayed for. The second cause of action alleged the ownership of the building by appellant, the fact that respondents moved it and then alleged that respondents so negligently handled the building in moving that appellant was damaged in the same amount set forth in the first cause of action. The answer denied the material allegations of the complaint, affirmatively alleged that the damage was caused by the acts and omissions of the appellant in that appellant failed and neglected to complete the foundation as required by the contract. Respondents also set up two matters of counterclaim, the first being for $150 alleged to be the agreed price for certain extra work appellant asked to be done and the second for $300 under a clause in the contract which provided that the owner would complete the foundation so that timbers placed there by the mover could be released within 45 days and thereafter a rental of $2.00 per day would be charged. The court found that the respondents had complied with the terms of the contract and that the failure of the appellant to perform his obligations under the contract was the proximate cause of his damage. The court decided in respondents' favor on the two items of counterclaim and rendered judgment in their favor for $450.

Appellant's first contention is that "The trial court erred in failing to find the defendants were required to chip and drypack under the terms of the contract." The pertinent provisions of the contract were that respondents should move appellant's house, furnish all labor, materials and equipment so to do, do the work in a good, workmanlike manner and "* * * in accordance with the best practice of house moving in that vicinity." The contract further provided that appellant should designate the exact location where the building was to be placed and that after appellant had placed the necessary foundation and underpinning, the respondents would lower the building and remove their equipment. Appellant agreed to complete the foundation within 45 days after the house was moved in order that the timbers might be released within that time.

After finding that appellant "spotted" the house at the location desired the court found, in part, as follows: "'That subsequent to the moving and spotting of the said house, as aforesaid, it was necessary, in order for the said house to be lowered onto the foundation, that each and all of the following be done: (1) that a foundation be prepared and installed, (2) that the undersurface of the said house be smoothed off, and (3) that dry-packing be installed in order to bind the house to the foundation. That the foregoing, to wit, the acts designated as (1), (2) and (3) were *not duties or responsibilities of the defendants, but were solely the duties and responsibilities of the plaintiff.*'" This is the portion of the findings that is under attack. At the trial, appellant called one of the respondents, Buford Mitchell, under the provisions of section 2055 of the Code of Civil Procedure. In response to questions asked him by appellant, he testified that the building to be moved was a hollow tile building and that it was not until about a month after the building arrived that appellant provided any foundation; that then the building could not be lowered because appellant had failed to chip off the mortar, cement, lime and plaster clinging to the bottom of the house or, to use the language of the court in its findings, to smooth off the undersurface of the house and also because no drypacking had been done. He said: "'Because of the rigidity of a hollow tile constructed dwelling the building cannot be lowered because *the foundation is not complete until two additional steps have been taken* * * *.'" The two steps that the witness referred to were smoothing off the undersurface of the house and drypacking it. The witness defined drypacking as a soft cement-sand combination placed on top and said it "* * * *is an integral part of the new, smooth concrete foundation* * * *." He also stated that both of these two steps were an integral part of the foundation work. Edwin O. Egnew called by the defendant as an expert witness testified: "'That in the house moving industry, chipping and drypacking is never done by the house mover; that such is a construction job, to wit, *part of the foundation work,* and is not any part or parcel of a house mover's job or duty. It is the job of the foundation man to clean the bottom of the building and then, after the house is lowered to within one inch of the foundation, to dry pack it. The housemover cannot lower a house onto a new foundation until the foundation is properly prepared. Dry-packing is the only possible method.'"

[1] Appellant, after telling us what is necessary in the way of foundation for a frame or stucco dwelling says this: "'But,' say the defendants, 'This is different for this is a hollow tile house. In this type house bits of plaster and mortar are on the bottom, and in this type of moving the owner has in addition to preparing the foundation, to chip and drypack.' This wording is not in the contract; there is not even a mention of hollow tile house in the document." The answer is obvious. The moving of a hollow tile house was the only subject of the contract. Appellant claims that the word "move" is ambiguous, gives a dissertation of the meaning of that word and cites as authority the case of Schlitz v. Akers, 210 Cal. 490, 292 P. 463. In that case the question was whether or not the words "rock" and "rock foundations" include "shale." The court did not hold that there was any ambiguity in the contract and did not depend upon any parol testimony to interpret the words but used the simple expedient of looking up the word "shale" in Webster's New International Dictionary and found that it was defined as a type of rock. The court held that there was nothing to show that the term was used in a technical sense in the contract but that it was used in its general or popular sense. So, in the case before us, the word "move" is not ambiguous and is

manifestly used in conformance with the general understanding of the word. The findings of which appellant complains do not, as he contends, read any new meaning into the word "move." They are concerned with the foundation for the hollow tile house which was the subject of the contract and which one party agreed to move in accordance with the best practices of house moving in that vicinity and under which the other party agreed to place the necessary foundation and underpinning and to complete the foundation within a specified time. The evidence which we have quoted was ample to support the findings and conclusions of the court that appellant had the duty to construct this foundation and do that which was incidental thereto.

[2] Secondly, it is contended "The trial court erred in precluding extrinsic evidence to explain the ambiguity in the contract." The court expressly found and concluded that the contract was "* * * clear and unambiguous on its face * * *." The only ambiguities suggested are in regard to the provisions of the contract concerning the moving of the house and the the placing of a new foundation under it at the new location. These provisions are clear and explicit. The cases cited by appellant in his brief are cases in which there are obvious ambiguities in the contract under consideration, the clearing up of which made parol evidence necessary. No circumstances are presented here which justify the application of any exception to the parol evidence rule. Civ.Code, secs. 1638, 1639, 1640.

[3, 4] Assuming that an ambiguity did exist, the court was justified in refusing the admission of the testimony proferred by appellant as it did not tend to interpret any clause of the contract, explain any alleged ambiguity or add anything to it. It had no materiality whatever and appellant could not have been injured by its exclusion. The evidence offered was two conversations which appellant's agent, Wayne Alles, had with Mr. Mitchell. The first one in its entirety was as follows: "'Q. By Mr. Corske: Now, this conversation that you say occurred prior to the time that the agreement was signed, would you give us the substance of what was said, what Mr. Mitchell said and what you said with him, *with reference to the foundation?* A. I remember that I told Mr. Mitchell that the owner felt that the price that he had made was extremely high, but that the owner was willing to accept the contract at the price. There was never any discussion as to the price being out of line on my part. After that I said to Mr. Mitchell, "Now, in order to let you understand my position in this matter, I have agreed with the owner to place an order for the foundation and to place the order with you for the moving of the house."'" Asked to give the substance of the second conversation which took place several days after the contract had been signed, the witness said: "I reviewed the conversation that was held at his office at the time the contract was signed, in stating 'Mr. Mitchell, you understand that there is no general contractor on this job, that I have let the contract to install the foundation, and placed the order with the plumbing concern, and you are expected to do everything that is necessary that we verbally discussed and agreed upon to see that the house is moved onto the foundation, is set down, and that everything will be in operation and in working order as it was before it was moved.'" It would serve no purpose to set forth the offer of proof referred to by appellant for the reason that this offer was to prove the same conversations we have just set forth which had previously been stricken by the court. The only amplification of the testimony suggested was that the witness would testify to certain inadmissible conclusions and would also testify that several statements were not made at the conversation which no one claimed had been made.

[5] Appellant's third point is that the court erred in rendering judgment for $300 for rental of equipment. The judgment was based on the provision of the contract that appellant would complete the foundation within 45 days in order to permit the removal of the timbers or pay $2.00 per day as rental. The court found on suffi-

cient evidence that the appellant failed to do so until March 6, 1947, although the house had been moved onto the new location on July 19, 1946.

[6–8] Finally, appellant contends that the respondents should be precluded from recovering the sum of $150 for raising the house for the reason that they neither alleged nor proved, as required in section 7031 of the Business and Professions Code, that they were licensed in accordance with the provisions of section 7026 of that code. He says that the court had therefore no jurisdiction. In that we cannot follow him. These sections have to do with the legality of contracts and penalties for failure to comply with the licensing requirements provided therein, not the jurisdiction of courts in the premises. It is true that a general demurrer will be sustained to a complaint by a contractor on a contract such as is described in section 7026 of the Business and Professions Code which does not allege and prove that the contractor was licensed, Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23, but the insufficiency of the complaint as to its allegations does not deprive the court of jurisdiction to try the action. McMorry v. Superior Court, 54 Cal.App. 76, 80, 201 P. 797; Felton Water Co. v. Superior Court, 82 Cal.App. 382, 388, 256 P. 255. The record before us was prepared under Rule 7(a), Rules on Appeal, of the Supreme Court and the certificate of the trial court shows that it is correct as to the proceedings had and the evidence offered in connection with the points to be raised on appeal as stated by appellant. Appellant, in conformity with the provisions of said rule, had set forth in detail the points he would raise on appeal. He did not mention the contention which he makes here. Rule 7 (a), Rules on Appeal, of the Supreme Court reads, in part, as follows: "If the condensed statement purports to cover only a portion of the oral proceedings, the appellant shall state the points to be raised by him on appeal, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him unless the reviewing court, on motion, shall permit him to present additional errors or grounds of appeal on such terms as it may prescribe." No motion was made by appellant to present additional errors or grounds of appeal. This being the record he is precluded from presenting this question now.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

105 Cal.App.2d 113

ACHEN et al. v. PEPSI-COLA BOTTLING CO. OF LOS ANGELES et al.

Civ. 17495.

District Court of Appeal, Second District, Division 1, California.

June 25, 1951.

Rehearing Denied July 23, 1951.

Hearing Denied Aug. 23, 1951.

Charles Achen and others brought action against Pepsi-Cola Bottling Co. of Los Angeles, a corporation, and others for a declaration of the rights of the parties under distribution contracts, for damages, for an injunction, and for other equitable relief based on alleged breach of contract. The Superior Court of Los Angeles County, Fred Miller, J., entered a judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Hanson, J. pro tem, held that alleged fact that one phrase in contract was ambiguous, did not authorize plaintiffs to introduce parol evidence as to all terms of the contracts.

Judgment affirmed.

1. Contracts 🔑152

The common or normal meaning of language will be given to the words of a contract, unless circumstances show that in a particular case a special meaning should be attached to it.

2. Evidence 🔑455

Alleged fact that certain phrases in contract between manufacturer of soft drink and distributors was ambiguous, did not authorize the admission of parol evidence as to all terms of the contract.

3. Contracts ⚷143

If all terms of a contract are plain, but one, court seeks evidence of a limited character to ascertain the sense in which the parties used the term which was not plain, and having ascertained the meaning or sense of such term, court will read the contract, as a whole, to determine whether any of the terms are then contradictory.

4. Contracts ⚷152

The grammatical and ordinary sense of the words in a contract is to be adhered to, unless to do so will lead to some absurdity, or some repugnance or inconsistency with the rest of the contract, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

5. Evidence ⚷222(1), 266

The exception to the hearsay rule which permits declarations or admissions by a party to be shown, applies only to declarations or admissions of fact and not to the interpretation, legal or otherwise, of the facts.

6. Contracts ⚷170(1)

What language used in contracts meant was a matter of interpretation for the courts and was not controlled in any sense by what either of the parties intended or thought its meaning to be, if it ran contrary to court's interpretation.

7. Courts ⚷107

The principle of a case is found by taking account of the facts treated by the judge as material, and his decision as based on such facts, and the principle is not found in the reasons given in the opinion or in the law therein set forth.

8. Courts ⚷107

General expressions in an opinion are to be taken in connection with the case in which they are used, and if they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

9. Appeal and error ⚷987(1)

The District Court of Appeal sits as a court to review errors of law and not errors of fact.

◆

Wood, Crump, Rogers & Arndt, Guy Richards Crump, and Stanley M. Arndt, all of Los Angeles, for appellants.

James D. Garibaldi, Los Angeles, Keesling & Keesling and Henry C. Clausen, all of San Francisco, O'Melveny & Myers, Rodney K. Potter, and Jackson W. Chance, all of Los Angeles, for respondents.

HANSON, Justice pro tem.

We are told by appellants that "The issue in this appeal is whether 'Thou Shalt Not Steal' applies to the soft drink distributing business." If that were the only issue we feel we would be compelled to answer it, as appellants would have us do, by stating that the quotation *does apply* to the business mentioned, and, for authority, we would content ourselves with citing the Seventh Commandment. The issue, however, as we see it, while equally as simple as the one stated by appellants, is whether under the terms of written contracts the plaintiffs severally were entitled to recover damages because of defendants' refusal to renew or extend them. This involves, in large part, a mere matter of the interpretation of the language found therein measured by the trial court's finding upon parol evidence admitted by it.

To aid us in the solution of the problem presented we have literally been bombarded by having the "law books thrown at us." Appellants' opening brief is 183 pages, respondents' brief 190 pages and appellants' reply brief 96 pages. This adds up to 469 pages. In addition we have supplemental briefs from each side along with a supplement entitled "Review of the Facts in the Record" consisting of 111 pages, not to mention the Clerk's Transcript of 262 pages and a Reporter's Transcript of 3941 pages which records the evidence introduced upon the trial which took two months of the trial judge's time. We may add that we are unable to think of any possible so-called equitable considerations which could possibly be raised upon the record, against respondents and the trial judge, which have not been urged by appellants. Under the circumstances we think that any reader of this opinion will concede that we cannot be expected to answer all the arguments of appellants set forth under 28 chapter headings or discuss or differentiate the 156 cases cited by appellants and in large part argued, or the reference to 17 texts and 16 statutes. We really think that our opinion, at least, should have some terminal facilities. Moreover, we feel that there is real merit in the rules of several of the various United States Courts of Appeals which require the clerk to refuse to file an appellant's or respondent's opening brief which exceeds 50 pages and a reply brief which exceeds 20 pages unless it is accompanied by an order from the court permitting its filing. See Rule 19 of the United States Court of Appeals, Second Circuit.

Turning to the case at hand we find that the controversy herein stems from the claim of the appellants that their contracts as distributors of Pepsi-Cola were, by a course of conduct on the part of respondent, automatically renewed or extended at least for a year or more from July 18, 1946. The trial court held otherwise. As a consequence appellants charge that trial court erred (1) in holding the contracts were not uncertain and ambiguous, (2) in striking out certain parol evidence which had been received, (3) in interpreting the language of the contracts to mean that appellants' contracts ceased on July 17, 1946 and (4) in making certain findings and in failing to make other findings.

Against this preliminary background we proceed to set forth the essential facts. The Pepsi-Cola Company (hereinafter referred to as the "national corporation") for years has been engaged in manufacturing what is known as "Pepsi-Cola Concentrate" which it sells to bottlers licensed by it in the various states, for use as a base in concocting the beverage known as Pepsi-Cola. In 1936 certain members of the Guth family who were stockholders and officers in the national corporation organized, with its assistance, a concern known as Pepsi-Cola Company of California. In July, 1939, the members of the Guth family organized the respondent corporation the "Pepsi-Cola Bottling Company of Los Angeles" to which the original California company transferred its assets. Respondent's license from the national corporation authorized it to bottle and distribute the beverage Pepsi-Cola exclusively in several counties in the southern California area.

The respondent corporation, it seems, concluded to market the beverage it bottled through distributors selected by it, who were to be given the exclusive right to distribute the bottled beverage in the areas allotted or granted to them. To that end it caused its counsel to prepare a uniform type of printed contract. Except for blanks left for insertion of the date of execution, the name of the distributor, the description of the territory granted, the *number* of days of notice left blank in paragraph 13, the effective date of the contract left blank in paragraph 14, and the blank lines for signatures, the contract otherwise was wholly printed. All distributors, whether selected in 1939 or later were required to sign this form of contract. All the distributors who had oral contracts with respondent's predecessor were offered, accepted and signed these printed forms of contract in July, 1939, with the blanks filled in. Fourteen (14) of the nineteen (19) distributors who are appellants here signed these forms of contract as early as July, 1939.

The contract typical of all the 1939 contracts here involved (which we shall hereafter refer to as "the 1939 contract") provides as follows: (1) "* * * appoints the distributor its [respondent's] exclusive agent to distribute Pepsi-Cola in" [describing the specific territory]. (2) An agreement by the distributor that he will purchase at the current wholesale price the number of cases of Pepsi-Cola the respondent may set at the beginning of each calendar month; the company however covenanting that the number shall be reasonable taking into account certain factors named.

(3) That the distributor shall operate as an independent contractor and not as an employee. (4) "It is understood and agreed that the distributor may adopt such arrangements as he desires with regard to the details of distributing the company's product, the personnel of his workers, and the hours during which said work is performed, and said distributor shall be responsible to the company only for the purchase of its product as hereinabove set forth. It is further mutually understood that the distributor's activity shall not be subject to the control, active or implied, of the Company, and said distributor shall not be subject to discharge by the Company." (5)-(6) That distributor shall be in business for himself, shall own and service his own trucks; that he shall not be required to dress in any particular style. (8)-(9) Not here material. (10)-(11) permit assignments and transfers of the contract provided the company consents and the assignee assumes in writing the duties and obligations of the contract. (12) Not here material. (13) "Either party shall have the right to terminate this contract upon five days notice, and all rights of the parties hereunder, upon the termiation of said contract, shall cease and be of no force or effect * * *." (14) "This contract shall become effective on the *18th day of July, 1939,* and shall remain in full force and effect for a period of one (1) year from and after said date, unless the same is terminated as hereinbefore provided, by either of the parties hereto prior to said expiration date." (15) "The company hereby grants to the distributor a right and option to renew this contract for a period of one (1) year from the date of its expiration. In the event the distributor shall decide to exercise said right and option, he shall notify the company in writing of said desire and intention to renew said contract at least ten (10) days prior to the expiration date of this contract."

All the distributors exercised in July, 1940, the option to extend their contracts to July 17, 1941. In July, 1941, prior to the latter date respondent prepared a letter contract duly signed by it dated July 18, 1941, which it sent to all its distributors. A typical copy sent to the distributor reads as follows:

"Dear Sirs:

"We have heretofore appointed you a distributor of Pepsi-Cola and Mavis products. Said agreement was to endure for a period of one year and contained an option which was subsequently exercised extending said contract for an additional year to July 17, 1941. We hereby agree to an extension of said contract upon the same terms and conditions as therein set forth for an additional year to and including July 17, 1942.

"Very truly yours,
Pepsi-Cola Bottling Company
of Los Angeles
By Charles C. Guth, Jr.
President

the foregoing is hereby accepted:
Bopp & Ballard
By F. A. Bopp
Distributor"

Each distributor signed and returned to respondent the letter contract. In July of each year thereafter up to and including July, 1945, the respondent corporation sent similar, if not identical, letter contracts to its distributors who in each case signed and returned them.

In 1946 control of the corporation passed to a new group of stockholders and, on or prior to July 5, 1946, a new board of directors and new officers were elected. At the meeting of the board on July 5, 1946, the directors voted to terminate the prevailing method of distributing Pepsi-Cola through distributors and directed that none of its outstanding contracts should be renewed. The distributors under date of July 9, 1946 (earlier in one instance) were notified by letter that the respondent corporation would not continue them as distributors on or after July 17, 1946.

None of the distributors were originally required to or ever paid respondent any consideration for the contracts which gave them the exclusive right to sell and distribute Pespi-Cola in the territory described in their respective contracts. The net profits of each distributor varied considerably, but apparently never netted any distributor, except one, more than $3,500.00 in any one year in any one territory. A few of the distributors bought or sold their contract rights for sums varying from $3,000 to as high as $7,000 at times with or without equipment, such as trucks. Often these sales were referred to by the distributors and by the corporation as a sale of "routes."

The action below purportedly was one for declaratory relief so far as the defendant Pepsi-Cola was concerned. While the complaint (34 pages in length) sought a declaration of the rights and obligations of the distributors as against Pepsi-Cola it sought in addition exceedingly large actual and exemplary damages, an injunction, and other equitable relief based on an alleged breach of contract, false representation and other alleged causes of action. Additionally, the complaint charged as to other named defendants a violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1–7, 15 note, and the Cartwright Act, Business and Professions Code, § 16700 et seq.

So far as we have been able to ascertain the trial judge was not furnished at the beginning of the trial or prior thereto with any trial brief to aid him. Moreover, it does not appear from the opening statements or otherwise that he was informed that the major question which he would be called upon to rule would be the applicability of the parol evidence rule. In fact, the case was made even more difficult for him by reason of the manner and order of its presentation. At the conclusion of the opening statements some of the defendants, other than Pepsi-Cola made certain motions, and arguments thereon, touching upon liabilities. As soon as these were disposed of the plaintiffs began their case by offering for identification or in evidence document after document. This continued for the better part of two days without objection. It was not until the very close of the second day of the trial, when the plaintiffs began reading a deposition, that there was brought to the fore the question of the admissibility of parol evidence which it was contended violated the parol evidence rule. After listening to detailed arguments and the citation of, and a reading from the authorities, which did not mention a most pertinent and controlling case which has been cited to us, and, which if cited would probably have caused the trial judge to rule otherwise, he concluded he would permit the plaintiffs to offer whatever evidence they chose as to the "surrounding circumstances," including therein all representations and so-called admissions of the respondent or its agents, with the announcement that at the close of the case he would strike out such evidence as he felt violated the rule. As a consequence of this ruling the case was necessarily lengthened with the result it took two months for its trial. Viewed by us in retrospect with the aid of decisions not submitted to the trial judge, the ruling was distinctly erroneous and unduly lengthened the trial, but even so we are not prepared to say we would necessarily have ruled otherwise had we been in the position in which the trial judge found himself. We turn to discuss the errors which appellants say he made.

The trial judge as we understand his ruling struck out only the parol evidence offered by appellants which (1) embodied representations made by the agents of appellants at and prior to the signing of the 1939 contract or the subsequent letter contracts, as to meaning of the language used in those contracts as to paragraphs 13, 14 and 15 and (2) the like representations made after the execution of the contracts except on the issue tendered by plaintiffs as to waiver and estoppel. All other evidence produced by appellants, regardless of whether it did or did not violate the parol evidence rule was permitted to remain in the record. We come then to the single question whether the ruling excluding the evidence mentioned was or was not erroneous.

The case of appellants is based wholly upon the 1939 written contracts, modified as they would have the language thereof modified by their testimony as to what they intended by and understood the language to mean, augmented by representations of like tenor made by respondent, and supplemented by the meaning ascribed by appellants to the language of the subsequent letter contracts.

[1] The 1939 contract provides that it is to endure for one year only (paragraph 14) unless the distributor exercises an option given to him to renew it for a year (paragraph 15). The contract gives to Pepsi-Cola no like right to renew the contract. However, the contract (paragraph 13) gives to both parties the right on five days' notice to terminate the contract. (In distributor Gray's contract the provision is for 30 days' notice.) The language of these provisions is exceedingly plain and requires no extrinsic aid to interpret them. As has aptly been said in 3 Williston on Contracts, Rev. Ed. (1936), sec. 618, p. 1777: "The common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it." When we come to reading the language of paragraph 4 of the 1939 contract we find a phrase reading "and said distributor shall not be subject to discharge by the Company." Is this language in the collocation of the other language used in said paragraph, so ambiguous and uncertain as to require extrinsic evidence to aid the court in interpreting it? If we were called upon to state the meaning or sense of the phrase by confining ourselves to the four corners of the contract, we would say it has to do only with the manner and exercise by the distributor of his own activities, as an independent contractor and not an employee, in selling and distributing Pepsi-Cola, but that it does not affect in any manner the language of paragraph 13 or for that matter paragraphs 14 and 15. However, the trial court received, and did not strike out, evidence submitted by the parties bearing on the intent, meaning and sense of the phrase. Upon evidence which was contradictory it found that the phrase did not give the distributor an indefinite term or a right to continue indefinitely as a distributor. On the contrary, it found that the provisions for the duration and termination of the 1939 contract were set forth in paragraphs 13, 14 and 15, and that on and after July 17, 1941, that paragraph 15 thereof was not by reference or otherwise a part of the subsequent letter contracts. In so ruling it was in accord with Penilla v. Gerstenkorn, 86 Cal.App. 668, 261 P. 488, 489, where it is said: "'A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, *except the covenant to renew*; to include which would make the lease perpetual.'"

[2-4] The position of the appellants, however, is that paragraph 4 was uncertain and ambiguous and hence contradicted paragraphs 13, 14 and 15 and, under those circumstances, they were entitled to introduce parol evidence not only as to the meaning, intent and sense of the quoted phrase in paragraph 4, as they were permitted to do, but as to *all* the terms of the contract. The law is otherwise. If all the terms of a contract are plain, but one, then we seek evidence of a limited character to ascertain the sense in which the parties used the term. Thereupon, having ascertained the meaning or sense of the phrase or term, we read the contract, as a whole, to determine whether any of the terms are then contradictory. If they are not we proceed no further. Cf. the oft-quoted language of Lord Wensleydale, in Grey v. Pearson, 6 H.L.C. 61, quoted in 3 Williston on Contracts, Rev.Ed. (1936), sec. 618, p. 1777, reading as follows: "The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." See also Rest., Contracts, sec. 235(a).

In an endeavor to support their contention that once an ambiguity is shown in a contract "the bars are down," as appellants phrase it, to introduce parol evidence on all the terms of the contract, they quote time and again a very famous observation of Mr. Justice Holmes in Towne v. Eisner, 245 U.S. 418, 38 S.Ct. 158, 159, 62 L.Ed. 372. It reads as follows: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." The question before Justice Holmes was whether the word "income" as used in the Constitution and as used in the Income Tax Law meant one and the same thing.

That Mr. Justice Holmes did not mean to imply in the language he used that every word in a contract should or could be defined by the "surrounding circumstances" is clear from a reading of his article entitled, "The Theory of Legal Interpretation," equally as famous as is the quotation. In that article in which he expressly concurs with the language used by Lord Wensleydale, quoted above, he says in part:

"How is it when you admit evidence of circumstances and read the document in the light of them? * * * we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were * * *

* * * * * *

"* * * Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual, so far as may be, if instruments are to be used. The question is how far the law ought to go in aid of the writers. In the case of contracts, to begin with them, it is obvious that they express *the wishes not of one person but of two, and those two adversaries.* If it turns out that one meant one thing and the other another, speaking generally, the only choice possible for the legislator is either to hold both parties to the judge's interpretation of the words in the sense which I have explained, or to allow the contract to be avoided because there has been no meeting of minds. The latter course not only would greatly enhance the difficulty of enforcing contracts against losing parties, but would run against a plain principle of justice. For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.

* * * * * *

"* * * I do not suppose that you could prove, for purposes of construction as distinguished from avoidance, an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church." (Italics supplied.) 12 Harv.L. Rev. 417. See also, IX Wigmore on Evidence, 3d Ed. (1940), sec. 2462, p. 191.

[5, 6] Appellants further contend that even if the parol evidence rule was properly invoked by the trial court they were entitled to show certain statements made by the officers of respondent, at and prior to the execution of the contracts, i. e. the 1939 contract or the letter contracts as they were in the nature of admissions against interest. Appellants particularly point to the testimony of some of the distributors who testified that the officers of the company interpreted the language of the contracts to mean, as for instance, that the term of the contract was for an indefinite period and could not be cancelled. The short answer to the contention is that the exception to the hearsay rule which permits declarations or admissions by a party to be shown applies only to declarations or admissions of *fact* and not to the interpretation, legal or otherwise of the facts. Here the factual language set forth in the contracts was not only equally available, but known to the respective parties. What the language used in the contracts meant was a matter of interpretation for the courts and not controlled in any sense by what either of the parties intended or thought its meaning to be if it ran contrary to the court's interpretation of it. The views expressed by any party to the contracts were, at best, his opinion or conclusion and as such not admissible, under any exception to the hearsay rule or otherwise.

In Tritsch v. Ayer Tanning Co., 316 Mass. 598, 56 N.E.2d 11, 13, the court had before it various letters and telegrams offered to show a contract between the parties. The court said: "The admission by Burns in his testimony that the correspondence constituted the entire contract does not help the plaintiff. It is still a question of law what was the contract and what is its meaning." So in Sturm v. Boker, 150 U.S. 312, at page 336, 14 S.Ct. 99, at page 106, 37 L.Ed. 1093, it is said: "Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

[7] Notwithstanding what we have so far said we are told that our Supreme Court in Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665, announced not *one* but *nine* separate *holdings,* which are quoted to us in detail. The truth of the matter is that the court did not announce a solitary one of the nine as its holding, i. e., the *ratio decidendi* of the case. In any case, "The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161. The principle of a case is not found in the reasons given in the opinion or in the law therein set forth. In short, the *ratio decidendi* of the Universal case is simply that the contract was ambiguous on its face and hence that parol evidence was admissible for the purpose of arriving at the meaning and sense of the contract.

In Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931, cited by appellants, the court held that the parties had entered into a joint venture agreement by the terms of which the plaintiff was entitled to receive a stated salary and a stated portion of the net profits of the San Francisco operation, i. e., a branch ice business. It further held that under the facts of the case that upon a sale of the business by the defendant the plaintiff was entitled to his percentage of the net profit arising from the sale. The lower court, having held otherwise, was reversed. The case is not in point. The numerous quotations made of language from the opinion are arguments used by the court in arriving at its decision and are in no sense words of precedent. In the Nelson case a fiduciary relation was shown which is not here involved. Likewise Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 105 P.2d 299, is not in point The quotations from that opinion, so often quoted, in appellants' briefs are but argumentative observations and no part of the *ratio decidendi* of the case.

The nine so-called "holdings" in the Universal case are either but recitals by the court of rules governing the admissibility of evidence, where the court finds, the terms of the contract uncertain or ambiguous, or else arguments or observations used by the court in reaching its decision. As was said by Chief Justice Marshall 130 years ago in Cohens v. Commonwealth of Virginia, 6 Wheat. 264, at page 290, 5 L. Ed. 257:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60.
>
> [8] "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illus-

trate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

"In the case of Marbury v. Madison, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it."

[9] We sit as a court to review errors of law and not errors of fact. Accordingly, we are perplexed to understand just why appellants throughout their briefs and argument constantly refer to the fact that the trial judge should on the evidence presented to him have found the facts contrary to the findings he made. If we were to conclude he erred in every finding he made on contradictory evidence we would still be completely helpless to reverse him on that account. The rule is too well established to require the citation of precedents.

Under somewhat lurid chapter headings such as "Blood, Sweat and Tears" and "D-Day Comes" we are told with unction the damages appellants suffered. But damages, be they ever so large, can have no effect on the basic issue in this case as to whether there was in fact a breach of contract.

The contention that the court erred in making certain findings and in failing to make other findings is without merit. We have reviewed them at length and fail to find any reversible error. Other errors assigned are likewise in the same category.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

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104 Cal.App.2d 821

BETTIS RUBBER CO. v. KLEAVER.

Civ. 18060.

District Court of Appeal, Second District,
Division 3, California.
June 19, 1951.

Action involving patent license agreement brought by Bettis Rubber Company, a corporation, against Estelle Kleaver. The Superior Court, Los Angeles County, Arthur S. Guerin, Judge Assigned, rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Vallée, J., held that contract by which defendant granted sole and exclusive license to plaintiff's assignor to manufacture and sell certain patented inventions was unambiguous, and in absence of language in contract from which it could be inferred that royalties were to be paid on licensed patents after expiration thereof, plaintiff was not required to pay royalties on inventions the patents for which had expired.

Judgment affirmed.

1. Appeal and error ⚷1008(3)

Where there is no conflict in evidence introduced in aid of interpretation of contract, District Court of Appeal is not bound by trial court's construction of contract but will determine its meaning as a matter of law.

2. Patents ⚷218(1)

The term "royalty" ordinarily envisages a duty to make and a corresponding right to receive payments proportionate to the use of patented methods or machines.

See publication Words and Phrases, for other judicial constructions and definitions of "Royalty".

3. Patents ⚷218(3)

The law presumes that royalties are not to be paid after the expiration of a patent, but the parties may contract to the contrary.

4. Patents ⚷218(3)

In the absence of some provision in patent license contract by which a promise for the continuing payment of royalties upon expired patents may be fairly inferred, the presumption is that the contract is upon the ordinary terms as to the duration of royalty.

5. Patents ⚷218(3)

Where contract granting licensee sole and exclusive license to manufacture and sell patented inventions provided that royalties were to be paid for full term of patents, and contained no language by which an intention could be inferred that royalties were to be paid on licensed patents after expiration thereof, plaintiff who was transferee of rights under contract was not required to pay royalties upon devices embodied in expired patents.

6. Patents ⚷218(3)

Where contract granting licensee sole and exclusive license to manufacture and sell certain patented inventions provided that royalties were to be paid for full term of patent, also provided that licensor would furnish moulds without cost to licensee except the cost of necessary repair, provision as to moulds did not override express provisions of contract to effect that royalties were to be paid only for the full term of the patent.

7. Patents ⚷218(3)

Where contract granting licensee sole and exclusive license to manufacture and sell certain patented inventions provided that royalties were to be paid for full term of patents, and contract was unambiguous, fact that licensee's successor in interest had paid royalties on certain expired patents did not amount to a construction of the contract on the part of the licensee's successor in interest, for court will look to the conduct of the parties to determine their intention only when the contract is uncertain or ambiguous.

8. Patents ⚷218(3)

Where contract granting licensee sole and exclusive license to manufacture and sell patented inventions provided that royalties were to be paid for full term of patents, fact that president of licensee's successor in interest knew at the time the contract was made that a certain patent had been held invalid in federal Circuit Court of Appeals, did not compel conclusion that contract required licensee or licensee's successor in interest to pay royalties on claims embodied in patent after its expiration, for neither licensee nor licensee's successor in interest was a party to such action and decision therein was not binding on licensee or licensee's successor in interest.

9. Patents ⚷327(14)

A decision adverse to a patent in one federal circuit is not binding on the courts of another circuit in litigation upon the same patent between different parties.

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Stephens, Jones & La Fever, Byron O. Smith and Louis Lee Abbott, all of Los Angeles, for appellant.

Brown, Beery & Rognes, Frank M. Benedict, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment declaring that plaintiff is not required to pay royalties on patented devices after the expiration of the patents.

On January 15, 1940, plaintiff's predecessor in interest, called licensee, and defendant, called licensor, entered into a contract in writing whereby licensor granted to licensee the sole and exclusive license "to manufacture, use and sell in the United States of America and all foreign countries, the invention or inventions disclosed in those certain Letters Patent Nos. 1,573,031, 1,863,740, 2,045,629, 2,163,932, 2,166,116, 2,166,937, together with any and all improvements thereon or thereto, present or future, together with the right to grant and revoke sublicenses of all rights herein granted and conveyed, for the full term of said patent and any continuation or extension thereof." Licensee agreed to pay licensor specified royalties on each well casing protector sold by licensee and accepted and paid for by purchasers. The licensee was given the right to relinquish all rights granted to it upon a 30-day written notice.

The contract contained this provision: "The Licensee shall have the right to use all moulds for the production of said protectors now in its possession, the property of the Licensor, which moulds are acknowledged to be in a good condition of repair at the date hereof to be used without cost except for necessary repairs thereto which shall be at the expense of the Licensee, all such moulds upon the termination of this license agreement for any cause shall be returned in as good a condition of repair as when received to Licensor at the sole expense of Licensee."

The rights of the licensee under the contract were duly assigned to plaintiff.

Patent 1,573,031 was declared invalid in Oliver-Sherwood Co. v. Patterson, 9 Cir., 95 F.2d 70, decided in 1938 prior to the making of the contract. The president of plaintiff corporation knew of that decision at the time it "came down." Patent 1,573,031 expired on February 16, 1943. Patent 1,863,740 expired on June 21, 1949, after the commencement of this action.

Plaintiff's predecessor began using moulds furnished by defendant in 1936 and had some in its possession on January 15, 1940, the date of the contract, of a value of between $3,000 and $4,000. In 1939 plaintiff's predecessor purchased additional moulds at a cost in excess of $1,000, which were paid for by defendant.

From February 16, 1943, to June 30, 1948, plaintiff paid royalties on all well casing protectors sold by it and embodying claims contained in the six patents, including 1,573,031. Since July 1, 1948, plaintiff has paid no royalties on that patent, and since June 21, 1949, has paid none on 1,863,740. It has paid them on inventions disclosed by the unexpired patents.

The court concluded and adjudged that plaintiff is not required by the contract to pay royalties upon devices embodied in claims contained in patent 1,573,031 or in patent 1,863,740 manufactured and sold after the expiration thereof, and that plaintiff is required to pay royalties only on devices embodying claims contained in such of the patents set forth in the contract as are in effect and have not expired at the time of the manufacture and sale of such devices. Defendant appeals.

Defendant contends that the contract imports a duty in plaintiff to pay royalties upon the manufacture and sale of all of the subject devices until termination of the contract, regardless of the earlier expiration of one or more of the patents licensed.

[1] There is no conflict in the evidence introduced in aid of interpretation of the contract. We are not bound therefore by the trial court's construction of the contract but are called upon to determine its meaning as a matter of law. Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757, and cases there cited; Export Leaf Tobacco Co. v. County of Los Angeles, 89 Cal.App.2d 909, 916, 202 P.2d 622.

[2-4] "The term royalty ordinarily envisages a duty to make and a corresponding right to receive payments proportionate to the use of patented methods or machines." Eastman Oil Well Survey Corp. v. Lane-Wells Co., 21 Cal.2d 872, 873, 136 P.2d 564, 565. The law presumes that royalties are not to be paid after the expiration of a patent, but the parties may contract to the contrary. Sproull v. Pratt & Whitney Co., 2 Cir., 108 F. 963, 965; Pressed Steel Car Co. v. Union Pac. R. Co., 2 Cir., 270 F. 518, 525; E. R. Squibb & Sons v. Chemical Foundation, 2 Cir., 93 F.2d 475, 477; Dwight & Lloyd Sintering Co. v. American Ore Reclamation Co., D.C.S.D.N.Y., 44 F. Supp. 396. In Sproull v. Pratt & Whitney Co., supra, the court stated, 108 F. at page 965: "Parties may, of course, contract as they choose; but, in the absence of some provision by which a promise for the continuing payment of royalties upon expired patents may be fairly inferred, the presumption is that the contract is upon the ordinary terms as to the duration of royalty." In E. R. Squibb & Sons v. Chemical Foundation, supra, an action in which the plaintiff recovered royalties which it had paid under patent licenses after the patents had expired, the court stated, 93 F.2d at page 477: "There is a presumption that royalties are not to be paid after the expiration of a patent; if the intention is to have them continue longer, the parties should phrase their contract in language from which such intention may fairly be inferred."

[5] There is no language in this contract from which an intention may be inferred that royalties were to be paid on licensed patents after the expiration thereof. The wording of the contract is definite and certain. Royalties were to be paid "for the full term of said patent." It is manifest that royalties were to be paid only during the life of a patent and not thereafter. The duration of the license as to each patent was limited to the life of that patent. Upon expiration of a patent the invention passed into the public domain.

[6] Defendant argues that the contract is indivisible; that the consideration promised by plaintiff was given not only for the patent licenses but also for the moulds; that so long as plaintiff uses the moulds it is required to pay royalties on all patents whether expired or not. We can see no justifiable reason for reading the mould clause as overriding the express provisions of the contract. The royalties agreed to be paid were on each and every well casing protector sold by plaintiff and were not for the use of the moulds. Plaintiff was given use of the moulds "without cost" except the cost of necessary repair. The contract does not provide for any consideration from defendant to plaintiff other than the grant of the license. Defendant merely loaned plaintiff the use of the moulds "without cost" until the final termination of the contract.

[7–9] The fact that plaintiff paid defendant royalties on protectors which embodied claims in patent 1,573,031 from February 16, 1943, the date it expired, until June 30, 1948, does not, as a matter of law, compel the conclusion that the contract required plaintiff to pay royalties on claims embodied in that patent after its expiration. Defendant argues that payment after February 16, 1943, was a practical construction of the contract. There was evidence that the payments were made by plaintiff in the belief that they were royalties on protectors which embodied claims covered by the unexpired patents. Further, it is only when the terms of the contract are uncertain or ambiguous that the court will look to the conduct of the parties in order to arrive at their intention. Dabney v. Dabney, 9 Cal.App.2d 665, 670, 51 P.2d 108. There is nothing uncertain or ambiguous on the face of the contract in the present case. Neither does the fact that plaintiff's president knew at the time the contract was made that patent 1,573,031 had been held invalid by the Circuit Court of Appeals for the Ninth Circuit compel the conclusion that the contract required plaintiff to pay royalties on claims embodied in a patent after its expiration. The license covered the United States and all foreign countries. Plaintiff was not a party to the litigation in which patent 1,573,031 was held invalid in the ninth circuit. The law is well established that a decision adverse to a patent in one circuit is not binding on the courts of another in litgation upon the same patent between different parties. Lowell v. Triplett, 4 Cir., 77 F.2d 556, 561, affirmed Triplett v. Lowell, 297 U.S. 638, 56 S.Ct. 645, 80 L.Ed. 949. If patent 1,573,031 had not been licensed to plaintiff, it would have been subject to suit for selling the protectors in any circuit other than the ninth. Apparently plaintiff did not want to chance a suit in any other circuit.

Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312, and Chicago Pneumatic Tool Co. v. Ziegler, 3 Cir., 151 F.2d 784, cited by defendant, are not helpful in construing the contract in issue. In the Hazeltine case it was held that it is not *per se* a misuse of patents to require a licensee to pay royalties on its sales even though none of the patents is used, and that the general rule is that a licensee under a patent license agreement may not challenge the validity of a licensed patent in a suit for royalties due under the contract. The Ziegler case held, that because of the peculiar facts presented under the particular language of the contracts there considered, a licensee was required to make royalty payments until the expiration of the monopoly granted by the latest patent embraced within either contract.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

105 Cal.App.2d 226

SWEDLOW ENGINEERING CO., Inc. v. FLICKINGER et al.

Civ. 17863.

District Court of Appeal, Second District,
Division 3, California.
June 29, 1951.

Rehearing Denied July 17, 1951.

Swedlow Engineering Co., Inc., sued R. H. Flickinger and Ralph Welker, individually and as copartners doing business under the firm name of Flickinger and Welker, a partnership, to recover for breach of a contract. The Superior Court, Los Angeles County, Lewis Drucker, J., rendered a judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Wood, J., held that it could not be said that the evidence was not of sufficient substantiality to support a finding for plaintiff.

Reversed.

1. Trial ⚷139(1), 165

A motion for nonsuit may not be granted where there is evidence of sufficient substantiality to support finding for plaintiff, and in arriving at conclusion on question evidence should be viewed most favorably to plaintiff with every legitimate inference drawn in plaintiff's favor and conflicts disregarded.

2. Highways ⚷113(4)

In action by contractor, who had agreed to construct portion of public highway for state, to recover from subcontractor for breach of contract, jury question was presented as to contractor's right to recover.

Laurence J. Rittenband, Los Angeles, and Jack Gold, Beverly Hills, for appellant.

Arthur J. Speight and C. J. Walker, Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for breach of contract, plaintiff appeals from a judgment of nonsuit.

On January 15, 1948, plaintiff was awarded a contract by the State of California for the construction of 4.9 miles of public highway north of Trona in Inyo County. The contract provided that it should be completed before the expiration of 150 working days after the approval of the contract by the attorney general. Such approval was given on January 28, 1948. (The approximate time for the completion of the contract was August 1st.) The proposed highway was 25,860 feet in length, and it was divided into 258 stations which were 100 feet apart. The station at the south end was station 0 † 00 and the station at the north end was 258 † 60.

On January 29, 1948, the defendant Flickinger signed a letter, which was prepared by and addressed to plaintiff, wherein it was stated in part: "We propose to furnish all labor, insurance, material, and equipment (including transportation) and to perform in full the work of 'Roadway excavation' and 'Overhaul' as defined in your contract" with the State of California "between approximately station 165 † 00 and approximately Station 237 † 00 for the unit price of one dollar per cubic yard for 'Roadway Excavation' * * * subject to the following conditions: (a) It is understood that the nature of the work involved in this proposal is primarily rock excavation requiring drilling, blasting, shovel excavation * * *. (b) It is understood that the quantity of roadway excavation to be moved by us will be between approximately 50,000 and approximately 75,000 Cu. Yds. (c) It is understood that as a prime condition to this proposed agreement, we specifically agree to prosecute the work described herein in such manner and according to such schedule as will conform to your general progress schedule. (d) It is understood that all men employed by us on this project will be carried on your payroll and that at the end of each pay period we will reimburse you in full for the amount of such payroll plus workmens' compensation, insurance, and employers share of social security and all other payroll taxes * * *." Plaintiff accepted said proposal on said day by writing and signing an acceptance of it below the signature of defendant Flickinger.

The defendant Welker was a partner of defendant Flickinger, but it does not appear that Welker was a party to the written contract. On several occasions Welker negotiated with representatives of the plaintiff concerning the construction work. It appears (according to a statement of counsel for respondents in connection with his motion for a nonsuit) that "this contract was turned over to the partnership, Flickinger and Welker and operated as a partnership job." Counsel for appellant stated in effect in his closing brief (p. 3) that counsel for respondent stipulated that the subcontractor was the partnership of Flickinger & Welker. We have not found that stipulation in the record.

As above shown, the portion of the road to be excavated under the subcontract of January 29, 1948, was between approximately station 165 and approximately station 237. Defendants commenced the construction work on February 4, 1948, at a point north of station 165 and worked south to station 161. Mr. Johnson, the secretary-treasurer and general manager of the plaintiff company, testified that the nature of the work required that excavation in that particular cut extend farther south than station 165 in order to get sufficient fill material. When defendants arrived at station 161, the plaintiff rented defendants' equipment (shovel, trucks, compressor, and caterpillar) and used it for 10 days in constructing the road from station 161 south to station 158. Mr. Johnson also testified that prior to the time the subcontract was signed he discussed with defendant Welker the length of time plaintiff had in which to complete the road; and he explained to Welker that the job should be completed not later than August 1st, and in order to meet the completion date it would be necessary that all the excavation work be completed by June 20th, which would allow plaintiff about 30 working days to do the surfacing of the road; that Welker replied, "Don't worry about our getting the job done on time"; that during the conversation he (Johnson) mentioned the fact that plaintiff would be doing the earth work (on the portion of the road to be excavated by plaintiff) while defendants were doing the rock excavation (on the portion of the road to be excavated under the subcontract), and that plaintiff would like to see the job progress in such a way that the earth work and the rock work would progress "somewhere nearly at the same rate so they would be completed somewhere near the same time."

There were approximately 75,410 cubic yards to be excavated between stations 161 and 237. Mr. Murphy, who was plaintiff's superintendent of said construction work, testified that on March 20, 1948, the defendants had excavated approximately 9,000 cubic yards, which was about 12 per cent of the total number of cubic yards to be excavated; on said March 20th he told Welker that at the rate defendants were working the plaintiff could not finish the contract within the allotted time; Welker assured him that the progress would improve; several times thereafter and prior to April 3rd he asked Welker if defendants were going to finish on time; and in reply thereto Welker replied that progress was improving. Mr. Johnson (general manager of plaintiff company) testified that on March 31st the defendants had excavated 15,988 cubic yards. On said date about 21 per cent of the total number of cubic yards had been excavated, and about 43 per cent of the allotted time had elapsed. Mr. Johnson also testified that about April 3rd he told Flickinger that defendants were behind schedule and that their part of the work was not progressing satisfactorily, that plaintiffs had substantially completed their part of the excavating and that their earth moving equipment was then at the north end of the project; that he (Johnson) asked Flickinger for permission to move that equipment in south of station 237 to see whether they could speed up the progress and "move any of that material south from 237 with our earth moving equipment"; that in reply thereto Flickinger said, "Yes, go ahead"; that he (Johnson) then instructed Mr. Murphy to start the equipment in south of station 237; thereafter between April 3rd and April 20th plaintiff proceeded with the work south from station 237, but during that time it encountered such difficulties in attempting to move the rock that it was a futile effort to try to make any headway with the earth moving equipment.

When the plaintiff undertook to remove the material south of station 237, Murphy and Johnson expected to remove the material "a lot faster than it came out." On April 20th defendants had moved about 25 per cent of the total amount of material to be moved under the subcontract, and about 57 per cent of the allotted time had elapsed; and plaintiff had completed about 95 per cent of the excavating which it was to do between stations 0 † 00 and 161 and between stations 237 and 258 † 60.

On said date, April 20th, a conference was held at Trona at which Murphy, Johnson, Swedlow, Flickinger and Welker were present. Mr. Murphy testified that at said meeting Mr. Johnson said that he had called them together to see if they couldn't work out some method of improving the progress, that the state engineer had started to squawk about the work not going according to schedule, and that he (Johnson) "wanted to know if defendants intended to put up additional equipment in there to bring the thing up to schedule" so that it would be completed on time; that Flickinger replied, "I am not going to bring in any more equipment. We are in this thing over our heads now," and that they had put into it as much as they could, they could not go any farther, and "if there was additional equipment brought in it would have to be brought in by somebody else"; that he (Murphy) then said that "if we [plaintiff] were going to do it, that we would have to have a power shovel and some truck equipment"; and that Johnson then said he had found that a power shovel and some trucks were available; that "it was decided then that 210 or 214—210, I believe—would be the most logical point to stop that operation if that equipment came in from the north"; that as they were getting ready to leave the meeting Johnson asked Flickinger to send him a letter "as you understand this meeting here, or as it applies to the overall picture of the general contract."

Mr. Johnson testified that at the conference of April 20th he opened the conversation by telling Flickinger that defendants were behind in their portion of the work, that at the rate the work was progressing plaintiff would not be able to complete the job on time, that something would have to be done to speed up the work; he asked Flickinger if he would move additional equipment to the project in order to speed the progress of the work; Flickinger said: "I will not move any additional equipment to the project. We have lost all the money we are going to lose on this job. We can't stand to take any more loss, and if any additional equipment is moved onto the job you will have to do it"; Johnson replied that "[I]n as much as he was refusing to put additional equipment on the job to fulfill the contract within the required time, we would be forced to rent some equipment outside and to place it on the job," on that portion of the work between stations 161 and 237; that he (Johnson) said further, "[I]f we move the additional shovel or additional equipment in we should get together and coordinate the work so that the work being done by Flickinger and Welker would not conflict with the work being done by the other shovel which was to be brought in"; he (Johnson) also said that plaintiff would start its shovel at station 237 and would work south to a junction with defendants' shovel which was coming from the south; Flickinger or Welker said that it appeared that the place where this junction would occur would be approximately station 210; that he (Johnson) "agreed in substance that from all appearances that would be the possible place where our operations would come together. It appeared feasible that it would work out that way"; he asked Flickinger if he would address a letter to plaintiff confirming the discussion and his understanding of the conclusions reached at the meeting, "so that there would be no conflict with our agreement or contract for the portion of the work being performed by them." On April 29th the defendants sent the following letter to plaintiff:

"In confirmation of our conversation at Trona, California, April 20, 1948, wherein it was agreed by all parties concerned regards the Trona Highway project, that we, Flickinger and Welker, would cease work upon reaching Station 210 † 00.

"If this meets with your understanding, please sign acceptance below and return duplicate copy, retaining original copy for your files.

"Very truly yours,
Flickinger & Welker
R. H. Flickinger
Partner

"Accepted:
Swedlow Engineering Co., Inc.
By ——————
Dated: ——————."

The plaintiff did not sign the acceptance form on that letter.

On May 15th the plaintiff sent the following letter to Flickinger:

"Referring to your letter of April 29, 1948 from Flickinger and Welker to Swedlow Engineering Co.

"In our conversation in Trona, California on April 20, 1948 with reference to the progress of the work on the Trona highway project, it was agreed by all parties present that progress on the portion of the work covered by our agreement of January 29th was behind schedule and that it would accordingly be necessary to put additional equipment to work in order to insure completion of the work on time. Upon being asked if you would be willing to do this you replied that you definitely would not and that any additional equipment needed would have to be furnished by us. It was then stated that there being no other alternative we would hire the necessary shovel and trucks from other sources and work southward from the north end of the job to a meeting with your operation progressing from the south. An estimate then made of the total unfinished work indicated that such a meeting would possibly occur at approximately 210 † 00, and a tentative plan of operation was made accordingly. In reply to our request you stated that you would confirm your approval of our action by letter.

"At no time during this conversation was it agreed that you would cease work at any specific station.

"Very truly yours,
Swedlow Engineering Co. Inc.
"Paul M. Johnson
Paul M. Johnson
Secretary-Treasurer."

The letter from plaintiff was prepared by Johnson and was submitted to plaintiff's legal advisor for approval, but the attorney did not change it substantially.

In the early part of May plaintiff rented a power shovel and other equipment and then proceeded with the construction work southerly from station 237.

Mr. Johnson testified that in the early part of June he told Welker that Murphy had told him that Welker intended to stop work with the shovel about June 15th; Welker replied that they had another job to move the shovel to, and that they had to get the shovel out of the Trona job by June 15th; he asked Welker about the rest of the work that is to be done; Welker replied that they (Flickinger and Welker) could complete the work between the place where the shovel will stop and station 210 with bulldozers; he (Johnson) said there is still additional shovel excavation beyond 210; Welker said they had agreed at the meeting on April 20th that they would quit at station 210; Johnson said that he had received a letter from Flickinger stating the same thing, but there had been no such agreement; and he showed Welker a copy of the letter he had sent to Flickinger; Welker replied that as far as he was concerned the shovel was going to stop on June 15th and that if any other arrangements were to be made they would have to be made with Flickinger's consent; thereafter Johnson related to Flickinger the conversation he had had with Welker, and stated that he objected to the shovel being removed before all the shovel work on the Flickinger and Welker portion of the job had been completed; Flickinger replied that it was his definite understanding from the meeting on April 20th that their operation was to stop at station 210; he and Flickinger then consulted the plans to see what could be worked out to further coordinate their efforts; between stations 196 and 198 there was additional material which should be put into the fill at station 214, and that between the place where that material was located and the fill there was a cut (between 210 and 213) which had not been removed; Flickinger said he would instruct Welker to remove the material between stations 210 and 212 ✝50. Defendants' shovel was removed from the job about July 12th. The excavation work which was being done by plaintiff southerly from station 237 and the work which was being done by defendants northerly from station 161 reached a junction at station 214 a few weeks after July 12th. The entire project was completed on October 13, 1948. After the project had been completed, the State of California, upon request of plaintiff, extended the time for completion of the project to the date of actual completion, namely, October 13th, and did not exact any penalty or damages for the delay.

The accountant for plaintiff testified that the records of plaintiff show that the costs incurred by plaintiff for rock excavation between stations 214 and 237, not including costs of defendants, was $67,829.34. Plaintiff asserts in its brief that, by reason of being compelled to take over defendants' portion of the work between stations 214 and 237, plaintiff was damaged in the net amount of $63,569.96, after crediting defendants' account with the agreed contract price of $1.00 per cubic yard for 26,319.4 cubic yards which it excavated for defendants' account. The full contract price (under plaintiff's contract with the State) was paid by the State to plaintiff.

Appellant (plaintiff) asserts that it was "a prime condition" of the subcontract that defendants would prosecute their work between stations 165 and 237 in such a manner that their work would conform with plaintiff's general progress schedule; that defendants, in their work, had fallen substantially behind the progress made by plaintiff, and they refused to bring their work up to schedule because they were losing money under the contract; that "whether plaintiff had completed its own work much sooner than expected and thus forged far ahead in completion" is immaterial on the question of defendants' obligation to complete their portion of the work by June 20th; that defendants did not complete their contract—they "stopped work and abandoned the contract at Station 214 instead of Station 237."

Respondents (defendants) assert that plaintiff voluntarily assumed the performance of a part of the work included in the subcontract without any intention of charging defendants therefor; that plaintiff expected a fairly easy job in excavating south from station 237 and expected to make money on that work; that plaintiff wanted to be sure it had permission from Flickinger before it did part of the work included in the subcontract, so that "there would be no conflict" with the subcontract, and that plaintiff would not be sued by Flickinger for moving in on his part of the work.

[1, 2] "A motion for a nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for the plaintiff, and in arriving at a conclusion on the question the evidence should be viewed most favorably to the plaintiff with every legitimate inference drawn in her [plaintiff's] favor and conflicts disregarded." Milana v. Credit Discount Co., 27 Cal.2d 335, 342, 343, 163 P.2d 869, 873, 165 A.L.R. 621. Under the evidence here questions of fact for the determination of the trial court included the following: Whether there was a work progress schedule? Whether it was the intention of the plaintiff and the subcontractor that the plaintiff, in performing a part of the work included in the subcontract, should be compensated by the subcontractor in the reasonable value of such work? Whether it was the intention of the plaintiff and the subcontractor that the plaintiff should perform a part of the work, included in the subcontract, at plaintiff's cost and for the compensation to be received by plaintiff from the State? Viewing the evidence in the light most favorable to the plaintiff, it might have been inferred that it was the intention of the plaintiff and the subcontractor that plaintiff should be compensat-

ed by the subcontractor in the reasonable value of such work performed by the plaintiff. Under such view of the evidence, it cannot be said that the evidence was not of sufficient substantiality to support a finding for the plaintiff.

It was error to grant the motion for a nonsuit.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

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104 Cal.App.2d 835

Ex parte MOILANEN.

Cr. 2288.

District Court of Appeal, Third District, California.

June 20, 1951.

Hearing Denied July 19, 1951.

Edwina Moilanen filed application in the Supreme Court for writ of habeas corpus to secure her release from the Solano County Detention Home, and the Supreme Court issued a writ, making it returnable before the District Court of Appeal. The District Court of Appeal, Adams, P. J., held that proceedings whereby the applicant, a 16 year old girl, was taken from her mother's custody and declared a ward of the court, after hearing of which neither she nor any person having a right to her custody had notice, were invalid and she should be released on habeas corpus, notwithstanding a recital in the order adjudging her to be a ward of the court, that due notice had been given.

Applicant discharged.

1. Habeas corpus 🔑56

By demurrer to petition for writ of habeas corpus, respondents admitted truth of facts set forth in the petition.

2. Infants 🔑16.7, 16.9

A parent cannot be deprived of custody of child in commitment proceedings without notice and opportunity to be heard.

3. Constitutional law 🔑255

Regardless of good intentions of public authorities in proceedings regarding wayward minors, such children should not be deprived of their liberty, nor their parents deprived of their children, without due process of law.

4. Infants 🔑16.7

Parents, guardians or others in whose custody a minor child may be found are entitled to notice of hearings in proceedings instituted for the purpose of separating children from custodians, and such notice is jurisdictional.

5. Habeas corpus 🔑25(2)

In order declaring minor a ward of juvenile court, recital that due and legal notice of hearing had been given in all respects as required by law was mere conclusion and did not preclude showing in habeas corpus proceeding that no notice was given to child's mother, guardian or other person having custody of child.

6. Habeas corpus 🔑25(2)
Infants 🔑16.7, 16.9

Where 16 year old girl, whose mother was entitled to her custody under Oregon divorce decree, was taken into custody without warrant and forcibly taken to another county to be used as witness in prosecution against mother, and juvenile court in such other county declared her a ward of court without notice of hearing to child, mother or counsel retained by mother, and child was not allowed to talk to anyone, including counsel, proceedings were invalid and child would be released on habeas corpus. Welfare and Institutions Code, § 739.

* * *

Winters & Winters, Benicia, for petitioner.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy, for Matron & Supt. Solano County Detention Home, for respondent.

ADAMS, Presiding Justice.

This proceeding was instituted by the filing in the Supreme Court of a petition for a writ of habeas corpus to secure the release of Edwina Moilanen, a minor, from the Solano County Detention Home. The Supreme Court issued the writ, making same returnable before this court.

The petition alleged that Edwina Moilanen was a resident of San Diego County, aged 16 years; that Lyyti Moilanen is the parent of said minor, and entitled to her custody under a decree of the Circuit Court of the State of Oregon for the county of Multnomah, dated February 8, 1947, reaffirmed on October 25, 1950; that on April 5, 1951, Mrs. Moilanen and the child came to Sacramento to visit friends; that Edwina was ill and was there left with these friends while her mother went to Fairfield to consult with one Christine Watson regarding the pregnancy of Edwina, believed to have been caused by Ray Watson, husband of said Christine; that Lyyti was arrested in Fairfield charged with attempted extortion from Mrs. Watson; that Edwina was taken into custody in Sacramento by the Chief of Police of Fairfield and forcibly taken to Fairfield; that a verified petition was filed in Solano County by the deputy probation officer, to make Edwina a ward of the Juvenile Court of Solano County; that said petition alleged that Mrs. Moilanen (under the name of Marlene Carroll) was the parent of Edwina, and that her address was Solano County jail, Fairfield; that on April 13th Robert K. Winters, who had been retained by the mother to act as counsel for her daughter, applied to the matron of the Detention Home to consult with Edwina, stating that he had been so employed, but was refused permission to see or consult with said minor; that on April 20th a hearing was held by the Juvenile Court without the knowledge of said attorney or any notice to him though he had advised the court, the district attorney and the probation officer of his retention to act as counsel for said minor; that Lyyti Moilanen was not present at said hearing and was not served with any citation or notified of the time or place of said hearing; that the record of the court contains no return of service on the mother, nor a copy of any notice served upon her; that the county probation officer knew that Lyyti asserted a right to custody of Edwina; that Lyyti was confined in a building adjoining the courthouse, but was not given notice of said hearing nor an opportunity to be present; that the Superior Court of Solano County, sitting as a Juvenile Court, was without jurisdiction to issue its order of April 20th making Edwina a ward of said court because she was not a resident of Solano County, and had been brought within the county for the purpose of attempting to give the court jurisdiction over her, and because Lyyti Moilanen, in whose custody Edwina had been placed by the court of a sister state, was not notified of said hearing, and was not present or represented by counsel thereat.

In compliance with the writ of habeas corpus respondents produced Edwina before this court and filed an answer and return in which it was alleged that the minor was being restrained by them by virtue of an order and commitment of the Juvenile Court copy of which was attached to the said answer and return and made a part thereof. It was then asserted that the petition for the writ does not state facts sufficient to justify the relief prayed for, or any relief cognizable in a proceeding in habeas corpus. The allegations of the petition were not denied.

[1] By the foregoing demurrer respondents admitted the truth of the facts set forth in the petition, including the fact of parentage, the failure to serve said parent, etc. We overruled said demurrer, whereupon, over the objection of the deputy attorney general who, together with a deputy district attorney of Solano County, represented respondent, petitioner introduced evidence which established the facts asserted in the petition. An authenticated copy of a decree of the Circuit Court of Multnomah County, Oregon, established that in a divorce decree there rendered on February 6, 1947, in an action between Lyyti K. Moilanen and Edwin Moilanen, the custody of Edwina Mae Moilanen, "the minor daughter of the parties," was awarded to the mother, with an order for payment to her of support money for the child; and subsequent orders amended the requirement for monthly payments by Ed-

win Moilanen, the latest one being dated October 25, 1950.

A certified "copy of the proceedings" in the Juvenile Court was introduced by respondents. It contains the following documents: A "Request and Order for Detention," both request and order being dated April 6th. The request, signed "Jule O. Pritchard by Rita Warford, Deputy Assistant" recites that a petition had been filed in the Juvenile Court of the county of Solano; that Edwina was a person in need of detention pending hearing and *because* of "further investigation" as to who had custody and control of said minor; but it alleged that the mother was Marlene Carroll; also that "Parent or guardian, or person with whom said minor was last living, had [been] notified concerning the request for detention." An order of the court recited that it being for the best interests of the child, she be detained in Solano County Juvenile Hall pending further hearing and disposition by the court. Bail was fixed at $500 cash or surety bond.

The Request and Order, though dated April 6th, are stamped filed April 7th. On April 7th a verified petition by Rita Warford was filed in said Juvenile Court which set forth, among other things, that "there is now residing within the County of Solano," the above named Edwina Moilanen; and, on information and belief, "That the said Edwina Moilanen is in danger of leading an immoral life in that she has had sexual intercourse with a married man within the past, approximately three months period, and she has, in addition thereto, had sexual intercourse with two other persons since reaching her fifteenth birthday." Also that so far as known the name and residence of the parents, guardian, relatives of said alleged ward residing in said county are: "Mother: Marlene Carroll. Address: Solano County Jail, Fairfield, California."

Also, as a part of said record there was included an unverified typewritten statement signed by Jule O. Pritchard, Probation Officer, filed April 23rd. The only other document in said record is the Order of Commitment, copy of which was attached to respondents' return. There is nothing to show upon what evidence, if any, the court acted.

The report of the probation officer, after stating facts pertaining to the arrest of Marlene Carroll, recited that: "For further investigation of this case, Chief of Police, Rex Clift, went to Sacramento, California, to the address of 2835—38th Street, the home of one Ben Tottila, and picked up and brought to Solano County, the said girl in question, Edwina Mae Moilanen." It further stated that upon questioning Edwina regarding the extortion charge placed against Marlene Carroll, the Chief of Police believed that the said Edwina was leading an idle and dissolute life, and "placed the said Edwina Mae Molianen in the Solano County Juvenile Hall and notified your Probation Officer of same." Then followed a discussion of possible previous delinquencies of the minor, and expressions of uncertainty on the part of the probation officer as to whether or not the minor was in fact the child of Marlene Carroll; also, a recital of purported statements made by the minor when questioned at the detention home. The report further stated that since Edwina had been placed in the Juvenile Hall she had not been allowed any visitors. The recommendation of the officer was that the case be continued in order that the officer have further time to ascertain the true facts about the girl, her parentage and her legal residence, stating in conclusion that Marlene Carroll was to be tried in the Superior Court and Edwina might be called as a witness in that case. He recommended that if the court did not continue the matter, the minor be committed to the California Youth Authority. This was not done.

The commitment, which consists mainly of a printed form and which is dated April 20th, recites the following, only the portions italicized being typed into the form:

"The above named *minor, Edwina Mae Molianen,* having been regularly brought before the above entitled Court on this *20th* day of *April,* 1951, upon the petition filed herein as required by law, and it appearing to the Court that due and legal notice of the hearing of said matter has been given in all respects as required by law to the parties entitled thereto; and testimony having been duly taken in said matter and the Court finds that said person was born *May 10th, 1934* and comes within the provisions of subdivision *K* of Section 700 of said Juvenile Court Law of the State of California and that the welfare of said person requires that said person be declared a ward of the Juvenile Court.

"Now, therefore, it is hereby expressly found that all the statements of fact contained in said petition and herein set forth are true."

Then follows an order declaring the minor to be a ward of the Juvenile Court of Solano County, ordering that she be placed on probation under the care of the probation officer until she shall have reached the age of twenty-one years or discharged by order of the court, that she be committed to the Solano County Juvenile Hall until further order of the court, and that she not be permitted to have visitors without a written order of the court.

The statement of said order that "it appearing to the Court that due and legal notice of the hearing of said matter has been given in all respects as required by law to the parties entitled thereto," was relied upon by counsel for respondents as conclusive upon this court at the hearing before us, and as precluding us from hearing any testimony which would show that, in fact, no notice was served upon the mother of the child or anyone else and that there was no waiver of notice.

We overruled the objection and testimony was adduced by both parties. Counsel for respondents admitted that Lyyti Moilanen (Marlene Carroll) was not present before the Juvenile Court at the hearing there; and that no citation was issued. Also it should be noted that the finding of the court that all the statements of fact contained in the petition are true, constituted a finding that the statements in the petition that Marlene Carroll is the mother of the child and that her address was the Solano County Jail were true.

With the consent of counsel for respondents the minor, Edwina, was called as a witness, as was Hilma, Toppila, the friend of Mrs. Moilanen with whom Edwina was staying in Sacramento. Summarizing their testimony it shows, without contradiction, that in the evening of April 5th, about 9:00 o'clock, Rex Clift, Chief of Police of Fairfield, accompanied by his wife and one or two Sacramento police officers, came to the place of employment of Mrs. Toppila, told her that they had to take her as a material witness in a case against Marlene Carroll, and took her in a police car to her home where Edwina was asleep in bed. Mrs. Toppila, having been told by the Chief of Police that he had to pick Edwina up and take her, asked to be permitted to tell the child, which she did. She told Edwina that she would have to go to Fairfield, as her mother was in trouble, whereupon Edwina dressed and joined the officers. They stated that she would not have to take a bag, because she wouldn't stay that long, whereupon all were taken to the Sacramento police station, and from there the Chief and his wife took the child to Fairfield. There Edwina was questioned by Mr. Raftery, the deputy district attorney, in the presence of the chief and his wife and a court reporter, and then taken to the Juvenile Hall in Fairfield and detained there without being allowed to see her mother.

Mrs. Moilanen, called as a witness, testified that she was never served with any papers to appear in court on April 20th; that she was not present when her daughter was made a ward and did not know anything about it until it was all over; that she had been awarded Edwina's custody in a divorce proceeding in Oregon; that prior to her arrest in Fairfield her address and that of her daughter was San Diego; that she had never lived in Solano County, nor been in the county before she was arrested except to stop at a gas station to make a telephone call on her way to Sacramento.

Chief of Police Rex Clift, called as a witness for respondents, stated that he came to Sacramento, after it had been decided upon by Mr. Raftery, to talk to Edwina; that he took her to Fairfield because "It was necessary, statement against her mother. There was a question she was pregnant. When I came up and found a possibility of being pregnant I wanted her to talk before the Court Reporter"; that "it was vital to my case." He said that he did not disclose to Edwina the real purpose of his visit, which was to question her as a possible witness in the prosecution against her mother; and that he had no warrant of arrest or other process.

Jule O. Pritchard, Chief Probation Officer of Solano County, called as a witness by respondent, stated that he had talked to Edwina in the detention home, and to Marlene Carroll in jail, in an endeavor to find out the girl's parentage. He also produced a letter given to him by Marlene to be delivered to Edwina, which he had failed to deliver and which was offered in evidence, and admitted subject to a future ruling as to its admissibility. He admitted that he knew during the hearing in the Juvenile Court of the divorce decree in Oregon awarding the custody of Edwina to her mother, Lyyti Moilanen, on February 10, 1947, and ordering the father, Edwin Moilanen, to pay $75 per month for the child's support.

Rita Warford, called by respondents, testified that she remembered that Mr. Pritchard read to the court at the hearing on April 20th extracts from a letter from the father of the minor, but what they were does not appear.

[2] From what precedes, certain things stand out clearly, to wit: that the minor was not a resident of Solano County, nor was she "found" within it. She was taken there from Sacramento, without process or authority of any kind, for the purpose of securing a statement from her by the assistant district attorney and the chief of police to aid them in the prosecution of her mother. Having brought her into the county for the aforesaid purpose she was then detained by resorting to Juvenile Court proceedings, in order that she would be available as a witness. No notice to the child's mother, be she parent or guardian, was given of the Juvenile Court proceedings which terminated in an order declaring the minor a ward of the court; and there was no finding such as is required by section 739 of the Welfare and Institutions Code, before a court may deprive a parent of the custody of her child. In 76 A.L.R. 247, it is said: "It has been uniformly held in cases based on statute and principle, that a parent cannot be deprived of the custody of a child in commitment proceedings, without notice and an opportunity to be heard." Citing Ex parte Becknell, 119 Cal. 496, 51 P. 692, and In re Hill, 78 Cal.App. 23, 247 P. 591, and cases from other jurisdictions.

[3, 4] However well intentioned public authorities may be in proceedings regarding wayward minors, the fact remains that such children should not be deprived of their liberty, nor their parents deprived of their children, without due process of law. Parents, guardians or others in whose custody a minor child may be found, are entitled to notice of hearings in proceedings instituted for the purpose of separating children from custodians, and such notice has been declared in numerous cases to be a jurisdictional requirement.

In re Creely, 70 Cal.App.2d 186, 190, 160 P.2d 870, 872, it was said that "Due process of law requires sufficient notice to the parents with an opportunity for them to be heard." That such notice is jurisdictional was also held by this court in Re Spiers, 15 Cal.App.2d 487, 59 P.2d 838; People v. Spiers, 17 Cal.App.2d 477, 485, 62 P.2d 414, and in Re Staser, 84 Cal.App.2d 746, 753, 191 P.2d 791, and by the Supreme Court in Re Etherington, 35 Cal.2d 863, 867, 221 P.2d 942.

[5, 6] Respondents say, however, that, even conceding that such service of notice is jurisdictional, where the order of the court contains the language hereinbefore set forth regarding service, the contrary may not be shown by testimony dehors the record made in the lower court. We cannot accede to that contention. While, in the absence of evidence to the contrary, the validity of an order of court will be presumed, a mere recital in such an order regarding the jurisdictional fact of service of notice, to wit: "that due and legal notice of the hearing of said matter has been given in all respects as required by law to the parties entitled thereto," does not preclude a showing in a habeas corpus proceeding of the fact that no notice at all was

given to the mother, guardian or any other person having custody of said child. In the first place, such an allegation is a pure conclusion or recital; the words are weasel words. Whether it purports to find that no notice was necessary, or that it was given to someone not named, or whether no notice was given to anyone because there was no one entitled thereto is left to speculation.

In recent years the scope of matters which may be shown on hearings in habeas corpus proceedings has been definitely broadened. In Mooney v. Holohan, 294 U. S. 103, 55 S.Ct. 340, 342, 79 L.Ed. 791, the United States Supreme Court held that where in a petition for a writ of habeas corpus it was alleged that conviction of a person charged with crime had been secured by the use of perjured testimony known to the prosecuting authorities to be perjured, there was a sufficient allegation of lack of due process to justify inquiry into the facts in a habeas corpus proceeding. It did not, itself, proceed to take such testimony, but denied the writ without prejudice, relegating the petitioner to the courts of the state for a writ, based upon the grounds stated in the one then before it, saying: "No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States." Following the suggestion of the United States Supreme Court, proceedings in habeas corpus were instituted in the Supreme Court of California, and there prolonged and extensive testimony was taken, and the matter given a full hearing. In re Mooney, 10 Cal.2d 1, 73 P.2d 554. Certainly if the grounds stated in the Mooney petition showed lack of due process justifying review in habeas corpus proceedings, lack of due process because of failure to secure jurisdiction would appear to be so reviewable.

Further expansion of the function of habeas corpus proceedings in this state is evidenced by the decisions in In re McVickers, 29 Cal.2d 264, 176 P.2d 40, and In re Seeley, 29 Cal.2d 294, 176 P.2d 24, in neither of which due process was involved. Also see statement in People v. Adamson, 34 Cal.2d 320, at page 327, 210 P.2d 13, at page 16, that: "With expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights." This court has clearly given recognition to the right of a petitioner for a writ of habeas corpus to show, if he can, that there has been a failure to observe the requirements of due notice in cases under the Juvenile Court law, as against a recital in a judgment that due and legal notice has been given to all persons entitled thereto, or similar language. While in the Staser case, supra, the writ of habeas corpus was discharged, it was not discharged because the order of the Juvenile Court recited that due notice was given to all parties entitled thereto, but because petitioner failed to show that the mother of the minor was not served with a citation. The opinion states, 84 Cal.App.2d at page 753, 191 P.2d at page 795: "We assume that the issuance and service of a citation upon the mother twenty-four hours before the hearing were a necessary prerequisite to confer jurisdiction on the court (People v. Spiers, 17 Cal. App.2d 477, 484, 62 P.2d 414; Welfare & Institutions Code, sec. 726), although that failure may be waived by personal appearance of the mother at the hearing, and without objection on that ground. People v. Spiers, supra. No evidence was adduced at the habeas corpus proceeding to show whether the citation was issued or whether the mother was or was not present at the hearing in the juvenile court. The petitioner's attorney did state that he wanted to call the mother as a witness for that purpose, but he failed to do so." Also, 84 Cal. App.2d at page 754, 191 P.2d at page 795: "For the reason that the petitioner, Thelma Hynes, failed to sustain the burden cast upon her to prove that the citation was not issued and served on her at least twenty-four hours before the hearing and that she did not appear and waive due notice thereof, we are constrained to hold that the order adjudging the minor to be a ward of the court is adequately supported by the record."

In Re Bell, 19 Cal.2d 488, 500-501, 502, 122 P.2d 22, the court said that while a habeas corpus proceeding is in the nature of a collateral attack, and carries with it a *presumption* of regularity, such presumption is not conclusive; that a petitioner seeking habeas corpus is not confined to the face of the record in attempting to sustain the burden of proving his conviction was in violation of his constitutional rights; and that the courts of the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at his trial but of any necessary additional evidence bearing upon the infringement of his constitutional rights, citing In re Mooney, supra, as holding that an examination of facts outside the record, to determine whether petitioner was denied due process of law, was proper.

In the Etherington case, supra, the court's decision is to the effect that notice is a jurisdictional prerequisite in a Juvenile Court proceeding; but that, as in that case the cause was continued at the request of the mother of the child and she then appeared and participated in the hearing, she thus waived the requirement of 24 hours' notice but the decision implies that had there been no such appearance and waiver there would have been no jurisdiction to proceed, since it was undisputed that the prerequisite notice had not been given to her.

The said minor, Edwina Mae Moilanen, is hereby released and discharged from custody, and ordered returned to her mother, Lyyti K. Moilanen, also known as Marlene Carroll.

PEEK, J., concurs.

VAN DYKE, Justice (dissenting).

I dissent.

At the outset it was contended by respondents that habeas corpus being a collateral attack upon the judgment of the juvenile court, we must test the validity thereof solely by an inspection of the record. Evidence was taken by this Court over objection, touching the truth of the findings on jurisdiction, but obviously if the objection be sound the case must be disposed of without regard to such evidence. I think the objection was good. To clarify the issue, however, it may be proper to say that this evidence did show, without contradiction, that Lyyti Moilanen, whom the petition alleged to be the mother of the minor, was at all times confined in the Solano County jail as alleged in the petition, that no citation was issued directed to her, that no notice of any sort was given to her of the pendency of the proceedings, nor opportunity to appear thereat, and that she did not appear.

The petition in the juvenile court proceedings which initiated the same contains in brief the following allegations: That Edwina is 16 years of age and not an inmate of any State institution; that she comes under the provisions of subdivision (k) of Section 700 of the Welfare and Institutions Code [the Juvenile Court Law] as being a person in danger of leading an immoral life; that she resides in Solano County; that her mother is Marlene Carroll; that the mother resides in Solano County and is in that county's jail. Petitioner prays that a time and place for the hearing of the petition be fixed; that Marlene Carroll be cited to appear at said time and place and show cause why the minor should not be adjudged a ward of the court; and that the court at said time inquire into the truth of the matters alleged and make such order as would be meet and proper. The judgment and order of commitment recites that the minor had been regularly brought before the Court on April 20, 1951, upon the petition, and that it appeared "to the court that due and legal notice of the hearing of said matter had been given in all respects in the manner required by law to the parties entitled thereto"; that testimony had been taken and that the court found that the minor was born May 10, 1934; that she came within the provisions of subdivision (k), Section 700, of the Welfare and Institutions Code, and that her welfare required that she be made a ward of the juvenile court. It is expressly found that all of the statements of fact contained in the petition are true, thus finding that the minor resides in Solano County; that Marlene Carroll [stipulated herein to be the same person as Lyyti Moilanen] is her mother; that she also resides in that county, and that her address is the Solano County jail. It is decreed that the minor be made a ward of the court and that she be placed on probation under the care of the probation officer of that county "until she shall have reached the age of 21 years or be discharged by the court." It is further ordered that she be committed to the Solano County Juvenile Hall until further order and that, likewise until further order, she be not permitted to have visitors without a written order of the court.

At the hearing, by stipulation of both sides and consent of the court, the petition for the writ was treated as a traverse to the return.

Proceedings to declare a person a ward of the juvenile court are governed by Division 2, Part 1, Chapter 2, Article 7, of the Welfare and Institutions Code of this State. By Section 720 it is declared, as to the manner of invoking the court's jurisdiction, that a person subject to the court's jurisdiction may be brought before the court by a petition praying that such person be declared the court's ward and so dealt with. Section 721 provides that the petition shall show that there is within the county, or residing therein, such person, and that the petition shall contain a statement of the facts relied upon and the names and residences of the parents or guardian of the person involved, if known to the petitioner. The petition here met these requirements and hence properly invoked the jurisdiction of the juvenile court. Section 726 requires that citation shall issue, directing such parent or guardian residing within the county to appear at a time and place theretofore fixed for hearing the petition and that service of such citation shall be made at least 24 hours before the hearing time so set. With regard to service of such citation, however, the section provides that it may be waived "by a voluntary appearance entered in the minutes" or "by a written waiver of service of citation filed with the clerk" prior to the hearing. It has been held that compliance with these provisions, where the facts are as alleged in the petition here involved, is jurisdictional and that failure to comply therewith makes void any judgment which may follow.

In a habeas corpus proceeding and where the return shows detention by virtue of the judgment of a court of general jurisdiction, the attack upon the judgment as constituting such justification for detention is a collateral attack and we must indulge in every presumption "in favor of the validity of the judgment or order of a court of general jurisdiction, and any condition of facts consistent with its validity and not affirmatively contradicted by the *judgment roll* will be presumed to have existed. * * where the record is silent, it will be presumed that process and pleadings were properly served and that due proof of such service was presented to the court. * * * Similarly, notice, or facts rendering it unnecessary, are presumed unless the record shows the contrary, and when the court may shorten time or dispense with notice, it will be presumed that the court did so if the order is silent upon the point. * * * Under this general rule it will be presumed, when necessary, that the parties consented to the court's action or waived objection thereto. For example, although there is no rendition of judgment when findings are required unless findings have been made or waived * * *, it has been held on a judgment roll appeal, where the court was limited to matters appearing on the face of the judgment roll, that a waiver of findings would be presumed unless the record affirmatively showed the contrary." (Italics added.) Phelan v. Superior Court, 35 Cal.2d 363, 373–374, 217 P.2d 951, 958.

An application of the foregoing rules necessitates a holding that the record here shows jurisdiction in the Solano County Juvenile Court to make the minor Edwina Moilanen a ward of said court. All of this, of course, is not to say that the court actually had jurisdiction. But, in view of the record and of the presumptions which must be indulged, the court's action cannot be successfully attacked on habeas corpus. The remedy is by some form of direct attack, as by motion to vacate or appeal. The best that can be said for petitioner, the record only considered, is that it is silent upon the matter of how in one of the various ways possible, as by service of citation, or waiver thereof or appearance at the hearing, jurisdiction to proceed was obtained. But on these matters the recitals of the court that due notice had been given to all persons entitled thereto and that the matter had been regularly heard by the court necessitate a holding that the court had jurisdiction to proceed and to make the order which it did make, declaring the minor a ward of the court. In re Spiers, 15 Cal.App.2d 487, 492–493, 59 P.2d 838, 841. In that case the court said: "* * * It was stipulated in open court that the petition should be considered as a traverse of the return, which of course leaves undetermined whether the mother of the minor was or was not present in court. Nothing else appearing, the recital of the court that due notice had been given to all persons entitled thereto would necessitate a holding that citation had been issued and properly served."

See, also, In re Orosco, 92 Cal.App.2d 352, 207 P.2d 656, and People ex rel. Pollock v. Bogart, 58 Cal.App.2d 831, 138 P.2d 360.

Concerning the contention advanced by petitioner that the court had no jurisdiction to proceed because the minor had been brought into the county by force and without warrant of law, I think that, assuming that such was done, the effect upon jurisdiction could not be determined in this proceeding. Matter of Maginnis, 162 Cal. 200, 205–206, 121 P. 723, 726. The court there said:

"* * * The decisions in this court, so far as they go, are to the contrary. In De la Montanya v. De la Montanya, 112 Cal. 131, 44 P. 354, Temple, J., delivering the opinion of the court, says: 'I do not doubt that the mere presence of infants within the jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state.'

"But it is not necessary, in the case at bar, to go into this question. The petition of Fairweather, initiating the proceedings in the juvenile court, alleges that the minor is residing in the city and county of San Francisco, and the order committing the child to the custody of the Children's Agency finds, as a fact, that this allegation is true. The petition, therefore, presented to the juvenile court a case which, under any view, was within its jurisdiction, and the court had power to decide whether the averments of jurisdictional facts were true. Its decision on the facts, however erroneous, cannot be reviewed on *habeas corpus*. The sufficiency of the evidence to sustain the finding 'is a matter into which we cannot inquire upon this writ. Under the writ, the court can only inquire into the jurisdiction to find, not into the correctness of the findings. * * *' [Cases cited.]"

One more matter should be discussed. The statute plainly requires that even though the court, in the exercise of its jurisdiction invoked by the petition, has regularly proceeded within that jurisdiction to make the subject minor a ward of the court, nevertheless where, as found by the court, here, there is a parent or guardian resident within the county, the court cannot take the actual custody of the minor from such parent or guardian without finding that one or more of the statutory conditions, set forth in Section 739 of the Welfare and Institutions Code, justify such change in custody.

It has been held that the making of such a finding is a jurisdictional requisite and that an order made without that act having been performed, which order takes the custody from the parent or guardian under such circumstances as is presented by the record here, renders the order to that extent void. The result of that would be that if that finding was not made the detention of Edwina Moilanen by the probation officer would be illegal and she would have to be discharged from that custody. What does the record show? First, the order of commitment contains no such finding, expressly, nor do I think that any of the language thereof can be said to impliedly embrace such finding. The recital that the minor was regularly brought before the court refers only to the main proceeding looking toward making her a ward of the court. The recital as to notice being given the mother goes no further than the matter to which it expressly refers. The finding that the minor comes within the provisions of subdivision (k) of Section 700 of the Welfare and Institutions Code is of no aid and the same must be said of the finding that the welfare of the minor required that she be made a ward. The finding that the allegations of the petition are true likewise does not reach the question here. Nor does the order, itself, committing the ward to the custody of the probation officer, affect the inquiry, for if no such finding was made in fact, and the record should so show either affirmatively or presumptively, then the order itself is no order at all. But the result of all this is simply to declare that the record is silent upon the issue of whether or not such finding was in fact made and under such circumstances the presumption comes to the aid of the order and the order is valid, as against the attack here made.

I have no quarrel with that part of the majority opinion which asserts that in the particulars therein mentioned the traditional scope of the writ of habeas corpus has been extended. However, I think that the cases referred to do not warrant what seems to me to be a new and very extensive broadening of the scope of the writ. If the writ can be used as it is here being used, then I think that mischievous results will follow. What has been done is to declare that, notwithstanding the trial court has passed upon the facts touching its jurisdiction to proceed and has declared in the record that those jurisdictional facts exist, the truth of the findings may be reviewed upon habeas corpus and that in doing so evidence may be taken contrary to the findings and a new determination be made upon habeas corpus as to whether or not the findings of the court were wrong in fact. If this can be done in this collateral proceeding, then I anticipate that such indirect attacks will become common. No effective limitations of time will be available and the judgments of courts will be made insecure.

I would discharge the writ.

Hearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.

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105 Cal.App.2d 250

BOGART v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 17867.

District Court of Appeal, Second District, Division 1, California.

July 2, 1951.

Mandamus proceeding by Esther P. Bogart against The Board of Medical Examiners of the State of California, and others, to review order of Board revoking license to practice medicine. The Superior Court of Los Angeles County, Joseph W. Vickers, J., sustained the order, and plaintiff appealed. The District Court of Appeal, Doran, J., held that the evidence supported trial court's findings that plaintiff violated Business and Professions Code, § 2377, in the procuring and performing of a criminal abortion.

Judgment affirmed.

See also 99 Cal.App.2d 170, 221 P.2d 168.

1. Appeal and error ⚷989, 996

The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury or by trial judge, and when two or more inferences can be reasonably deduced from the facts the reviewing court is without power to substitute its deductions for those of the trial court.

2. Mandamus ⚷168(4)

Evidence was sufficient to sustain finding of trial court in mandamus proceeding to review order of Board of Medical Examiners that Board properly revoked physician's license to practice medicine for procuring and performing criminal abortion. Business and Professions Code, § 2377.

3. Administrative law and procedure ⚷683, 786

Mandamus ⚷187(9)

Physicians and surgeons ⚷11(3)

In proceeding to revoke physician's license for performing an abortion, conflict in testimony was a matter to be initially determined by Board of Medical Examiners, and once again by trial judge in mandamus proceeding to review Board's order of revocation. Business and Professions Code, § 2377.

4. Evidence ⚷317(3)

In mandamus proceeding to review order of Board of Medical Examiners revoking physician's license to practice medicine for performing an abortion, testimony of doctors whose personal examination of patient indicated that an abortion was performed was not hearsay based on statements made by patient. Business and Professions Code, § 2377.

5. Mandamus ⚷154(4)

In mandamus proceeding to review order of Board of Medical Examiners revoking physician's license to practice medicine for performing an abortion, where physician questioned proceedings before the Board, it was incumbent upon physician to set forth his objections in petition for writ. Business and Professions Code, § 2377.

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Sidney W. Kaufman, and N. Stanley Leland, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal from a judgment discharging an alternative writ of mandate, denying a peremptory writ of mandate, and sustaining an order of the respondent board revoking appellant's license to practice medicine. No new evidence was offered at the hearing in Superior Court, the matter being submitted upon the record of the proceedings before the Board, together with written briefs and oral argument of the parties hereto.

According to the appellant's brief, appellant's license was issued on December 17, 1945. On July 8, 1949 appellant was charged with a violation of Section 2377 of the Business and Professions Code in the procuring and performing of a criminal abortion upon the person of one Gayle Rubin on or about May 31, 1949. The respondent Board found the appellant guilty as accused.

The record discloses that Gayle Rubin, a single girl aged about 20, was some five weeks pregnant when the appellant woman physician was first consulted. One Jean Warfield accompanied Miss Rubin on this first visit, at which time appellant, according to Gayle Rubin, set a price of $150, ordered Miss Rubin to take a laxative and to return March 31, 1949 with $100; appellant would do the rest.

On the designated day, accompanied by a boy friend, Miss Rubin went to appellant's office when according to the victim's testimony, the physician used some sort of liquid in a syringe. No scraping or cutting was felt but the girl felt a little pain and had some cramps. Thereafter, in response to a telephone call and due to the fact that Miss Rubin had been bleeding for two days, Dr. Bogart came to the patient's apartment, ordered everyone to leave the room and stated that there was nothing to worry about.

Dr. Walter Williams, who was called on June 4, 1949, diagnosed the trouble as "a threatened or incomplete miscarriage with localized peritonitis". Miss Rubin was sent to the general hospital on June 5th; Dr. Donald J. Crawford there examined the girl and concluded that there had been a completed abortion following a criminal induction.

Appellant denied the accusation; claimed to have first seen Miss Rubin at the latter's apartment on June 2nd in response to a telephone call that a girl was sick and wanted a woman doctor; denied even making a pelvic examination, and claimed to have merely given the patient a business card with instructions "to return tomorrow morning to my office for complete physical check-up and X-ray of the back because it was the only complaint at the time, that she told me a funny feeling in the back and funny sensation in the legs". Appellant's son corroborated appellant's testimony that Dr. Bogart was at the son's house during the evenings of May 29, 30 and 31, 1949, and that the mother did not make any calls during that period.

It is appellant's contention that "The decision is not supported by substantial evidence in the light of the whole record, nor by any evidence whatsoever". In this connection appellant argues that "the only evidence that an abortion had been attempted or committed by the appellant came from the lips of Gayle Rubin, the alleged victim". It is further contended that the diagnoses of Dr. Williams and of Dr. Crawford were based upon Miss Rubin's statement that a criminal abortion had been committed; that, in effect the Board ordered revocation of appellant's license "on the testimony of Miss Rubin alone corroborated only by hearsay evidence wherein the two physicians repeated what she had told them". Alleged discrepancies in Gayle Rubin's testimony are also pointed out and that "an analysis of Miss Rubin's testimony shows it to be of practically no value". The trial court's findings are said to be based upon only surmises in respect to the commission of the alleged act.

[1] It is elementary, as stated in Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20, 25, that "the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury (or by a trial judge). When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court".

[2] Under the rule as above stated, appellant's contentions in reference to alleged insufficiency of the evidence do not furnish ground for reversal of the trial court's findings. That these findings to the effect that appellant was guilty of the act charged are here supported by substantial evidence, cannot well be doubted. It is quite true that the appellant's version of what took place is diametrically opposed to that offered by Gayle Rubin. This fact in no manner affects the application of the above rule; it would be difficult to find a case where no contradiction exists.

[3] Appellant has pointed out various alleged discrepancies and inconsistencies in the victim's testimony. Discrepancies may also be found in the appellant's explanations, as pointed out in respondents' brief. Any conflict in testimony was a matter to be initially determined by the Board, and once again by the trial judge. The record fails to indicate that the trial judge did not "exercise independent judgment in reviewing the evidence", as argued by the appellant. Nor does it appear that the trial court's findings were based upon mere surmises of guilt. Substantial evidence and reasonable inferences support these findings.

[4, 5] As stated in respondents' brief, "an examination of the petition for a Writ of Mandate shows that no complaint whatever was made to the introduction of any hearsay testimony." And, as said in Dare v. Board of Medical Examiners, 21 Cal.2d 790, 800, 136 P.2d 304, 309, "If the proceedings before the board are to be questioned at the trial it would be the duty of the petitioner to set forth his objections in the petition for the writ". Moreover, the testimony of Dr. Williams and Dr. Crawford was not, as appellant argues, based upon mere hearsay statements made by Miss Rubin, but upon personal examination of the patient indicating that an abortion had been recently performed. No merit is found in any of the appellant's contentions.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

105 Cal.App.2d 324

PEOPLE v. PORTER et al

Cr. 4611.

District Court of Appeal, Second District, Division 2, California.

July 6, 1951.

Hoyt Porter and Frank Deckard were convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of murder in the first degree, and they appealed. The

District Court of Appeal, Wilson, J., held that the evidence supported the convictions.

Judgments affirmed.

1. Criminal law 🔑351(10)

False and contradictory statements are evidence of consciousness of guilt.

2. Criminal law 🔑407(1)

In murder prosecution, court could take into consideration fact that one defendant admitted that his associate made an accusatory statement and that he failed to deny accusation, and court could determine whether under circumstances in which statement was made defendant's conduct indicated consciousness of guilt.

3. Criminal law 🔑552(3), 561(1)

Rule that circumstantial evidence must lead to but one reasonable hypothesis against defendant before it can be so used and requirement that guilt be proved beyond reasonable doubt are for application in and are primarily for concern of trial court.

4. Criminal law 🔑260(11)

Appellate court will not alter or hold unsupported trial court's findings merely because it might reasonably draw inference different from one trial court reasonably drew, or might not be convinced beyond reasonable doubt that it would have made same findings.

5. Criminal law 🔑260(11)

After conviction, all intendments are in favor of judgment, and it will not be set aside unless record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence, circumstantial or otherwise, to support conclusion reached by trial court.

6. Homicide 🔑250

Evidence supported convictions of murder.

7. Criminal law 🔑1036(1)

Objections to admission of re-recordings of original wire recording of conversation between codefendants not raised in trial court could not be raised for first time on appeal.

8. Criminal law 🔑695(5)

Defendants who objected to introduction of re-recordings of original wire recording of conversation between them waived all grounds of objection not stated.

9. Criminal law 🔑386

In murder prosecution, re-recordings of original wire recording of conversations between two codefendants were not objectionable as evidence because they did not reflect entire conversation that took place.

10. Criminal law 🔑417(1)

Witness may testify to part of conversation if that is all he heard and it appears to be intelligible.

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Thomas G. Neusom, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WILSON, Justice.

By information defendants were charged jointly with the crime of murder. Each pleaded not guilty. After trial by the court without a jury they were found guilty of murder in the first degree and each was sentenced to the state prison for life. Their motion for new trial was denied and they are appealing from the judgment upon the grounds (1) insufficiency of the evidence; (2) the court committed reversible error in admitting re-recordings of a wire recording of a conversation between appellants.

The scene of the assault and robbery which resulted in the death of the victim was a stop of the Pacific Electric Railway line known as Valley Junction in the eastern part of Los Angeles, slightly to the north and east of the General Hospital. The Ramona Freeway runs easterly of and parallel to the tracks at this point and over it is a pedestrian bridge which on its west end terminates in a cement stairway leading to the rear of the passenger waiting station at Valley Junction and on its easterly end terminates in a stairway which leads up to the Pomeroy Street ramp, which in turn after a few feet intersects the main artery of Soto Street.

About 10:00 o'clock in the evening of May 17, 1949, Richard Castro was on the ramp leading to the passenger bridge and as he started to go down the stairs he heard a thud and saw a man fall flat on his face by the waiting station at Valley Junction. Within a couple of seconds thereafter he saw two men rush from behind the station and search the victim's pockets after which he saw them run toward the tracks, proceed north along the tracks and disappear through some shrubs and brush. The junction was lighted by an overhead light. Castro turned around and ran to a hot dog stand on the corner of Pomeroy and Soto and he and a person from the stand ran back across the pedestrian bridge to the victim. Castro did not see or pass anyone on the bridge. When they reached the scene of the crime they found a police officer there.

The officer had arrived on the Pacific Electric car which stopped at the junction about one or two minutes after 10:00 P.M. He immediately saw the fallen victim lying on his back a few feet from the passenger station and about five or six feet from the tracks. There was blood alongside the victim's head. The pocket on the left side of his trousers was out and a watch chain was found approximately a foot from the body.

About 10:00 o'clock of the same evening two colored men were seen by a boy, one James Krout, running across Soto Street where it is intersected by Wabash Street toward Valley Junction and disappearing from view at the Pomeroy ramp. The boy continued north on Soto to the hot dog stand and saw Castro as he ran to the stand. Neither Castro nor Krout could positively identify as defendants the men they saw although each testified they were similar in appearance.

About ten minutes after 10:00 of the same evening one Samuel Sandoval, who knew defendant Porter, saw the two men about five blocks from the scene of the crime coming from the vicinity of Soto Street and walking fast, "sort of trotting." In reply to Sandoval's inquiry as to where they were coming from defendant Porter said they had just "pulled a caper."

On the following day Richard Hirsch saw defendant Porter and asked him if he had been around Valley Junction that night. Defendant told him he had been there with another man, that he had "pulled a caper down there" and got a gold pocket watch and some change. Porter told Hirsch to keep quiet.

Defendants were held for investigation and later released. At that time each of them admitted he was in the vicinity of Soto and Pomeroy at 10:00 P.M. on May 17, but stated they went directly home. Each of them denied he had been drinking.

About a year after the crime was committed defendant Porter was advised by an investigating officer that there was evidence connecting him with the crime. Porter stated he would tell the police everything that happened at Valley Junction if he could talk to defendant Deckard. Defendants were brought together and left alone. A wire recording was made of their conversation and the technician who made the recording also listened to the conversation directly through the amplifying equipment. During the conversation Porter indicated to Deckard that they had gone down to Valley Junction after crossing Soto Street to board a car to Watts; the victim was lying there when they arrived; they thought he was drunk and went through his pockets, took a watch and several dollars, changed their minds about going to Watts and went home. Porter asked Deckard if he "wanted to put it that way." Deckard said it would be all right with him and if Porter wanted to do it he would "go for it." Deckard told Porter to do all the talking and Porter assented, admonishing Deckard to listen to every word he told the officers. When the officer returned Porter told the following story: He and Deckard had been at the house of a friend; they had gone from there to a hot dog stand at Soto and Pomeroy Streets about 9:30; from there they had gone down to Brooklyn Avenue and a short time later returned to Soto; he told Deckard they wanted to go to Watts and they had run across the street "the way the guy said" and down the ramp leading to Valley Junction where they saw "this guy lying down"; he was short of money and when he saw the man lying there he got the idea he wanted to search his pockets which he did, obtaining a small coin purse and a pocket watch; the man was lying on his right side with his legs "sort of curled up under him"; he believed the chain broke when he jerked the watch out of the victim's pocket; about this time they saw a streetcar coming from another direction and not wanting to be seen, they ran along the tracks leading north from Valley Junction; they then proceeded home and on the way met Sandoval. When asked why they wanted to go to Watts, Porter stated Deckard was feeling pretty "high" and they just made up their minds to go there; the next day he saw some of his friends and someone called him a murderer; he "went along with the joke," neither affirming nor denying the charge. Both Porter and Deckard stated they had been drinking and that they were "high." Porter admitted disposing of the watch by throwing it in a ditch, later directing the officers to the spot where the police recovered the watch.

Defendants testified in their own behalf. Each of them admitted they were at Valley Junction a little before 10:00 P.M.; that Porter turned the victim over and took the watch and several dollars and they then ran north along the tracks. Each of them testified, however, that the victim was lying on his back when they first saw him; that they were at the waiting room about one or two minutes. Porter denied he told Sandoval he had "pulled a caper" and also denied he had told the police officers on the day following the assault that they had not been drinking. Defendants admitted committing the robbery but denied committing the assault which resulted in the victim's death. Their explanation as to why they had not told the story sooner was that when the officers told them they had found witnesses who could place them at Valley Junction on the night of the crime it looked bad for them so they decided to admit the theft.

Defendants contend "the evidence introduced at the trial was purely circumstantial and not sufficient as a matter of law to establish their guilt beyond a reasonable doubt." Their contentions are that the testimony of Richard Castro was inherently improbable and not entitled to credibility; neither Castro nor Krout was able to identify defendants; Castro testified he was on the ramp going down the stairs leading to the waiting room and heard a thud and saw a man fall; he did not see anyone near the man but saw some men run from behind the waiting room and rifle the victim's pockets; Castro failed to see what caused the thud although he should have been able to see it since the area was well lighted.

While Castro and Krout could not positively identify defendants, each of them testified the men they saw were similar in appearance to defendants. Moreover, the admissions of defendants themselves establish that they were at the scene of the crime and robbed the victim at about the time Castro heard the thud and saw the man fall. The body lay only about ten feet from the waiting room. Since it was the thud which attracted Castro's attention it does not necessarily follow that he would have seen the person who struck the blow. Defendants admitted they were at the waiting room a minute or two and Castro testified that within a second or two after he heard the thud and saw the victim fall he saw two men, similar in appearance to defendants, rush from behind the waiting station and rifle the victim's pockets. There is nothing unreasonable or inherently improbable in Castro's testimony.

Defendants assert the evidence establishes only that they had an opportunity to commit the assault, that such evidence can have no weight apart from other circumstances unless it excludes all reasonable opportunity for its commission by another, and standing alone it is insufficient to sustain a conviction, citing People v. Tarbox, 115, Cal. 57, 46 P. 896.

[1] The evidence goes far beyond establishing that defendants had an opportunity to commit the crime and indeed

excludes all reasonable opportunity for its commission by another. Their testimony as well as that of witnesses placed them at the scene of the crime at the time it was committed. No one else was observed on the ramp or the bridge and defendants have not testified to encountering anyone else in the area. At the time of their arrest they denied they had been drinking and made no mention of the fact that they had been at Valley Junction. At the time of trial they admitted they were at Valley Junction at or about the time of the assault and that they robbed the victim; they also asserted they had been drinking and were "pretty high." They denied they told the police officers they had not been drinking and Porter denied telling the witness he had "pulled a caper." False and contradictory statements are evidence of a consciousness of guilt. People v. Turner, 86 Cal.App.2d 791, 801, 195 P.2d 809; People v. Darrow, 212 Cal. 167, 177, 298 P. 1; People v. Kittrelle, 102 Cal.App. 2d 149, 227 P.2d 38, 43.

[2] The trial court could take into consideration the fact that defendant Porter admitted that one of his associates made an accusatory statement and that he failed to deny the accusation and could determine whether under the circumstances in which the statement was made his conduct indicated a consciousness of guilt. People v. Simmons, 28 Cal.2d 699, 712–713, 172 P. 2d 18.

In addition to the foregoing, there was defendants' conduct in refusing to make any statements to the police until they had an opportunity to consult with each other. Wholly aside from the conversation itself, the court could infer, inasmuch as defendants knew there was substantial evidence against them, that they were seeking to devise a defense that was consistent with the evidence they knew the officers had. From the conversation it is obvious Porter was instructing Deckard as to the defense they were to adopt and Deckard agreed to the plan. Inasmuch as Deckard had accompanied him there could be no other reason for his relating what took place. Since they dropped their voices it is also apparent they did not want to be overheard laying their plans.

[3–6] Defendants maintain that in order to sustain a conviction on circumstantial evidence all the circumstances proved must not only be consistent each with the others but consistent with the hypothesis that the accused is guilty and at the same time inconsistent with the hypothesis of innocence; that where all the circumstances are as compatible with innocence as with guilt, a reasonable doubt of guilt arises. The rule that circumstantial evidence must lead to but one reasonable hypothesis against a defendant before it can be so used, and the requirement that guilt be proved beyond a reasonable doubt, are for application in and are primarily for the concern of the trial court. "An appellate court will not alter or hold unsupported the trial court's findings merely because it might reasonably draw an inference different from one the trial court reasonably drew, or might not be convinced beyond a reasonable doubt that it would have made the same findings." People v. Kerr, 37 Cal.2d 11, 229 P.2d 777, 779; People v. Huizenga, 34 Cal.2d 669, 675–676, 213 P.2d 710. After conviction all intendments are in favor of the judgment and it will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached by the trial court. People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Kerr, supra; People v. Kittrelle, 102 Cal.App.2d 149, 227 P.2d 38, 39; People v. Klinkenberg, 90 Cal.App.2d 608, 626, 204 P.2d 47, 613; People v. Schoeller, 96 Cal.App.2d 55, 60, 214 P.2d 572.

[7–10] Relying upon the case of People v. King, 101 Cal.App.2d 500, 225 P.2d 950, defendants contend that the court committed reversible error in admitting the re-recordings of the original wire recording of the conversation between them. The recordings consist of two reels of wire recording and a disc recording. The original wire recording was of the conversation between defendants in the office of the district attorney. The technician who took the recording re-recorded it on another wire recording for the purpose of eliminating as much as possible the background noises. The disc recording was also taken from the original wire recording and was made for the same purpose as the second wire recording. All three recordings were admitted into evidence. In People v. King, supra, the original wire recording was intentionally destroyed and was not available at the trial. Objection was made to the introduction into evidence of the re-recordings upon the grounds the discs were not the best evidence and were hearsay. The court held they were secondary evidence and under the circumstances should not have been received in evidence. In the instant case no such objection was raised in the trial court and it cannot therefore be raised for the first time on appeal. People v. Wignall, 125 Cal.App. 465, 474, 13 P.2d 995; People v. Sellas, 114 Cal.App. 367, 378, 300 P. 150. Appellants are deemed to have waived all grounds of objection not stated by them. The objection raised by defendants in the trial court was that the recordings did not reflect the entire conversation that took place. Such objection is without merit since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible. People v. Adamson, 27 Cal.2d 478, 485, 165 P.2d 3; People v. Tarbox, 115 Cal. 57, 64, 46 P. 896.

Judgments affirmed.

MOORE, P. J., and McCOMB, J., concur.

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105 Cal.App.2d 239

KENDALL v. BOARD OF OSTEOPATHIC EXAMINERS.

No. 14668.

District Court of Appeal, First District, Division 1, California.

July 2, 1951.

Rehearing Denied Aug. 1, 1951.

Hearing Denied Aug. 30, 1951.

J. Lane Kendall filed application for writ of mandate against the Board of Osteopathic Examiners of the State of California to compel the restoration of the petitioner's license as a drugless practitioner. The Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., affirmed the revocation and denied the writ and petitioner appealed. The District Court of Appeal, Bray, J., held that the evidence sustained the revocation on charges of procuring abortion and prescribing drugs in the absence of an emergency.

Judgment affirmed.

1. Mandamus 🔑187(9)

On appeal from denial of writ of mandate to compel restoration of drugless practitioner's license, court must review the evidence in light most favorable to respondent and determine whether there is any substantial evidence, contradicted or uncontradicted supporting trial court's conclusions.

2. Mandamus 🔑168(4)

Evidence supported denial of writ of mandate to compel restoration of drugless practitioner's license, revoked for procuring abortion and using drugs in absence of emergency. Business and Professions Code, §§ 2377, 2394; Pen.Code, § 274.

3. Physicians and surgeons 🔑11(3)

The board of osteopathic examiners was not required to prove pregnancy of patient in order to substantiate charge of procuring abortion as ground for revoking drugless practitioner's license. Business and Professions Code, §§ 2377, 2394; Pen. Code, § 274.

4. Abortion 🔑8

Proof of pregnancy is no longer required to establish guilt of abortion. Pen. Code, § 274.

5. Mandamus 🔑187(9)

Credibility of witnesses before board of osteopathic examiners in proceeding to revoke drugless practitioner's license was for the board to determine, not for reviewing court in mandate proceeding to compel restoration of license.

6. Physicians and surgeons 🔑11(3)

Board of osteopathic examiners was not required to disregard testimony that drugless practitioner had performed abortion on witness, merely because witness had attempted to extort money from practitioner as price of silence and had pecuniary interest in inducing revocation, though board should consider such facts as affecting credibility.

7. Mandamus ⚷168(4)

Record in mandamus proceeding to compel restoration of drugless practitioner's license did not support contention that board of osteopathic examiners refused to consider extortion plot shown in proceeding for revocation.

8. Physicians and surgeons ⚷11(2)

Board of osteopathic examiners would not be justified in excusing drugless practitioner from unprofessional conduct in procuring abortion, by fact that patient and her husband attempted to extort money from practitioner as price of silence.

9. Physicians and surgeons ⚷11(3)

Board of osteopathic examiners was not required to believe drugless practitioner's testimony, though not controverted by other witness, that emergency existed when he prescribed drugs. Business and Professions Code, § 2144.

10. Mandamus ⚷187(9)

If evidence in mandate proceeding, viewed in light most favorable to trial court's decision, sustained trial court's findings, reviewing court must affirm.

11. Administrative law and procedure ⚷443
Physicians and surgeons ⚷11(3)

Failure of drugless practitioner, in hearings for revocation of license, to avail himself of statutory proceedings for disqualification of member of board of osteopathic examiners conducting the hearing, barred him from raising the matter after hearing was concluded. Government Code, § 11512.

12. Administrative law and procedure ⚷467
Physicians and surgeons ⚷11(3)

Dismissal of charges against drugless practitioner in proceeding for revocation of license is not required to be with prejudice.

13. Administrative law and procedure ⚷311

An administrative, disciplinary proceeding is not to be judged by legal standards applicable to criminal prosecutions.

Piccirillo & Wolf, San Francisco, for appellant.

J. Robert Meserve, Los Angeles, for respondent.

BRAY, Justice.

Respondent board, after a hearing of certain charges, revoked petitioner's license as a drugless practitioner. On application to the superior court for a writ of mandate to compel the restoration of the license, the revocation was affirmed and the writ denied. Petitioner appeals.

Questions Involved.

1. Are the findings of the trial court and the board supported by the weight of the evidence?

2. Was petitioner denied a fair hearing because of alleged prejudice of a board member?

3. Concerning charges as to which no evidence was offered, was the board required to dismiss with prejudice?

Record.

Petitioner was charged by the board with violation of section 2377 of the Business and Professions Code by procuring a criminal abortion on the persons of three women, referred to herein as (1) Sylvia, (2) Dolores, and (3) Eleanor, and by violating section 2394 of the Business and Professions Code by using drugs and penetrating the tissues of Sylvia. Two hearings were had. No evidence was introduced to support the abortion charges as to Sylvia and Dolores and these charges were dismissed by the board without prejudice. The board found petitioner guilty of unprofessional conduct in that he had procured and performed a criminal abortion on Eleanor and had used drugs and penetrated the tissues of Sylvia. A petition for reconsideration was denied by lapse of time. Petitioner then filed the present mandamus proceeding in the superior court, which heard oral argument and thoroughly read the transcripts of the board hearings. No additional evidence was produced other than petitioner's petition for reconsideration and a letter of the board's attorney. The trial court exercised its independent judgment and made findings of fact and conclusions of law to the effect that (1) petitioner agreed to and did perform and procure a criminal abortion on Eleanor, who was then pregnant, which fact was known to petitioner, and (2) that petitioner used and administered drugs to Sylvia to check an infection, and that none of the services were performed as an emergency treatment; (3) that the board's findings are supported by the weight of the evidence, and (4) that the board was not, as charged, guilty of abuse of its discretion.

1. Evidence.

[1] Our province is to review the evidence in the light most favorable to respondent and to determine whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the trial court's conclusions. Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20. We will consider the charges separately.

The Abortion Charge.

[2] The testimony of Eleanor alone is sufficient to support the court's conclusion. It is unnecessary to go into great detail on this charge. Eleanor testified that when she thought herself pregnant she did not want to go through with it as she was considering leaving her husband. She took some quinine tablets to abort herself. Then she changed her mind and consulted Dr. Wynekoop on May 7. (Dr. Wynekoop testified that he then found her pregnant "beyond any ordinary doubt." He found no sign of a miscarriage.) Eleanor again changed her mind, and decided not to have the baby. She did nothing herself to abort. In the early part of June she went to petitioner's office. Her cousin had informed her that petitioner had aborted the cousin. Eleanor told petitioner that she was pregnant, and could not afford to remain pregnant because she would have to go to work, and maybe he could help her. He said he would try to cause her to lose her baby on condition that she would not tell. He then directed her to a small room, told her to take off her underclothes and lie on a table. She then described the acts of attempted abortion and her sensations, which were of such a nature as to leave no doubt that an abortion was attempted. Admittedly no drugs or medicinal preparations were used. Eleanor's evidence, however, shows that "something cutting like a knife" was used. Petitioner told her he thought the treatment was successful and if it were not she was to come back. He told her she would have cramps and gave her some pills to take after she had them for a certain length of time. She gave petitioner two checks totalling $22.21 and $15 in cash and promised to pay the balance of the $75 he asked in two weeks. No receipt was asked for or given. He told her that now that he had helped her she was not to tell except that if she knew someone who needed help to send her to him. Eleanor went home and about six hours later started to get "awful cramps." They had continued for about an hour when her husband returned home about 11 p. m. At first she refused to tell him the cause of her distress. He was a policeman and carried a gun. He then forced her at gun point to disclose its cause. She then told him and later other officers that petitioner had performed an abortion on her. She was taken, about 2 a. m., to the county hospital. There she was in great pain. Dr. Anton examined her and from the condition of her uterus concluded that she had an induced threatened abortion and perimetritis. He attempted to preserve the pregnancy since he felt that it was only threatened. She remained in the hospital about a week and was then discharged, as Dr. Anton concluded that the threatened abortion had subsided. After returning home she had a severe hemorrhage and returned to the hospital a day and a half later. Dr. Anton then diagnosed her condition as inevitable abortion. She was discharged a day or so later as the doctor concluded that she had completed her abortion. About a week later she started to hemorrhage again. A Dr. Nichols sent her to another hospital where he performed a curettement. Eleanor testified that later

petitioner contacted her through her sister. Eleanor saw petitioner about three or four weeks before the hearing of the charges which the board had brought against him. He offered her a vacation if she would not testify. Her husband suggested that they "shake down" petitioner for $2500. She met petitioner the night before the hearing and he offered her $500, the balance of $2000 to be paid her after the hearing was over. Petitioner admitted this meeting but contended that Eleanor and her husband were the moving parties and that he was trying to trap them. Petitioner testified that when Eleanor first came to his office a Mrs. Gillian, who was working there to pay off a treatment bill, was there and that he treated Eleanor with Mrs. Gillian present in an adjoining office with the door open between. He claimed that he examined Eleanor to relieve "her low back pain and tenderness"; that he told her she looked as if she might be in the process of aborting; the cervix looked like it had been tampered with; that he refused her request to give her a treatment to cause her to lose her baby and that he did nothing to bring about an abortion. He claimed he charged her only $15, giving her change from the total of the two checks. Mrs. Gillian substantiated petitioner's testimony as to his conversations with Eleanor at his office. Eleanor positively denied that Mrs. Gillian was there at all. Dr. Bashor, a specialist in obstetrics, gynecology and surgery was called by respondent. In answer to a hypothetical question based upon a history of the case given by petitioner's counsel he testified that in his opinion no abortion was performed in petitioner's office, that at most it was possible that there was an induction of an abortion. When additional facts as testified by Eleanor were added to the question, he testified that there was likelihood that an induction was performed and that the abortion followed subsequently.

Petitioner's Contentions.

1. Petitioner contends that there was no evidence to show that at the time Eleanor was in petitioner's office she was pregnant and that petitioner knew that fact. This contention overlooks the fact that Dr. Wynekoop testified that in his opinion she was pregnant and that he told her so, petitioner's testimony that Eleanor told him that she believed herself to be pregnant, and petitioner's own diagnosis that she looked "as if she might be in the process of aborting."

[3, 4] Petitioner's claim of failure of proof of pregnancy is based on his erroneous contention that the board was required to prove pregnancy in order to substantiate the charge against petitioner. He quotes section 274 of the Penal Code as it read prior to 1935, when it was amended taking out the word "pregnant." Now proof of pregnancy is not required to establish guilt of the crime of abortion. *"Proof of pregnancy not necessary.* Since the amendment to section 274 of the Penal Code in 1935 it has not been necessary to prove that the woman on whom the operation was performed was pregnant at the time of the commission of the offense. Rinker v. State Board of Medical Examiners, 59 Cal.App. 2d 222, 224, 138 P.2d 403 [405]; People v. Emery, 79 Cal.App.2d 226, 231, 179 P.2d 843. The performing of the operation with the intent on the part of the accused person to produce or procure a miscarriage constitutes the offense even though the woman on whom the operation is performed is not in fact pregnant." People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802, 808. Although unnecessary to its decision the trial court found that Eleanor was pregnant and that fact was known to petitioner. The evidence supports this conclusion, even though petitioner made no tests for pregnancy.

2. There is no evidence to support the finding that petitioner performed and agreed to perform acts with the intent to procure a miscarriage. This contention ignores entirely Eleanor's testimony that she asked petitioner to abort her, that he said he would and that thereupon he performed acts which eventually brought about the abortion. While she saw no knife she felt something cutting like a knife. While there was evidence from which the board might have determined that Eleanor's abortion was self-inflicted, her testimony of what occurred at petitioner's office is sub-

stantial evidence of an induction of an abortion having occurred there. In fact, under all the circumstances, the weight of the evidence is more in favor of the latter cause. Dr. Bashor's expert testimony did not rule out the possibility or even the probability that the abortion was induced by petitioner.

[5, 6] 3. The board abused its discretion in deciding the case on Eleanor's testimony and disregarding that of petitioner and Mrs. Gillian. As to this, the board saw the witnesses. Their credibility was for the board to determine, not for us. There was nothing inherently improbable in Eleanor's testimony. It is true that Eleanor and her husband attempted to extort money from petitioner. However, petitioner's meeting with Eleanor with, as he claims, marked bills which he was going to give her (but which he did not), with only his wife and a friend as witnesses, and the circumstances of that meeting, even under his own testimony, were such as to be more consistent with his having done something illegal to Eleanor, than with his version of his treatment of her. Petitioner testified that Eleanor had told him that the board's investigator had urged her to testify against him and had told her that if the board found petitioner guilty her husband could sue petitioner for damages. Undoubtedly the board had in mind any pecuniary advantage Eleanor or her husband might derive from a conviction, and considered it in weighing her testimony. However, we cannot say that the extortion incident and her pecuniary interest *required* the board to disregard her testimony.

[7, 8] Petitioner states baldly that the board refused to consider the "extortion plot." There is nothing in the record to support this statement. Petitioner at considerable length brought out the facts which showed that Eleanor's husband conceived the plan of extorting $2500 from petitioner. The evidence was before the board and it no doubt considered it. While the husband's actions were reprehensible, as were Eleanor's, in being willing, as she apparently was, to accept money from petitioner, neither fact would justify the board in excusing petitioner from his unprofessional conduct. These facts must be viewed in weighing the credibility of the witnesses. There is no indication that the board did not so weigh them.

The Sylvia Case.

Petitioner admitted administering and prescribing the drugs but contended that they were administered as an emergency treatment for an acute infection endangering her life. Section 2144 of the Business and Professions Code provides that the inhibition against a drugless practitioner administering or prescribing drugs does not prohibit "service in the case of emergency." Petitioner testified that he went to see Sylvia at the request of her friend, Mrs. Adams, who told him that Sylvia had aborted herself; that she showed him the fetus of twins. He then examined Sylvia. She seems to be in good condition except that she was "run-down looking." He externally palpated her abdomen but prescribed no drugs. Three days later Mrs. Adams called him, saying that Sylvia was running a temperature. Mrs. Adams had attempted to remove from Sylvia's vagina the "secundines." Petitioner saw Sylvia. She had a temperature, and he suspected puerperal infection, sepsis due to Mrs. Adams' action. Petitioner called several doctors, but as it was Saturday afternoon, getting late, he could not get any doctor. Later Mrs. Adams phoned petitioner that Sylvia was getting worse, her temperature had increased. Petitioner then went to a drug store, procured a hypodermic syringe and posterior pituitrin and sulfadiazine tablets. He asked Sylvia to go to the county hospital. She refused. Her temperature was between 103 and 104, so he gave her the pituitrin and the sulfadiazine. It was his opinion that her condition was such as to require emergency treatment. Also it was required because she was uncooperative, saying she would rather die than go to the county hospital.

[9, 10] Petitioner contends that as his testimony was not controverted by any witness there is nothing to refute his statement that an emergency existed. However,

the board was not required to believe petitioner's story, particularly in view of the circumstances as he explained them. On his first call on Sylvia he found that she had aborted herself, that she was bleeding from the vaginal canal. He made no suggestion that a doctor (an M.D.) be called to treat this condition, which obviously would continue. His conduct in not doing so, coupled with his failure to call the hospital or the California Osteopathic Association for a doctor, in spite of his claim that he spent an hour trying to get a doctor (he did talk to a Dr. Hagin although it does not appear what the talk was about, what kind of a doctor Dr. Hagin is, or whether he was asked to attend Sylvia) justifies a reasonable inference that he purposely neglected advising that an M.D. be called. Thus, if infection occurred or drugs were necessary he could contend that an emergency existed and he could then administer drugs. Moreover, a reading of petitioner's testimony raises a very real doubt that an emergency actually existed. Petitioner seemed to be more concerned with Sylvia's uncooperativeness than with her physical condition. He contends that the circumstances of this charge are similar to those in Moran v. Board of Medical Examiners, supra, 32 Cal.2d 301, 196 P.2d 201, where the trial court held that the weight of evidence showed that the doctor against whom the charges of improper prescribing of narcotics were brought, had done so as emergency treatments. There is no similarity between the facts of that case and those here. Although there, was a conflict in the evidence, the evidence showing that emergencies existed was strong. Contrary to the situation here, the trial court found in petitioner's favor. The reviewing court pointed out that it was bound by the rule that if the evidence viewed in the light most favorable to the trial court's decision sustains that court's findings, the reviewing court must affirm. We are bound by the same rule.

2. Was Petitioner Denied a Fair Hearing?

[11] In his petition for reconsideration petitioner, for the first time, contended that Dr. Cayler, the secretary and one of the members of the board, was unfair minded and unduly prejudiced against petitioner. This charge was based upon the claim that petitioner, as an active member and officer of the California Osteopaths, had endeavored since 1942 to bring about an amendment to the Business and Professions Code to permit osteopaths to take an examination to qualify them as medical physicians and surgeons; that during that period Dr. Cayler opposed such legislation; that petitioner and Dr. Cayler had been in violent disagreement on the subject, and that petitioner had pointed out publicly that Dr. Cayler had broken his promised word concerning the matter. Attached to the petition are certain letters showing petitioner's interest in the legislation and his activities concerning it, and Dr. Cayler's position and opposition. While these letters show opposition by Dr. Cayler to the legislation and indicate that possibly Dr. Cayler had unduly delayed the restoration to petitioner of his license when, on a former occasion, petitioner had been acquitted of a charge of unprofessional conduct, there is nothing in them to show any prejudice of Dr. Cayler towards petitioner or hostile action by him at the hearing. Nor is there any basis for petitioner's contention that the board was prejudiced against him and did not give him a fair hearing. At the end of the first hearing the board found petitioner guilty. Petitioner filed a petition for writ of mandate in the superior court. This writ was granted and the court ordered the board to set aside its decision and to receive additional expert evidence. At that time petitioner knew that Dr. Cayler was one of the board who had found him guilty, yet, without any objection to Dr. Cayler's presence, petitioner proceeded before him with the second hearing. At no time during either hearing did petitioner avail himself of the provisions of section 11512 of the Government Code, which provides machinery for the disqualification of a board member. His failure to do so bars him from raising the matter after the hearing was concluded and decided. It is not clear from the record whether the trial judge considered the allegations of the petition for reconsideration. Whether he did or not, the fact that

petitioner did not see fit to question Dr. Cayler's right to sit in his case until a second adverse decision was made would justify a disregard of the unproved allegations of the petition.

3. Dismissed Charges.

[12, 13] No evidence was offered on the charges concerning alleged abortions on Sylvia and Dolores. The board dismissed these charges without prejudice. Petitioner moved that they be discharged with prejudice. This motion the board denied. Petitioner contends that it thereby abused its discretion. He presents no authorities to support his position. He cites McPheeters v. Board of Medical Examiners, 103 Cal.App. 297, 284 P. 938, on the contention that the Medical Practice Act, as it relates to punishment for unprofessional conduct, is penal in its nature. We know of no requirement that the dismissal, under the circumstances here, must be with prejudice. Murphy v. Board of Medical Examiners, 75 Cal.App.2d 161, pages 166–167, 170 P.2d 510, page 514, holds: "The proceeding here involved is an administrative, disciplinary proceeding, and is not criminal in its nature, nor is it to be judged by the legal standards applicable to criminal prosecutions. In the late case of Webster v. Board of Dental Examiners, 17 Cal.2d 534, at pages 537, 538 and 539, 110 P.2d 992, at page 994, our Supreme Court states the rule: 'Appellant first challenges the order of suspension on the theory that administrative proceedings to revoke a professional license are quasi criminal in nature. * * * This analogy between a proceeding to revoke a license and a criminal trial is found in a number of the earlier cases. In some of the decisions, however, language describing the revocation of a license as penal in nature is entirely inapplicable to an administrative proceeding brought for that purpose, because in the particular case the legislature had provided for forfeiture of the professional license as an extra penalty to be added by the criminal court after a conviction for violation of the statute. * * *

" 'Where, on the other hand, the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law. * * *' "

Whether the board will again file the same charges is problematical and if it does the question of whether or not petitioner has been injuried by the delay could then be determined. We find no abuse of discretion.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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105 Cal.App.2d 298

MORTIMER, Bldg. & Loan Commissioner of State v. ACQUISITION & IMPROVEMENT DISTRICT NO. 36 of SAN DIEGO COUNTY et al.

COUNTY OF SAN DIEGO v. CLAMAN.

Civ. 18093.

District Court of Appeal, Second District, Division 3, California.
July 5, 1951.

Action by Frank C. Mortimer, as Building and Loan Commissioner of the State of California in the liquidation of the California Mutual Building and Loan Association, a corporation, against Acquisition and Improvement District No. 36 of San Diego County, and others, and against Howard Claman, for whom Lorraine Claman was substituted as special administratrix with the general powers of the estate of Howard Claman, deceased, to recover on certain coupons detached from specific bonds issued by the district, and for other relief. The Superior Court, Los Angeles County, Elmer D. Doyle, Judge assigned, on remand rendered an adverse judgment, and the County of

San Diego appealed. The District Court of Appeal, Vallée, J., held that the obligation of the county on the coupons was limited to payment out of a specified interest and sinking fund and was not a general obligation of the county.

Judgment modified, and, as modified, affirmed.

1. Appeal and error ⚿1195(1), 1212(4)

In action against county acquisition and improvement district to recover amount of coupons detached from bonds, where appellate court reversed and remanded judgment with instructions for new trial on question whether county and district were legal entities so as to entitle plaintiff to judgment against county, all other issues were determined by prior judgment and sole issue to be determined on remand was question of entity. Gen.Laws 1931, Act 3276a.

2. Appeal and error ⚿1212(4)

Trial court was bound by directions given by reviewing court on former appeal and had no authority to retry any other issue or to make any other findings.

3. Counties ⚿22

Acquisition and improvement district established by county board of supervisors pursuant to authority granted by Improvement Act of 1925 was nothing more than an assessment district created by and under control of the board for acquisition and improvement of public way, etc. Gen. Laws 1931, Act 3276a.

4. Counties ⚿22

In action against county acquisition and improvement district to recover amounts of coupons detached from bonds, on retrial of issue whether county and district were one legal entity so as to entitle plaintiffs to judgment against county, evidence justified conclusion that district was established by the county, that coupons were signed by county treasurer and payable at his office, that required sum was on deposit in county trust fund for payment and was in control of county treasurer, and that money to pay bonds and interest was obtained for express purpose by general obligation on bond issue voted by taxpayers. Gen.Laws 1931, Act 3276a.

5. District and prosecuting attorneys ⚿7(1)

In action against county acquisition and improvement district to recover amount of coupons detached from bonds, testimony of deputy district attorney of county as to matters involving bond issue and sum set aside for payment of coupons was not objectionable on theory that attorney had no authority to bind county since in testifying he was not binding county as attorney but was merely testifying as to facts. Gen.Laws 1931, Act 3276a.

6. Counties ⚿188

In action against county acquisition and improvement district to recover amount of coupons detached from bonds, evidence established that county and district composed one legal entity so as to entitle coupon holder to judgment against county for outstanding sum. Gen.Laws 1931, Act 3276a.

7. Appeal and error ⚿1195(3)

In action against county acquisition and improvement district to recover amounts of coupons detached from bonds, where counsel for county on former appeal contended that district was not a legal entity and court so held, counsel for county could not contend on retrial of issue that county and district were not one entity. Gen.Laws 1931, Act 3276a.

8. Counties ⚿187

Under bond of acquisition and improvement district providing that obligation was limited to payments out of acquisition and improvement district sinking fund of county, payment of principal and interest was not a general obligation of county but was limited to specified interest and sinking fund. Gen.Laws 1931, Act 3276a.

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James Don Keller, District Atty., San Diego, Carroll H. Smith, Deputy, and Frank T. Dunn, Asst. Dist. Atty., all of San Diego, for appellant.

Musgrove & Cannan and Thomas H. Cannan, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by the county of San Diego from a judgment decreeing that Lorraine Claman, as special administratrix with general powers of the estate of Howard Claman, is the owner of certain coupons detached from specific bonds of Acquisition and Improvement District No. 36 of San Diego County; that she recover from the county of San Diego $1204.24; and that upon payment thereof "said coupons shall then be returned to the defendant, County of San Diego." The bonds were issued under the Acquisition and Improvement Act of 1925. (Stats.1925, p. 849, as amended; Deering's Gen.Laws, 1931, Act 3276a.) The Act of 1925 was repealed in 1933, but the enforcement of bonds already issued was not affected by the repeal. (Stats.1933, p. 948.)

The cause was tried in 1945 and a judgment rendered decreeing that Howard Claman was the owner of the coupons and "entitled to the payment thereof from the defendant San Diego Acquisition and Improvement District No. 36." The county of San Diego had been sued by a fictitious name. It had appeared by its true name, but it was not named in the judgment. District No. 36 appealed. On appeal, Mortimer v. Acquisition etc. Dist. No. 36, 79 Cal.App.2d 404, 180 P.2d 355, 357, it was held that the judgment was void because the district had no legal capacity to be sued and therefore was not such a legal entity as would permit a judgment to operate against it. The judgment was reversed with directions as follows: "The judgment is reversed and the cause remanded for a new trial on the question as to whether the County of San Diego and the Acquisition and Improvement District No. 36 of the County of San Diego compose one legal entity so as to entitle respondent to a judgment against the County of San Diego for the sum of $1,204.24, which the County Treasurer holds in the Acquisition and Improvement District No. 36 of the County of San Diego Interest and Sinking Fund, at which time the trial court may permit such amendments to the pleadings, findings and judgment as it sees fit."

On the trial held pursuant to this mandate the court found that the coupons were from bonds "issued by the County Treasurer of the County of San Diego in connection with the Acquisition and Improvement District No. 36 of San Diego County," and that "the County of San Diego caused to be deposited the sum of $1,204.24 in the County Trust fund and now has and holds the sum of $1,204.24 as aforesaid for the purpose of judicial determination of the legal and proper payee of said sum to the owner and holder" of said coupons. The court further found that Lorraine Claman, as special administratrix, is the proper payee of said sum of $1204.24 and is entitled to the payment thereof, and that upon payment of $1204.24, "said coupons shall then be returned to the defendant County of San Diego."

The judgment which followed adjudged that Lorraine Claman, as special administratrix, recover from the county of San Diego the sum of $1204.24, and that upon payment thereof "said coupons shall then be returned to the defendant, County of San Diego." The county appealed.

The county contends 1) the judgment is void because contrary to specific directions of the appellate court on remand for new trial, and 2) the findings are not supported by the evidence and are contrary to the evidence. The contentions cannot be sustained.

[1] The only issue to be determined on the retrial was whether the county of San Diego and Acquisition and Improvement District No. 36 of the county of San Diego compose one legal entity so as to entitle respondent Claman to a judgment against the county of San Diego for the sum of $1204.24, which the county treasurer holds in Acquisition and Improvement District No. 36 of the county of San Diego interest and sinking fund. All other issues were determined by the prior judgment.

[2] The trial court was bound by the directions given by the reviewing court on the former appeal and had no authority to retry any other issue or to make any other findings. Rice v. Schmid, 25 Cal.2d 259,

263, 153 P.2d 313; Carter v. Superior Court, 96 Cal.App.2d 388, 391, 215 P.2d 491.

[3] An acquisition and improvement district established by a board of supervisors pursuant to the authority granted by the Act of 1925 is nothing more than an assessment district created by, and under the control of, the board of supervisors, for the acquisition and improvement of a public way, etc. See Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 218–220, 183 P. 809; Sacramento & San Joaquin Drainage Dist. v. Riley, 199 Cal. 668, 687, 251 P. 207; Southlands Co. v. City of San Diego, 211 Cal. 646, 666, 297 P. 521; County of San Diego v. Childs, 217 Cal. 109, 115, 17 P.2d 734; American Securities Co. v. Forward, 220 Cal. 566, 570, 32 P.2d 343, 96 A.L.R. 1268; County of Los Angeles v. Rockhold, 3 Cal.2d 192, 199, 44 P.2d 340, 100 A.L.R. 149; Bond v. City of Pasadena, 6 Cal.2d 139, 56 P.2d 946; Harpham v. Board of Supervisors, 41 Cal.App. 192, 194, 182 P. 324. The board of supervisors of a county was empowered to establish districts and to conduct, supervise and control their operations. (Stats.1925, p. 849, as amended, Deering's Gen.Laws, 1931, Act 3276a.) The board was authorized to issue and sell, or otherwise dispose of, bonds; to constitute a fund for the payment of such bonds; to levy and collect special assessment taxes; and to transfer money from county funds to the special funds provided by the act. (Sec. 2.) The county was authorized to contribute money or materials for the things proposed to be done. (Secs. 7, 36, 38.) Actions to condemn were brought in the name of the county. (Sec. 11.) Bidders on work to be done, who purchased bonds issued pursuant to the act, made payment therefor to the county treasurer. (Sec. 11.) Faithful performance bonds ran to the county. (Sec. 20.) The county treasurer issued bonds to the contractor in payment for work accepted (Secs. 25, 44); for property acquired (Secs. 28, 36, 36½); for immediate possession. (Sec. 28½.) Proceeds from the sale of bonds were paid to the county treasurer. (Secs. 28, 28½, 28¾, 36.) Condemnation proceedings could not be abandoned until the county compensated property owners for all damage; and if immediate possession had been taken, the county was liable to holders of immediate possession bonds, for all damages to owners of property of which immediate possession had been taken. (Sec. 35.) Bonds issued expressly provided that the county "will pay to the bearer, out of the fund hereinafter designated, at the office of the treasurer of said county" the amount of the bond with interest thereon. (Sec. 39.) Bonds were signed by the treasurer of the county and had the seal of the board of supervisors of the county affixed, and the county treasurer determined the form of interest coupons and signed them. (Sec. 39.) Principal and interest of bonds issued are payable at the office of the treasurer issuing the same. (Sec. 40.) The act provided that "For each district in which bonds have been issued under the provisions of this act a special fund to be named 'Acquisition and improvement district No. — of the county (or city) of — interest and sinking fund' (the number to be that of the district) for the discharge and payment of such bonds, whether issued for an acquisition or improvement, or both, and interest thereon, *shall be constituted by the county*". (Italics added.) (Sec. 41.) Surplus funds remaining in the interest and sinking fund after all bonds are retired "shall be transferred to the general fund of the county". (Sec. 41.) The board of supervisors is authorized to create and use revolving funds for the purpose of facilitating, contributing towards, or assisting in any way, any acquisitions and improvements authorized by the act. (Sec. 43.)

[4, 5] On the retrial there were evidence and inferences reasonably deducible therefrom from which the court was justified in concluding that District 36 was established by the county of San Diego; that the coupons in suit were signed by the treasurer of that county and payable at his office; that $1204.24 was on deposit "in a County trust fund" for their payment and "in the possession and control of the County Treasurer of San Diego County," and "for the retirement, satisfaction and payment" of said coupons, and that the

money to pay this issue of bonds and the interest coupons was obtained for that express purpose by a "general obligation County bond issue," voted by the taxpayers of the county of San Diego. Some of the testimony with respect to these matters came from a deputy district attorney of the county. He now argues that he did not have authority to bind the county. He did not bind the county as its attorney; he merely testified to facts.

[6] The Act of 1925, together with the evidence and inferences reasonably deducible therefrom, leave no doubt that the county of San Diego and Acquisition and Improvement District No. 36 of the county of San Diego compose one legal entity so as to entitle respondent to a judgment against the county of San Diego for the sum of $1204.24, which the county treasurer holds in Acquisition and Improvement District No. 36 of the county of San Diego Interest and Sinking Fund.

[7] Counsel for the county, on the former appeal, contended that the district was not a legal entity, and the court so held. They now contend that it is a legal entity, separate and distinct from the county. This legal legerdemain is of no avail. The question was settled by the former decision.

The county argues that the coupons are payable only on presentation to the county treasurer and that the judgment is erroneous in not so providing. We think the point is of no consequence. The coupons are on deposit with the clerk of the court below. By the terms of the judgment they are to be delivered to the county upon payment of the $1204.24.

[8] The form of bond prescribed by the act (Sec. 39) specifically says that the county will pay the amount of the bond with interest "out of the fund hereinafter designated". The court, on the former appeal, 79 Cal.App.2d 404, 408, 180 P.2d 355, 357, after quoting the form of the bond, said: "This appears to be a direct promise of the county to pay to the bearer the amount of the bond and interest coupons upon presentment." The fund thereinafter designated is "Acquisition and improvement district No. 36 of the county of San Diego interest and sinking fund." The county in its answer admitted, and the court on the former appeal determined, that the $1204.24 is now held in that fund. Payment of principal or interest is not a general obligation of the county. The obligation of the county is limited to payment out of "Acquisition and improvement district No. 36 of the county of San Diego interest and sinking fund." County of San Diego v. Childs, 217 Cal. 109, 115, 17 P.2d 734, 740. The judgment decrees that respondent "shall have and recover of and from the County of San Diego said sum of $1,204.24." It does not limit payment of the coupons to the specified interest and sinking fund, and it must be modified accordingly.

The judgment is modified by adding immediately after the words last above quoted the following: "payable out of Acquisition and improvement district No. 36 of the county of San Diego interest and sinking fund." As thus modified it is affirmed.

SHINN, P. J., and WOOD, J., concur.

105 Cal.App.2d 164

PEOPLE v. COFFMAN.

Crim. 2714.

District Court of Appeal, First District, Division 1, California.

June 27, 1951.

Rehearing Denied July 5, 1951.

Hearing Denied July 26, 1951.

Luther E. Coffman was convicted of murder. The Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., denied petition for writ of mandamus, writ of error coram nobis, writ of habeas corpus or for new trial, and petitioner appealed. The District Court of Appeal, Bray, J., held that if there were irregularities occurring at trial and errors of law, such matters could have been corrected on motion for new trial or by appeal and could not be corrected by writ of error coram nobis.

Order affirmed.

1. Criminal law 🔑997

Person who had entered a plea of guilty to charge of murder and had been sentenced to life imprisonment could not have review by writ of error coram nobis of alleged error in purported failure of trial court to take evidence on degree of crime, since such alleged error was reviewable by appeal. Pen.Code, §§ 865, 925.

2. Criminal law 🔑997

Writ of error coram nobis does not issue to correct errors of law nor to redress irregularities occurring at trial which could have been corrected on motion for new trial or by appeal.

3. Criminal law 🔑627(7), 627½

Right of person charged with murder to copy of indictment and transcript of testimony, if not waived by entering of plea of guilty, was waived when such person did not raise issue until five years of imprisonment had elapsed. Penal Code, § 925.

4. Homicide 🔑139

It is not necessary that an indictment charge the degree of murder.

5. Criminal law 🔑997

That testimony of arresting officer given before grand jury was utilized to determine degree of murder to which accused had entered plea of guilty, if error, could have been considered on appeal, and writ of error coram nobis would not issue.

6. Jury 🔑29(4)

Plea of guilty to offense charged is waiver of right to trial by jury.

7. Criminal law 🔑984

Where defendant pleaded guilty to two counts of indictment charging same homicide and was sentenced to life imprisonment on each count with sentences to run concurrently, even though result was that defendant had been twice convicted of same homicide, practical effect of such double conviction was nil, and defendant must be considered for all purposes as having suffered but one conviction.

8. Criminal law 🔑997

Showing of diligence in ascertainment of facts relied upon for reversal must be made in application for a writ of error coram nobis.

9. Habeas corpus 🔑113(3)

Appeal from a decision of a superior court on habeas corpus is not authorized.

10. Habeas corpus 🔑48

Prisoner of state being resident of Sacramento County must present his petition for writ of habeas corpus to Superior Court of Sacramento County and trial court of another county has no jurisdiction to entertain his petition.

11. Criminal law 🔑951(2)

Motion for new trial which was made after conviction and sentence would not be granted. Penal Code, § 1182.

◆

Luther E. Coffman, in pro per.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Petitioner, a prisoner at Folsom, petitioned the superior court for a writ of mandamus, writ of error coram nobis, writ of habeas corpus or for a new trial. The court, by order, denied the petition. Petitioner appeals.

Record.

Petitioner, before the trial court and here, appeared in propria persona. On June 23, 1944, petitioner was indicted under an indictment containing three counts. The first count accused him and John Doe jointly with the murder of James B. Stanley on June 10, 1944, at San Francisco. The second count charged defendant alone with the murder of the same person at the same time and place. The third count charged John Doe alone with the same offense. On October 5, 1944, petitioner was arraigned in the presence of his attorney, the assistant public defender. At the latter's request the cause was twice continued to plead. On October 18, defendant in the presence of his attorney pleaded not guilty. It was then continued to be set. On October 25, defendant and his attorney being present, the case was set for trial for December 7. It was then continued to January 11, 1945, for trial. Defendant being present with his attorney, the district attorney with leave of court, filed an amended indictment. The only change in the indictment was the setting up of a prior conviction of manslaughter in Oklahoma in 1940. Defendant was arraigned and pleaded not guilty to counts 1 and 2. (It does not appear that he then pleaded to the prior.) By consent, the cause was set for trial for January 15. On that day petitioner appeared with his counsel and admitted the prior. He requested, and was granted permission, to change his plea, and pleaded guilty to counts 1 and 2. The court determined the degree to be first degree. Defendant waived time and asked immediate sentence. He was then asked "if he had any legal cause to show why judgment should not be pronounced against him; to which defendant replied that he had none." The court then sentenced him to imprisonment for the term of life on each count, the sentences to run concurrently.

June 14, 1950, over five years after being sentenced, petitioner filed in the San Francisco Superior Court a petition for mandamus to compel the People of the State of California, the District Attorney of San Francisco and others, to settle petitioner's "petition for the writ of error coram nobis and alternative writ of habeas corpus, or a new trial." Apparently what petitioner wants is a review of his conviction, and particularly a new trial, regardless of what, if any, writs or remedies apply.

Contentions.

It is very difficult to determine from a study of the petition and points and authorities in the trial court and here, just what petitioner is contending other than that "he wants out."

[1, 2] 1. He refers to section 865 of the Penal Code which provides that witnesses must be examined in the presence of a defendant. It is not clear to what this is directed. There is some intimation that perhaps the court failed to take evidence on the degree of the crime. The record states: "Thereupon the Court determines the degree to be first degree, The Defendant, waiving time, asked immediate judgment of the Court." Assuming, but not deciding, that the court failed to take such evidence and that defendant did not waive such requirement, its failure to do so was reviewable upon appeal and hence coram nobis is not available to defendant. "The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal." People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375, 378.

[3] 2. He contends that he was not arraigned, given a copy of the indictment or transcript of the testimony before the grand jury. The record shows that he was arraigned. So far as not getting a copy of the transcript is concerned, the record seems to be silent on the subject. Section 925 of the Penal Code which provides the time within which he shall receive such copy provides that if a defendant does not receive it the court *on motion* of the defendant shall continue the trial until he does get it. If petitioner did not waive his right to be given a copy by pleading guilty he waived it by doing nothing about it for over five years. Again, this is a matter which could have been raised on appeal.

[4] 3. Apparently defendant contends that the indictment must charge the degree of murder. There is no such requirement.

[5] 4. He makes a number of broad contentions without specifying any detail. Thus he states that the court erred in allowing the arresting officer to testify and in admitting his deposition. We do not know what he means by this. As petitioner pleaded guilty no evidence was

taken, other than, perhaps, on the degree. If for that purpose the court considered the officer's testimony before the grand jury (we assume that is what petitioner means by "deposition") no objection was made to this; and again, if error, it could have been considered on appeal. He contends that his attorney failed to give effective and substantial legal assistance, but does not specify in what particular. Apparently, for a period of five years he was satisfied with his counsel. (See discussion under (6).)

[6] 5. He raises a number of completely baseless claims. (a) That he was denied a jury trial. He pleaded guilty and hence he waived a trial jury or otherwise. (b) He contends that the coroner did not charge him wth murder or impanel a coroner's jury. There is no requirement that the coroner do either. (c) The grand jury did not specify the degree of murder. The law does not require it to do so. (d) It considered illegal and hearsay evidence. In what respect does not appear. If it did, petitioner by not moving to set aside the indictment is precluded from raising this objection. (Penal Code § 996.)

[7] 6. He contends that charging three counts of murder on one homicide in one indictment was improper. As pleading there can be no objection to this procedure. However, a different situation arises in connection with his conviction. He is in the absurd situation of being twice convicted of the same homicide. It is true that he pleaded guilty to both counts, and that his sentence runs concurrently. Nevertheless, the court, as well as the district attorney and petitioner's attorney, should have realized the situation. Fortunately, the practical effect of such double conviction is nil. His sentence being concurrent is for but one term. Undoubtedly, the adult authority in considering his case will disregard the second conviction. If it does not do so, petitioner on application to the courts will be entitled to relief requiring it to do so. As the face of the record shows that the two convictions were for the identical offense, petitioner must be considered for all purposes as having suffered but one conviction.

[8] It should be pointed out, in connection with all of petitioner's contentions save that of double conviction, petitioner makes no contention that he is not guilty, nor does he state any facts showing that his plea of guilty was not freely and voluntarily made. Nor does petitioner set forth any reason for waiting five years before complaining. "The courts of this state require that a showing of diligence be made in the application for a writ of error *coram nobis*. 27 Cal. Law Rev. 232." People v. Egan, 73 Cal.App.2d 894, 900, 167 P.2d 766, 770; see also People v. Coyle, 88 Cal.App.2d 967, 975, 200 P.2d 546, and People v. Collins, 97 Cal.App.2d 552, 556, 218 P.2d 87.

Habeas Corpus and New Trial.

[9–11] Considering the petition as one for habeas corpus, it, as said in People v. Dunlop, 102 Cal.App.2d 314, 227 P.2d 281 is "hopeless" for two reasons: (1) "Appeal from a decision of a superior court on habeas corpus has not been authorized", 102 Cal.App.2d at page 318, 227 P.2d at page 284, and (2) the trial court had no jurisdiction to entertain a petition for habeas corpus from him, as petitioner is a resident of Sacramento to whose superior court he as a prisoner of the state must present his petition for such a writ. Id., 102 Cal.App.2d at page 318, 227 P.2d at page 284. Obviously, petitioner never having requested a new trial before sentence is not entitled to one now. "The application for a new trial must be made before judgment * * *". Penal Code, § 1182; People v. Egan, 135 Cal.App. 561, 27 P.2d 765.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

105 Cal.App.2d 169

PEOPLE v. TOLLACK.

Cr. 4638.

District Court of Appeal, Second District,
Division 3, California.
June 27, 1951.

Hearing Denied July 26, 1951.

Robert Leslie Tollack was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of forcible rape, and from judgment of conviction and from an order denying his motion for a new trial, he appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support the verdict.

Judgment and order affirmed.

1. Rape ⚿51(4)

Evidence sustained defendant's conviction of forcible rape. Pen.Code, § 261, subds. 3, 4.

2. Rape ⚿6

If female resists, but her resistance is overcome by force or violence, rape is committed under conditions prescribed in statute. Pen.Code, § 261, subds. 3, 4.

3. Rape ⚿6

Gravamen of offense of forcible rape is use of force or violence sufficient to overcome resistance of female and bodily injury is not essence of offense. Pen.Code, § 261, subds. 3, 4.

4. Rape ⚿6

For purposes of prosecution for forcible rape, word "force" implies physical power exerted upon a person or thing and kind of physical force is immaterial. Pen. Code, § 261, subds. 3, 4.

See publication Words and Phrases, for other judicial constructions and definitions of "Force".

5. Rape ⚿14

If female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, rape is committed under conditions prescribed by statute. Pen.Code, § 261, subds. 3, 4.

6. Rape ⚿11

A submission induced by fear is not acquiescence in act of rape. Pen.Code, § 261, subds. 3, 4.

7. Rape ⚿35(4)

In rape prosecution, fact that information charged violation of subdivision of statute defining offense, as one where female resists, but her resistance is overcome by force or violence, and proof showed a violation of subdivision of same statute defining offense, as one where female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, was not a prejudicial variance when evidence was sufficient to bring case within either of such subdivisions. Pen.Code, § 261, subds. 3, 4.

8. Criminal law ⚿1159(2)

A reviewing court will not alter, or hold unsupported, a jury's findings merely because it might reasonably draw an inference different from one that jury reasonably drew.

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Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted by a jury of forcible rape. He appeals from the judgment and the order denying his motion for a new trial. The information charged defendant with having committed the act with force and violence, without the consent and against the will of the prosecutrix, and that she resisted the accomplishment of the act, but her resistance was overcome by force and violence.

Defendant admitted the act. He claims that the evidence does not support the verdict in that there was no evidence that the prosecutrix resisted but her resistance was overcome by force or violence, or that she was prevented "from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution". Pen.Code, § 261(3) (4).

About 11:30 p. m., as the prosecutrix was walking home on an unfrequented street, defendant stepped from behind a tree in the parkway and accosted her on the sidewalk. Defendant stopped her and would not let her pass. He told her "he was interested in a little loving"; that he had a knife and unless she did what he said he would use it. She testified that defendant "repeatedly mentioned about the knife"; that he "repeated over and over, 'I'll start with your face—I have a knife, and I will start with your face, and you do what I say or I will use the knife.'" Defendant had her walk to a secluded spot. He walked behind her. As she walked along, she hesitated; and each time she did, defendant mentioned the knife and said he intended to have what he wanted. She testified that she was in great fear, "[i]t was my fear of the knife that controlled my whole actions."

[1-6] The verdict is sustained by the evidence. If the female resists, but her resistance is overcome by force *or* violence, rape is committed under the conditions prescribed by subdivision 3 of section 261. The gravamen of the offense is the use of force or violence sufficient to overcome the resistance of the female. Bodily injury is not the essence of the offense. The word "force" implies physical power exerted upon a person or thing. People v. McIlvain, 55 Cal.App.2d 322, 328, 331, 130 P.2d 131. In People v. Bradbury, 151 Cal. 675, at page 677, 91 P. 497, quoting from Bishop on Criminal Law, it was said: "'The kind of physical force is immaterial; * * * it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.'" The prosecutrix testified that while on the sidewalk defendant took her arm and turned her around; that he edged her from the sidewalk to the place where the act was committed; put his hands underneath her clothes and fondled her; put his hand inside her blouse; and that he raised and pushed her clothing aside. The evidence was sufficient to bring the offense within subdivision 3 of section 261. If the female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, rape is committed under the conditions prescribed by subdivision 4. Threats to do bodily harm were made and the consent of the prosecutrix was obtained as a result of those threats. People v. Peterman, 103 Cal.App.2d 322, 229 P.2d 444. The threats were accompanied by apparent power of execution. "A submission induced by fear is not acquiescence." People v. Blankenship, 103 Cal.App.2d 60, 228 P.2d 835, 839. The evidence was also sufficient to bring the offense within subdivision 4.

[7] It is suggested that there was a prejudicial variance because, so it is argued, the information charged a violation of subdivision 3 of section 261 of the Penal Code, which defines the offense where the female resists but her resistance is overcome by force or violence, while the proof showed a violation of subdivision 4, which defines the offense where the female is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution. Regardless of the subdivision alleged in the information, if the evidence brings the case within any one of the subdivisions of section 261 the offense of rape has been established. People v. Blankenship, 103 Cal.App.2d 60, 228 P.2d 835. Further, the evidence was sufficient to bring the case within either subdivision.

[8] It is argued that because the prosecutrix did not resist physically, did not make an outcry, and did not obtain the license number on defendant's car, which he had parked at the curb where he stopped, her testimony was incredible. These matters were the concern of the jury and the trial judge on the motion for a new trial. A reviewing court will not alter, or hold unsupported, a jury's findings merely because it might reasonably draw an inference different from one the jury reasonably drew. People v. Kerr, 37 Cal.2d 11, 229 P.2d 777.

For the reasons we have given, it was not error to instruct the jury with respect to the circumstances under which rape may be accomplished, as specified in subdivision 4 of section 261 of the Penal Code.

The judgment and order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

105 Cal.App.2d 154

KEIM et al. v. D. B. BERELSON & CO. et al.

No. 14521.

District Court of Appeal, First District, Division 1, California.

June 27, 1951.

Action by J. E. Keim and others, copartners doing business as Keim Produce Company, against D. B. Berelson & Co., a copartnership, and D. B. Berelson, and others, individually and as copartners doing business as D. B. Berelson & Co., for breach of warranty relating to sale of crushed frozen pineapples to plaintiff. The Superior Court in and for the City and County of San Francisco, Thomas M. Foley, J., entered judgment on verdict for defendants and plaintiffs appealed. The District Court of Appeal, Wood, J., held that instruction which allowed jury to consider statement of buyer made in another action that buyer had purchased pineapple from fruit company for whom these defendants were general sales agents was not error, but merely allowed jury to consider such evidence on issue whether buyer had in fact dealt with general sales agents as principal.

Judgment affirmed.

1. Trial 🔑194(4)

In action for breach of warranty by buyer of frozen pineapple against general sales agent for fruit company on ground that buyer had dealt with agent as principal, instruction which authorized consideration by jury of sworn statement by buyer in another action which indicated that buyer knew that general agent was not in fact principal was not error since such instruction merely told jury that written statement might be considered with other evidence in reaching determination on issue of buyer's knowledge.

2. Trial 🔑244(3)

In action by buyer of frozen pineapple against general sales agent of fruit company for breach of warranty in oral contract of sale on theory that buyer had dealt with agent as principal, instruction that if at time enforceable and binding contract for sale was made buyer knew that defendant was in fact general sales agent of fruit company then buyer could not recover, did not improperly direct attention of jury to knowledge of buyer at time of performance of oral contract.

3. Trial 🔑260(3)

Where buyer of frozen pineapple brought action for breach of warranty against general sales agent for fruit company, on theory that buyer had dealt with agent as principal, and jury was fully instructed on circumstantial evidence and that buyer might establish his case by inferences, refusal of buyer's requested instruction which merely differed in form and phraseology, from instructions given was not error.

4. Trial 🔑29(2)

In action by buyer of frozen pineapple which had fermented against general sales agent for seller for breach of warranty on theory that agent had been dealt with as principal, statement by trial judge, when sustaining objection to question by buyer to expert witness as to whether fresh pineapple would ferment before processed and frozen, that there wasn't any testimony from which it might be said fermentation could have happened here, which was objected to on ground that weight of evidence was for jury, was not error, in view of adequate instructions advising jury as to their duty to pass upon all questions of fact unaided by suggestion from court.

5. Sales 🔑440(3)

In action by buyer of frozen pineapple which had fermented against general sales agent of seller for breach of warranty on theory that agent had been dealt with as principal, evidence as to whether pineapple packs of same stock shipped on same day as pineapple involved had soured or contaminated in any way was relevant on issue whether spoilage had occurred before or after pineapple came into possession of buyer.

6. Trial 🔑83(2)

Objection to question that same was incompetent, irrelevant and immaterial was too broad to reasonably include and to present to court and opposing counsel specific objection that question called for hearsay.

7. Appeal and error 🔑231(3)

Where general objection that evidence was incompetent, irrelevant, and immaterial was overruled by trial court, party against whom ruling was made could not for first time on appeal raise specific objections thereto unless evidence was not admissible for any purpose.

8. Trial 🔑83(2)

A general objection that evidence is incompetent, irrelevant and immaterial does not present question whether subject is proper for expert testimony or that witness is not properly qualified or that instrument is not properly authenticated and that no proper foundation has been laid for introduction of copy nor that witness has insufficient knowledge of value of property injured to testify as to amount of damage.

9. Evidence 🔑593

Hearsay evidence if admitted without objection is sufficient to establish a fact.

10. Witnesses 🔑372(1)

Extent to which counsel should be permitted to pursue question of interest upon cross-examination of witness including question of when further questioning becomes merely cumulative is committed largely to sound discretion of trial judge.

11. Witnesses 🔑372(2)

In action by buyer of frozen pineapple against general sales agent of seller for breach of warranty on theory that buyer had dealt with agent as principal, refusal to allow buyer to question seller as to whether seller had agreed to finance defense of action or whether agent had offered seller opportunity to defend case and as to information received by seller from agent as to case when it had been previously elicited that seller had come long distance at own expense to testify was not abuse of discretion.

Marvin Handler and Dana, Bledsoe & Smith, San Francisco, for appellants.

Alfred F. Breslauer and Appel, Dains & Liebermann, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiffs, copartners doing business as wholesale produce dealers in Arizona, have appealed from the judgment entered upon a verdict against them and in favor of defendants, copartners doing business as brokers in California, for breach of warranty of crushed, frozen pineapple purchased by plaintiffs.

Appellants do not question the sufficiency of the evidence to support the verdict. They claim the judgment should be reversed because of asserted errors in ruling on the evidence and in giving and refusing instructions to the jury.

The pineapple was grown in Mexico, purchased by Miller Brothers Foods Company, processed and frozen at its plant near Edinburg, Texas, and then shipped (one carload of 1,624 cases) to Tucson, Arizona, where appellants received and on July 25, 1945, stored it in their locker in an ice plant. Within a few days 73 cases were removed to another frozen food warehouse and then distributed by truck to various retail outlets in Arizona. August 16, 1945, appellants shipped the remaining 1,551 cases to a buyer at Seattle, Washington. Upon arrival at Seattle, this lot was found sour, decomposed, and fermented. Efforts to salvage and recondition it proved unsuccessful. The entire lot was eventually condemned by the government. Meanwhile, about one-third of the 73 cases proved sour and were returned to appellants.

Appellants claim that the pineapple was defective when delivered to them at Tucson; respondents, that the spoilage occurred after delivery, caused by improper storage by appellants at Tucson.

As to the contract of sale, appellants claim that they bought from respondents, as principal, through Smith-Whalen (an Arizona brokerage firm who negotiated the sale) as respondents' agent. Respondents claim that appellants bought from Smith-Whalen who was agent for Miller Brothers Foods Company and did not disclose the name of the principal; i. e., that respondents were general agents for Miller Brothers but had delegated Arizona business, including this transaction, to Smith-Whalen who as subagent represented the principal and for whose acts respondents were not responsible.

[1] One of the assertedly erroneous instructions read as follows: "The sworn statement by J. E. Keim that Keim Produce Company purchased the pineapple from Miller Brothers Foods Company of Edinburg, Texas, is evidence that Keim Produce Company, at the time it purchased the pineapple in question, knew that the pineapple was being purchased from Miller Brothers Foods Company and that D. B. Berelson and Company was only the sales agent or broker for Miller Brothers Foods Company."

The statement mentioned was made by Keim in a third party claim filed by appellants October 4, 1945, in the government's condemnation proceeding then pending at Seattle. In it he said "That prior to August 16, 1945, claimants purchased from Miller Brothers Foods Company, of Edinburg, Texas, a quantity of frozen foods, including the 1549 cases, more or less, each case containing twenty-four one-pound cups of articles labeled in part, 'Miller's Lone Star Frozen Crushed Pineapple, packed with pure pineapple juice and sugar, Net Weight when Packed one pound, Miller Bros. Foods Co., Edinburg, Texas,' lib[e]led in the above action."

Appellants contend that at the time of their oral contract with Smith-Whalen (July 9, 1945) they believed that Berelson owned the pineapple and was the principal, that they then had no knowledge of Miller Brothers; that Keim's October statement was consistent with appellants' claim they acquired that knowledge later; that said statement might at most form the basis of an inference that at the time of contracting they knew Miller Brothers was the seller; and that the instruction gave the jury the impression that the statement was not merely evidence from which an inference might have been drawn but that it gave rise to a presumption, as a matter of law, that Keim had such knowledge at the time of the contract; hence, that the instruction had the effect of telling the jury what inference they might draw from certain facts in evidence. We do not so view it. By that instruction the court merely told the jury that the written statement made by Keim in October (potentially inconsistent with the position taken by appellants at the trial concerning their claimed lack of knowledge of Miller Brothers in July) was evidence for the consideration of the jury. The court also told the jury that "Statements or admissions made do not prevent the party who made them from showing the circumstances under which they were made in order to explain the meaning and intent of the statement"; that the jury are the exclusive judges of all questions of fact, the weight of the evidence and the credibility of the witnesses, and must not select a single instruction or portion of an instruction but must consider all of the instructions as a pattern in determining any issue in the case. It is similar, though not identical, to the situation presented in Fawkes v. Reynolds, 190 Cal. 204, 211 P. 449, an action for damages for an alleged battery upon the person of the plaintiff. Concerning evidence of a plea of guilty entered by the defendant in a criminal action based upon the same occurrence, the trial court instructed the jury that "* * * 'Such plea of guilty is not to be taken by you as being conclusive that the defendant was guilty of the crime of assault and battery against the plaintiff. This plea of guilty should only be regarded by you as an admission on the part of the defendant, and it is proper that you should consider all that was said by the defendant at that time.'" 190 Cal. at page 213, 211 P. at page 453. The Supreme Court held that instruction proper, deeming it important that the jury be advised that the plea of guilty was not conclusive but that the jury was to determine the question, "treating the plea of guilty as an admission of the defendant to be weighed in connection with his explanation thereof and all the evidence in the case." 190 Cal. at page 213, 211 P. at page 453. The Fawkes case was decided in 1922. The 1934 amendment to section 19 of article VI of the state Constitution authorizes the trial court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." The amendment, obviously, enlarged the province of the court in this regard beyond that formerly permitted by section 19 of article VI, which, until 1934, declared that "Judges shall not charge juries with respect to matters of fact * * *". See discussion in People v. Gosden, 6 Cal.2d 14, 28, 56 P.2d 211; People v. Ottey, 5 Cal.2d 714, 722–730, 56 P.2d 193. We do not find error in the giving of the questioned instruction.

[2] Appellants claim the following instruction was erroneous: "If you find from the evidence that the copartnership, D. B. Berelson and Company, was in fact acting as an agent and broker for the account of Miller Brothers Food Company of Edinburg, Texas, in the sale of the pineapple involved, and that at the time an enforceable and binding contract for the sale of the pineapple to Keim Produce Company was made, Keim Produce Company knew that D. B. Berelson and Company was acting as agent for Miller Brothers Food Company, your verdict in such case must be in favor of defendant D. B. Berelson and Company." Appellants say the vice of this instruction inheres in the words "at the time an enforceable and binding contract for the sale of the pineapple [was made]"; that those words refer to the time of performance (acceptance of delivery and payment of the purchase price) because it was an oral contract, not "enforceable" until part performance; and that the time when that knowledge was significant was the time of the making of the oral contract. We do not deem that a reasonable interpretation of the instruction. There was no plea of the statute of frauds and no instruction concerning it. The questioned instruction was immediately followed by this one: "A person who makes a contract with another as agent for a disclosed principal does not become a party to the contract. A disclosed principal is one whose identity at the time the contract was made was known to the third person with whom the agent deals." The court had already informed the jury that "A valid contract of sale may be made by word of mouth or may be inferred from the conduct of the parties. It need not be in writing," and "An agent who enters into a contract of sale in his own name without disclosing the identity of his principal renders himself personally liable, even though the buyer knows he is acting as an agent," and "Before an agent can avoid liability on the ground that he acted as a mere agent or broker he must show that he indicated the name or identity of his principal clearly and in such manner as to bring the identity to the actual notice of the buyer." The questioned instruction referred to the time of the making of the oral contract and did not assume facts not in evidence. The statement that Keim made in the third party claim which appellants filed in October (discussed earlier in this opinion) was some evidence that he and his firm knew, at the time of the oral contract, that Miller Brothers Foods Company was the principal. We conclude that the trial court did not commit error in giving the instruction.

[3] Appellants assign as error the court's refusal of their proposed instructions on circumstantial evidence, as follows: "You may find in accordance with an inference which you might reasonably make from circumstantial evidence even though direct evidence, if any, to the contrary has been introduced by the defendant. It is not necessary that a jury accept as true all direct evidence, if any, offered in opposition to an inference. If direct evidence is offered by a defendant to contradict an inference you may reject the direct evidence and accept the inference if the direct evidence is not clear, positive, uncontradicted, or free from doubt," and "It is not necessary in order to establish a theory by circumstantial evidence that the plaintiffs show that their theory is the only conclusion that can fairly or reasonably be drawn from the evidence. It is not necessary that the plaintiffs prove that degree of certainty which excludes every other reasonable conclusion." The court refused these instructions upon the ground that they were covered by instructions given the jury. The court gave these instructions on this subject: "The plaintiffs may rely on inferences, and inferences are what the reason of the jury may draw as a logical conclusion from facts which have been proved in the case," and "In this case the plaintiffs are seeking to prove a negative, that is, they are seeking to prove that the unmerchantable condition of the pineapple claimed by them to have existed was not due to

conditions existing after passage of title in the pineapple to the plaintiffs. In this connection the plaintiffs are seeking to prove that the transportation and storage of the pineapple after its arrival in Tucson was not the cause of deterioration, if any. The law recognizes that the proof of a negative is difficult and it is the law that slight proof by a plaintiff in support of a negative will be sufficient to make out a prima facie case." The differences between the instructions requested and those given were more of form and phraseology than of substance. Those given were apt to the situation; focused attention more pointedly to the problem; and thus were as favorable to appellants as the more formal and abstract instructions which they requested. Appellants had introduced evidence that where ripe pineapple is shipped from the field to the processing plant over the distance and under the temperature and other conditions this pineapple was shipped, a high percentage of it will ferment, and it would be hard to separate the spoiled from the unspoiled fruit and avoid getting a deleterious product into the pack. There was no direct evidence that any of the fruit purchased by Miller Brothers Foods Company did ferment on the way to the plant, nor that any fermented fruit did in fact get into the pack.

[4] Appellants assert error of the court in sustaining an objection to a question they asked of an expert, "* * * will fresh pineapple ferment before it is processed and frozen?" The witness answered "yes," whereupon an objection was interposed and sustained. But no motion to strike was made and no admonition requested or given the jury to disregard the testimony. Appellants also claim that in sustaining the objection the court made a prejudically unfair comment on the evidence. That comment was: "You haven't any testimony from [which] you might say that [fermentation of fresh pineapple] could have happened here." Upon the making of that statement, the following discussion between appellants' counsel and the court immediately ensued:

"Mr. Bledsoe: Well, if the Court please, I don't like to take exception to your Honor's remarks, but I think that is something that ought to be stricken from the record and the jury admonished.

"The Court: Well, I mean I don't recall it. I am not saying there isn't any, but there is none that I recall.

"Mr. Bledsoe: I think the weight of the evidence is for the jury, your Honor.

"The Court: There is no question of that. I have told the jury before they are the final arbiters of it. But I will sustain the objection." Then the court allowed quite extensive testimony by the same witness on that subject. In the instructions given at the end of the trial, the court advised the jury it was their duty to pass upon all questions of fact, unaided by any suggestion from the court; that with questions of fact, the weight of the evidence, the credit they should give any witness, the court had nothing to do; that those were matters entirely within their province and which they must determine for themselves. We find in that situation no basis for predicating error.

[5] Miller, who processed the pineapple, testified that he packed from the same stock, and shipped, one other carload the same day as the carload lot here involved. He was asked if he had received any complaint about the other carload being defrosted or having soured or been contaminated in any way. Appellants objected to that question as "incompetent, irrelevant and immaterial." The objection was overruled. The witness answered "No." The overruling of that objection, appellants assign as error. The court sustained their objections to similar questions later addressed to Miller concerning other shipments, and in so ruling the court said to counsel for respondents, "Well, I have allowed you to show the one car that was packed under the same circumstances and out of the same pack, but if you go into the shipments all season, there are many varying conditions."

[6–9] Appellants' point is not well taken. One of their experts testified upon cross-examination that if in such a case fruit in one car spoiled and that in the other did not, in his opinion the two carload lots left the plant in the same condition and something happened later to cause the spoilage. That shows the relevancy of the question, the answer to which would furnish some evidence of spoilage or nonspoilage of fruit in the other car. Appellants now object that the question erroneously called for hearsay. They did not so specify at the trial when respondents could have tendered evidence that was not hearsay, if they had such evidence available and desired to use it. The objection which appellants made when the question was asked ("incompetent, irrelevant and immaterial") was too broad reasonably to include, and to present to court and opposing counsel, the specific objection that the question called for hearsay. "It is well settled that when a general objection to the admission of certain evidence is overruled by the trial court, the party against whom the ruling is made cannot raise for the first time on appeal a specific objection thereto, unless the evidence is not admissible for any purpose." In re Estate of Pierce, 32 Cal.2d 265, 273, 196 P.2d 1, 6, holding that a general objection to evidence which is relevant does not present the question of its admissibility on the ground of remoteness. An objection to evidence upon the ground that it is incompetent, irrelevant and immaterial is too general to present the question whether the subject is proper for expert testimony or that the witness is qualified, Bundy v. Sierra Lumber Co., 149 Cal. 772, 773, 87 P. 622, or that an instrument is not properly authenticated and that no proper foundation has been laid for introduction of a copy, Attebury v. Wayland, 73 Cal.App.2d 1, 3, 165 P.2d 524, or that a witness has insufficient knowledge of the value of property injured to testify as to the amount of the damage. Brumley v. Flint, 87 Cal. 471, 473–474, 25 P. 683. Hearsay evidence, if admitted without objection, is sufficient to establish a fact. Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 466, 168 P. 1037.

[10, 11] Finally, appellants assert error of the court in sustaining objections to certain questions they addressed to Miller concerning his interest in the outcome of the litigation. These questions were: "Did you or have you agreed to finance the defense of this action?"; "Have they [respondents] tendered to you the opportunity to defend this case?" "Had you received any communication before this case came to trial from Berelson * * * advising you of the pendency of this litigation and advising you that in the event they sustained a loss or lose this case that they will look to you for reimbursement?" Appellants claim these were proper questions upon cross-examination by way of impeachment. However, they did elicit from Miller the fact that he came all the way from Texas, at his own expense, to testify in the case. In response to their question, "Have you made any promise to Mr. Berelson or the Berelson concern with reference to repayment to them if they lose in this litigation?" he answered, "No sir, I have not." His interest as processor and shipper of the fruit was, of course, apparent. The extent to which counsel should be permitted to pursue the question of interest, upon cross-examination, is committed largely to the sound discretion of the trial judge, including the determination when further questioning becomes merely cumulative. We find no error in the court's rulings upon the quoted questions relative to Miller's interest in the outcome of this litigation.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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105 Cal.App.2d 295

SIDNEY v. MARTIN IRON WORKS.

Civ. 18084.

District Court of Appeal, Second District, Division 3, California.

July 5, 1951.

Action by Wallace Sidney against Martin Iron Works for damages for breach of contract of employment. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered judgment for defendant, and plain-

tiff appealed. The District Court of Appeal, Vallée, J., held that contract of employment made in violation of provision of Salary Stabilization Act which froze salaries in excess of $5,000 and required approval from commissioner of internal revenue for increases of salary was illegal and against public policy and recovery could not be had thereon.

Judgment affirmed.

1. War and national defense ⚷404

Where employer's defense to suit by employee for damages for breach of contract of employment was that contract was in violation of Salary Stabilization Act which froze salaries in excess of $5,000 and provided that approval of Commissioner of Internal Revenue for increase of salary in excess of $5,000 must be obtained with certain exceptions, in absence of anything on face of contract showing that approval was required, burden was on employer to show that approval was necessary to valid increase. Stabilization Act 1942, §§ 1–11, 50 U.S.C.A.Appendix, §§ 961–971.

2. War and national defense ⚷404

In action by employee against employer for breach of contract of employment which was defended by assertion that contract was void because made in violation of Salary Stabilization Act which froze salaries in excess of $5,000 and allowed increase of salary only upon approval by Commissioner of Internal Revenue, evidence sustained finding that contract was one which required approval by Commissioner and was not within exceptions of act and was consequently void. Stabilization Act 1942, §§ 1–11, 50 U.S.C.A.Appendix, §§ 961-971.

3. Trial ⚷143

It is function of trial court to resolve inconsistencies and contradictions, if any, in testimony of witnesses, and portion of testimony of witness may be accepted as true and remainder disbelieved.

4. Appeal and error ⚷989

When testimony of witnesses is inconsistent and contradictory, appellate court will accept that portion of testimony which tends to support judgment and not such portion as would defeat or tend to defeat judgment.

5. War and national defense ⚷404

Contract of employment made in violation of provision of Salary Stabilization Act which froze salaries in excess of $5,000 and required approval of Commissioner of Internal Revenue for increases was illegal and recovery could not be had thereon. Stabilization Act of 1942, §§ 1–11, 50 U.S.C.A.Appendix, §§ 961–971.

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Alvan M. Palmer, Hollywood, for appellant.

A. Stewart Maddox, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action for damages for the alleged breach of a contract of employment.

On July 6, 1943, plaintiff and defendant entered into a written contract whereby defendant employed plaintiff as superintendent of its machine shop, valves and gates department and sheet metal department for one year at a salary of $100 a week. The contract also provided for the payment to plaintiff of a percentage of the net profits from the operations of these departments. The complaint alleged that the salary was paid to March 2, 1944, and that on that date defendant arbitrarily terminated the contract and failed to pay plaintiff for the period from March 2 to July 1, 1944. Affirmatively the answer alleged that the contract was void as violative of the Salary Stabilization Act of 1942.

The court found that for a long time prior to July 6, 1943, defendant has in its employ one McCarty who had been employed as, and held the position of, superintendent of defendant's machine shop, valves and gates department and sheet metal department; that McCarty had performed substantially the same duties as those performed by plaintiff after July 6, 1943, under the contract; that the employment and job classification of McCarty on

July 6, 1943, and prior thereto, was the same as that of plaintiff after July 6, 1943; that McCarty's total compensation had been $250 a month. The court also found that the compensation required to be paid to plaintiff under the contract was in excess of $5,000 a year and that the same had not been approved as required by an act of Congress known as the Salary Stabilization Act of 1942. The court concluded and adjudged that the contract was illegal and void and that plaintiff was not entitled to recover.

Plaintiff claims that the recited findings are not supported by the evidence. The contention is without merit.

The Salary Stabilization Act of 1942 authorized the president to stabilize wages and salaries and provided that no employer should pay and no employee should receive wages or salaries in contravention of the regulations promulgated by the president. 50 U.S.C.A.Appendix, §§ 961–971. Pursuant thereto the president by executive order established the Office of Economic Stabilization and the office of director thereof. 7 Fed.Reg. 7871. On October 27, 1942, the director issued regulations which delegated jurisdiction of salaries in excess of $5,000 a year to the Commissioner of Internal Revenue. 7 Fed.Reg. 8748. On December 2, 1942, the Commissioner of Internal Revenue issued what was called T.D. 5186, freezing all salaries in excess of $5,000 a year at the rates in effect on October 3, 1942, and providing that no increase thereof could be made without first obtaining the approval of the commissioner. 7 Fed.Reg. 10050. T.D. 5186 contained this provision: "An employer who has established a new job classification, or who has begun business, after October 3, 1942, must obtain approval of the Commissioner for the payment of salaries for such job classification or in such new business: Provided, however, That if the salary rates in question are not in excess of those prevailing for similar job classifications within the local area, the approval of the Commissioner is not required."

On September 4, 1943, the commissioner issued T.D. 5295 which superseded the quoted exception and read as follows: "Provided, however, That if the salary rates in question are not in excess of the minimum of those prevailing for similar job classifications within his own organization or if no such rates are available, then within the local area on September 15, 1942, the approval of the Commissioner is not required." 8 Fed.Reg. 12429, 12432."

[1, 2] The approval of the contract of July 6, 1943, was not obtained from the Commissioner of Internal Revenue. Under the regulations it was not necessary to obtain the approval of the commissioner if the salary provided in the contract was not in excess of the minimum of those prevailing for similar job classifications within defendant's own organization or if no such rates were available, then those prevailing within the local area on September 15, 1942. Since nothing appears on the face of the contract itself indicating its invalidity, the burden was on the defendant to negative the exceptions. Vagim v. Brown, 63 Cal.App.2d 504, 511, 146 P.2d 923; Thacker v. American Foundry, 78 Cal.App.2d 76, 82, 177 P.2d 322; Gelb v. Benjamin, 78 Cal.App.2d 881, 884, 178 P.2d 476. Defendant assumed and, as the court found, sustained the burden. Two witnesses testified that for a number of years immediately prior to July 6, 1943, McCarty was superintendent of production in the machine shop, valves and gates department and the sheet metal department of defendant; that he was in active charge and direction of production activities in those departments; that he was consulted in connection with estimates and bids made by defendant for the manufacture of products in those departments. These were exactly the duties which plaintiff was employed to, and did, perform under the contract of July 6, 1943. One of these witnesses testified that McCarty's salary was $250 a month and that he did not receive any of the profits.

[3, 4] Plaintiff argues the weight of the testimony of these witnesses and says that there are inconsistencies in the testimony of each. It was the function of the trial court, not this court, to resolve inconsistencies and contradictions, if any, in

the testimony of these witnesses. The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. People v. Thomas, 103 Cal.App.2d 669, 229 P.2d 836.

[5] The court did not err in concluding that the salary agreed to be paid to plaintiff was in excess of that permitted by the Stabilization Act of 1942, and that by reason of the failure to obtain the approval of the Commissioner of Internal Revenue to the increase, the contract was illegal and void. Plaintiff concedes that "if the contract is against public policy or against the mandate of statute, recovery may not be had thereon."

In view of our conclusion, we need not consider other points urged by plaintiff.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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105 Cal.App.2d 196

FLYNN v. CALIFORNIA CASKET CO.

No. 14711.

District Court of Appeal, First District,
Division 1, California.

June 29, 1951.

Hearing Denied Aug. 23, 1951.

Action by Joseph D. Flynn against the California Casket Company, a corporation, upon a contract for the sale to defendant of shares of stock of its own issue held by the plaintiff. The Superior Court, in and for the City and County of San Francisco, Franklin A. Griffin, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Wood, J., held that the evidence sustained implied findings of trial court that the corporation had an earned surplus out of which to pay for the stock held, and that no reasonable ground existed for believing that corporation was unable or by purchase of the stock would be rendered unable to satisfy its debts and liabilities as they fell due.

Affirmed.

1. Corporations 🔑389

In action by a former officer of defendant corporation upon a contract for sale to corporation of shares of stock of its own issue held by plaintiff, evidence supported implied finding that corporation had an earned surplus out of which to pay for stock held by plaintiff. Corporations Code, §§ 1705, 1707, 1708.

2. Corporations 🔑389

In action by a former officer of defendant corporation upon a contract for sale to defendant of shares of stock of its own issue held by plaintiff, evidence supported implied finding that there was not reasonable grounds for believing that corporation was unable, or by purchase of shares of stock, would be rendered unable to satisfy its debts and liabilities as they fell due.

3. Corporations 🔑389

In action by a former officer of defendant corporation upon a contract for sale to defendant of shares of stock of its own issue held by plaintiff, evidence sustained implied finding that corporation's debts and liabilities had been adequately provided for as required by Corporations Code. Corporations Code, § 1708.

4. Corporations 🔑521

In action by a former officer of defendant corporation upon a contract for sale to defendant of shares of stock of its own issue held by plaintiff, an instruction of outlining factors to be determined whether corporation was able to pay plaintiff for stock he held, was proper.

5. Corporations 🔑521

In action by a former officer of defendant corporation upon a contract for sale to defendant of shares of stock of its own issue held by plaintiff, an instruction that it was for jury to decide whether or not debts and liabilities of corporation were adequately provided for as required by statute, was proper. Corporations Code, § 1708.

6. Interest ⟹39(1)

When a contract for payment of money is silent as to interest, law awards interest at legal rates from time it became due and payable, if such time is certain or can be made certain by calculation.

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Doyle & Clecak, San Francisco, for appellant.

Roth & Bahrs, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant, California Casket Company, a corporation, appeals from a judgment entered upon a verdict for plaintiff in an action upon a contract for the sale to defendant of shares of stock of its own issue. Defendant also appeals from an order modifying the amount of the judgment to include interest from the due date under the contract to the date of the judgment.

Appellant assigns as reversible error: (1) Insufficiency of the evidence to support the verdict and (2) the giving of assertedly erroneous and misleading instructions to the jury.

The contract between the parties was executed August 19, 1941, and amended in 1945 and 1948. During that period and until his resignation May 31, 1949, respondent was a director and executive vice-president of appellant company; hence, an officer, not an employee, of appellant. By the terms of the contract as amended, respondent gave appellant an irrevocable option to repurchase all shares of its stock acquired by respondent on and after August 19, 1941, if at any time and for any reason respondent's employment with appellant should terminate, "for a sum computed in accordance with the following formula: (a) Par value; (b) Plus or minus a sum equal to 5% of the average net earnings of First Party [appellant] for the next preceding five-year period prior to the date of termination of employment," and appellant agreed to purchase all of said shares "for said amount, for cash, within sixty days (60) after such termination."

During the period covered by the contract, respondent acquired 460 shares of the par value of $100 each. Five per cent of appellant's average net earnings for the five-year period preceding respondent's resignation, amounted to $2,389.85. The verdict and judgment were in the sum of $48,389.85. Upon motion of respondent, the trial court modified the judgment to include the sum of $1,975.89 (interest from the due date under the contract until entry of the judgment), increasing the total amount to $50,365.74.

Appellant claims legal incapacity to consummate the purchase of these shares. It invokes section 1705 of the Corporations Code, which declares that "A corporation shall not purchase directly or indirectly any shares issued by it * * *, except as authorized by Section 1706 or Section 1707", and claims that its financial condition does not bring it within any of those exceptions. A potentially applicable exception is expressed in section 1707, which declares that "A corporation may also purchase shares issued by it, * * * in any of the following cases: * * * (c) Subject to any limitations contained in its articles, out of earned surplus. Purchases under this subdivision are not limited to cases authorized under other subdivisions of this section or of Section 1706." An additional limitation imposed by section 1708 is that "A corporation shall not purchase * * * shares issued by it * * in any case when there is reasonable ground for believing that the corporation is unable, or, by such purchase * * * will be rendered unable, to satisfy its debts and liabilities when they fall due, except such debts and liabilities as have been otherwise adequately provided for."

Appellant claims that the evidence is insufficient to support the implied findings of the jury that appellant had an earned surplus out of which to pay for these shares and that there was not reasonable ground for believing that appellant was unable, or by the purchase would be rendered unable, to satisfy its debts and liabilities when they fell due, or that appellant's debts, or any of them, had been otherwise adequately provided for.

As to Appellant's Earned Surplus.

[1] The evidence supports the implied finding that appellant had an earned surplus out of which to pay for these shares. After respondent's resignation on May 31, 1949, appellant employed a firm of certified public accountants to make an examination of the affairs of the company and to determine what amounts should be set up on the books of the corporation in the various categories, except only that the write-down of the casket inventory was made by appellant's division managers. This was done as of June 30, 1949. The report was accepted by appellant's board of directors without discussion and the books of the corporation were adjusted in accordance with the report. As thus adjusted, the books showed an earned surplus of $23,301.21. They also showed, as a current liability, a reserve of $44,000 for the purchase of the shares of stock involved herein, an item which, at the trial, appellant's vice-president testified and its attorney agreed should, for the purposes of this suit, go back into earned surplus. There were other items which an expert called by respondent testified were improperly set up as liabilities, and, if properly adjusted, would further increase the amount of the surplus. At the very least, the evidence shows that for the purposes of this suit appellant on June 30, 1949, had an earned surplus of $67,301.21 out of which to pay this liability of $48,389.85.

Appellant claims its earned surplus was reduced by a loss of $12,064.68 which it sustained in July, 1949. That would still leave a surplus of $55,236.53 out of which to purchase this stock, whether on August 1, 1949 (the due date under the contract), or on August 11, 1949 (the date of the commencement of suit herein).

Appellant contends that the date for determination of the amount of its earned surplus is the day the trial herein commenced, February 9, 1950, and that on that day, the evidence demonstrated, its surplus was insufficient. In support of its contention that the time of trial is the critical date, appellant cites Goodman v. Global Industries, 80 Cal.App.2d 583, 182 P.2d 300. But the court in that case did not decide the question. After observing that the appellant therein claimed his rights should be determined as of the time he filed his suit, the court said, "In view of the fact that appellant neither alleged nor proved the existence of an earned surplus *at any time*, the question is immaterial." 80 Cal.App.2d at page 589, 182 P.2d at page 304. Nor need we decide that question. The evidence herein would support a finding that on February 9, 1950, the appellant had an earned surplus out of which to purchase these shares.

Appellant's balance sheet for January 31, 1950, shows an earned surplus of minus $94.94. The addition of the $44,000 reserve for the purchase of these shares increases the surplus to $43,905.06 as of that date. There was a conflict of testimony concerning the propriety of a reserve of $34,000 for tax liabilities of prior years, a write-down of the casket inventory in the amount of $35,000, and a reserve of $145,000 against the appliance division inventory of $172,985.08. The reserve of $34,000 was in the amount, plus interest, of a proposed additional assessment of federal income and excess profit taxes for the three fiscal years ending June 30, 1946, an assessment proposed by the government in 1947. The appellant protested the proposed assessment, was taking active measures to dispute the government's claim, and had not, prior to June 30, 1949, entered it in its books as a liability of any kind nor set up any reserve for its payment. An accounting expert called by respondent testified that under those circumstances it was not in accordance with sound accounting procedures to set that item up in the sum of $34,000 among the liabilities of the corporation, nor to set it up as a liability at all. He further testified that if the company had received information that a similar case had been decided in favor of the taxpayer (there was evidence it had) there was, according to sound accounting procedures, an obligation upon the part of the financial officers of the corporation to remove that item from the balance sheet of current liabilities and restore it to earned surplus.

The balance sheet for January 31, 1950, also showed, as a current asset, a special bank account of $33,992.88, which appellant's treasurer testified the bank impounded; i. e., that the bank would not honor checks against that account for any purpose except for the payment of the amount set up on the books in connection with the income tax deficiency, when and if it should become due and payable. Appellant's president testified that upon January 30 or 31 the company received a letter from its attorney saying he would probably be able to settle the case for $15,000, upon the basis of which the bank, on February 1, 1950, released $18,000, reducing the special account to $15,000.

Here was evidence that would justify restoring from $18,000 to $34,000 to earned surplus. It amply supports an implied finding that, as of the date of the trial, appellant had an earned surplus of not less than $61,905.06 (minus $94.94 plus $44,000 plus $18,000), more than sufficient for the purchase of these shares. It is, therefore, not necessary to consider the additional amount, if any, which the jury may have considered available for return to surplus, based upon evidence tending to show that the casket inventory write-down and the reserve against the appliance division inventory were excessive.

As to Appellant's Ability to Satisfy its Debts and Liabilities as They Fall Due.

[2] The evidence supports an implied finding that there was not reasonable ground for believing that appellant was unable, or by the purchase of these shares of stock would be rendered unable, to satisfy its debts and liabilities as they fell due.

According to appellant's own balance sheet, it had on June 30, 1949, a net worth of $1,121,459.32 (assets, $1,725,317.19; liabilities, $603,857.87). That indicates a potential ability to pay debts as they fall due, save that if a considerable portion of the assets were frozen appellant might not be able to do so. This suggests consideration of the ratio of current assets to current liabilities, for there was expert testimony that "current assets," as an accounting term, means either cash or assets readily convertible into cash. The balance sheet for June 30, 1949, showed current assets of $866,822.68 and current liabilities of $463,407.87. There was expert testimony tending to prove needed adjustments in various items (including the $44,000 reserve for purchase of these shares and the $34,000 reserve for disputed federal tax liabilities, discussed earlier in this opinion), which, if made, would show a ratio of two to one between current assets and current liabilities. In the opinion of one of the experts, appellant had more than ample assets over liabilities to pay all its obligations, as reflected by its balance sheet for June 30, 1949. The balance sheet for December 31, 1949, reflected substantially the same condition: Total assets of $1,633,625.54 and total liabilities of $523,552.62; current assets of $809,556.07 and current liabilities of $414,079.37.

Appellant's sales, during the last six months of 1949, grossed $762,501.74. Its cost of materials normally runs from 46 to 57 per cent of the amount of sales. This indicates that appellant's cost of materials during that period was about 51.5 per cent of $762,000,—approximately $392,000. It drew from inventory, materials valued at $50,000, indicating purchase of materials in the amount of $342,000. Meanwhile, the amount of its accounts payable did not materially increase ($116,087.89 on June 30; $113,814.94 on December 31). Upon the latter date there appeared, in addition, an item of $30,766.62 as deferred accounts payable, and $7,581.40 as other accounts payable. Deduction of the last two amounts (less the $2,000 decrease in accounts payable) from the $342,000 indicates that during the period July to December, 1949, appellant paid current debts in the amount of $306,000, approximately.

During the same six months period, appellant reduced its bank loans in the amount of $120,000, paying at the rate of $20,000 a month. The total amount of its indebtedness to the bank reached $400,000 in February, 1949; $250,000 unsecured, and $150,000 secured by a mortgage on San Francisco property carried at a depreciated valuation of $452,935.49. By January 31, 1950, appellant had paid $194,000 on those loans, reducing them to $206,000.

The payment of current liabilities in the amount of $306,000, approximately, and the reduction of bank loans, secured and unsecured, in the amount of $120,000, during July-December, 1949, under the conditions described, evidently did not create in the minds of the jury a reasonable doubt concerning the ability of appellant to pay its debts and liabilities as they fell due.

But appellant directs attention to its balance sheet of January 31, 1950, which shows a substantial increase in "Trade Accounts Payable" (from $113,814.94 at the end of December to $149,430.99 at the end of January), an increase of $35,616.05. However, during January, "Deferred Accounts Payable" and "Other Accounts Payable" decreased to the extent of $7,694.43 and $608.11, respectively. This means a total increase of $27,313.51 during January, 1951. The profit and loss statement for July-January shows total sales of $899,400, in contrast to $762,000 for the six months period ending December 31, 1949, and no apparent substantial change in inventories between December 31 and January 31. The $27,313.51 increase in trade accounts payable between December 31 and January 31 need not, and apparently did not, alter the implied finding of the jury concerning appellant's ability to pay its debts as they fell due. Significant in this connection is the testimony of appellant's vice-president concerning the relation of the increase in accounts payable and the reduction of the bank loans during the seven months period ending January 31, 1950. He testified that accounts payable did not go up nearly as much as the bank loan went down ($65,000 and $129,500, respectively) and that appellant was paying the bank at least partially at the expense of its trade creditors.

Appellant lays considerable stress upon the relation of its cash on hand (less than $50,000) to the amount of its accounts payable and other current liabilities, as demonstrating inability to pay its debts as they fall due. True, there is a wide disparity. But the jury was entitled to, and we must assume did, take into consideration appellant's large volume of accounts receivable, which, during the seven months ending January 31, 1950, ranged from $220,000 to $229,000, after deducting approximately 10 per cent as a reserve for bad debts. There was evidence, which we have noted, that accounts receivable are readily converted into cash. But, says appellant, its accounts receivable are payable in 60 days whereas its accounts payable are due in 30 days. That, testified an expert, cancels itself out in 30 days. He also testified that a corporation in the financial condition of appellant would be able to borrow money to use as a revolving fund for prompt liquidation of its accounts payable. Another factor stressed by appellant was slowness in the payment of its accounts payable. That, inferably, resulted in part from the lack of a revolving fund. The expert testified that all this was correctible by an adequate loan and other financing arrangements, including the reduction of inventory and the speeding up of the collection of receivables, and that it could be done if the receivables were sound. Our attention has been directed to no evidence in the record (and we have found no evidence) that the receivables were other than sound. Appellant claimed it was unable to borrow further from its bank, despite the ratio of its assets to liabilities and the reduction of its bank loan from $400,000 to $206,000 in one year. But its president testified they did not try to borrow further money from the bank. He said they just tried to get the bank to postpone for a while the monthly payments on the bank loan. That, evidently, did not impress the jury as a real effort to get additional moneys from their bank for revolving fund purposes, nor did it in their minds counterbalance the testimony that the additional moneys were obtainable.

The evidence presented to the jury, with the inferences which they were entitled to draw therefrom, furnished substantial support for an implied finding by them that there is not "reasonable ground for believing" that the corporation was "unable" or by the purchase of these shares would be rendered "unable" to "satisfy its debts and liabilities when they fall due." Upon that issue, a complete picture of appellant's financial condition and operations was presented to the jury. There were conflicts in the evidence. Those conflicts the jury resolved in respondent's favor. It is not our function to reweigh them. It is essentially a question of fact.

Appellant invokes a number of definitions of insolvency, appearing in various statutes. They are not applicable here. One of them, section 3077 of the Civil Code, is patently inapplicable. It says that a buyer of goods is insolvent (within the meaning of section 3076 of the same code) "when he *ceases to pay* his debts in the manner usual with persons of his business, or when he *declares his inability* or *unwillingness* to do so" (emphasis added). There is no such expression in the statute with which we are concerned. The definition in section 3077 is appropriate to the purpose for which enacted, that of prescribing the conditions under which an unpaid seller of goods may stop the goods in transit. That definition throws no light upon the meaning of the words "unable * * * to satisfy its debts and liabilities when they fall due."

Under our statute (Corp.Code, § 1708), it is simply a question of *ability* to satisfy debts when they fall due. The fact that a corporation is overdue in the payment of some of its accounts and presently may not be operating at a profit, would be some evidence tending to show inability to satisfy debts when due. But the weight of such evidence may be overcome by evidence of other facts tending to show *ability* to satisfy debts when due. That is what the triers of fact impliedly found in the instant case, a conclusion which finds support in the evidence.

As to Debts Otherwise Adequately Provided For.

Appellant claims it had no debts that had been "otherwise adequately provided for," because there was no evidence that the payment of any of its debts or liabilities had been "assumed or guaranteed" by any "person or persons."

This claim is predicated upon the statement in section 1708 of the Corporations Code that "The payment of a debt or liability has been adequately provided for if the payment thereof has been assumed or guaranteed in good faith by a financially responsible person or persons." Appellant says this means that a debt so assumed or guaranteed is the only kind of a debt "adequately provided for", as an exception to the requirement of ability to pay debts when they fall due. We derive no such meaning from the quoted statement. The Legislature used it for the purpose of illustration and to remove any possible doubt that a debt so assumed or guaranteed is "adequately provided for"; not to restrict or narrow the scope or meaning of that term. See Oil Workers Int'l Union v. Superior Court, 103 Cal.App.2d 512, —, 230 P.2d 71, and cases cited. Certainly there was no intent upon the part of the Legislature to exclude from consideration a debt adequately secured by a mortgage upon real or personal property or by the pledge of personal property or by the assignment of solvent credits. Nor need a debt be secured, to be provided for. In the absence of a limitation expressed or necessarily implied (we find none in this statute), it becomes a question of fact in each case whether or not debts and liabilities have been "adequately provided for."

Upon this issue, the jury had before it all the facts which it had for the consideration of the question of appellant's ability to satisfy its debts as they fall due, including, among others: Appellant has a net worth in excess of $1,000,000; its total assets exceed total liabilities in the ratio of three to one; its current assets exceed current liabilities in the ratio of two to one, or better; its accounts receivable exceed its accounts payable by a wide margin; during July-December, 1949, it paid current liabilities in the amount, approximately, of $306,000, and reduced its bank loan by $120,000; and, during the year 1949, it reduced its bank loan from $400,000 to $206,000.

[3] These and related facts, and the inferences which might reasonably be drawn from them, supported an implied finding by the jury that appellant's debts and liabilities had been adequately provided for.

The Questioned Instructions.

[4] Appellant assigns as error the giving of a certain instruction because, it claims, the court thereby erroneously told the jury that because the corporation had a large net worth it was compelled to sell its operating assets, that a liquidation should be had to repurchase the plaintiff's stock. We do not so read that instruction. It was in these words: "If you find from the evidence that at the time for performance of defendant's agreement to purchase plaintiff's stock, the defendant corporation had assets which could be converted into cash in an amount sufficient to pay its debts and liabilities as they fell due, then you may find that there was no reasonable ground for believing that the corporation was unable or by such purchase of plaintiff's stock would be unable to pay its debts and liabilities when they fall due." The questioned instruction should be read in its context. It immediately followed these instructions: "The test to be applied by you in determining the condition of the defendant's financial affairs is not 'Will the defendant's assets on an immediate sale realize enough to pay its debts that are due and will become due?' but the true test is, 'Are the defendant's affairs in such a condition as to enable it, in the usual and ordinary course of its business, to make its payments as they fall due?' In other words, the defendant is not compelled to sell or liquidate its assets in order to place it in a position to repurchase the plaintiff's stock, if there is reasonable ground for believing that in the ordinary course of business the defendant is unable to pay its debts and liabilities as they fall due, or there is reasonable ground for believing that the defendant, by the repurchasing of plaintiff's stock, will be rendered unable to pay its debts and liabilities as they fall due. You cannot infer that the defendant California Casket Company can pay its debts and liabilities as they fall due, simply because its financial statements show an excess of current assets over current liabilities, and a net worth of $1,110,172.92. However, a corporation is not unable to satisfy its debts and liabilities when they fall due merely because it does not have cash on hand or money in the bank sufficient to pay its debts and liabilities." Viewed in its context, the questioned instruction had no such connotation as that which appellant would ascribe to it. We do not find error in this group of instructions.

[5] The other instruction questioned by appellant reads as follows: "All of the assets of the defendant corporation, in whatever form they may be, are subject to the claims of its creditors, and, therefore, if you find that the defendant corporation has assets substantially in excess of all of its outstanding liabilities to creditors, you may find that the debts and liabilities of the corporation are adequately provided for." Appellant contends that this instruction assumes facts not in evidence, claiming that the only kind of a debt which the statute recognizes as "adequately provided for" is one that has been assumed or guaranteed by a financially responsible person or persons. That is not our view of the statute, as we have indicated. Upon oral argument, appellant's counsel conceded that if that clause of section 1708 which he invokes does not operate as a limitation, it is for the trier of facts to decide whether or not the debts and liabilities were adequately provided for. That is what the trial judge committed to the jury when he gave this instruction, to be read, of course, in conjunction with the group of instructions already discussed, a group which immediately preceded this instruction.

The judgment should be affirmed.

[6] Concerning the order which modified the judgment to allow interest from

and after the due date under the contract, appellant has made no suggestion or comment, either in the briefs or upon oral argument. We assume appellant has concluded the order was not erroneous. The applicable rule is that when a contract for the payment of money is silent as to interest, the law awards interest at the legal rate from the time it becomes due and payable, if such time is certain or can be made certain by calculation. Nesbit v. MacDonald, 203 Cal. 219, 222, 263 P. 1007; Puppo v. Larosa, 194 Cal. 717, 720, 230 P. 439. The order should be affirmed.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS, J., dissenting.

105 Cal.App.2d 260

DIXON et al. v. EASTOWN REALTY CO.

Civ. 18295.

District Court of Appeal, Second District, Division 2, California.

July 2, 1951.

Action by A. Stanton Dixon and another, against Eastown Realty Company, a corporation, to abate a nuisance consisting of an encroachment of defendant's garage building on plaintiffs' property, wherein defendant filed a cross complaint. The Superior Court, Los Angeles County, John J. Ford, J., rendered a judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Wilson, J. held that the trial court determined that an easement existed in favor of defendant.

Judgment affirmed.

1. Easements 🔑16

When owner of entire estate sells portion of it, purchaser takes portion sold with all benefits and with all burdens that appear at time of sale to belong to property sold as between that property and property which grantor retains.

2. Easements 🔑16

When owner of one heritage consisting of several parts has so adapted them that one derives benefit from the other, when he sells one without making mention of incidental burdens of one with respect to other, implied understanding arises that burdens and correlative advantages shall continue as before separation of title.

3. Easements 🔑16

Where owners of lot erected garage which encroached slightly on owners' adjoining lot and erected apartment building on second, and plaintiffs loaned money for building without making inspection or survey, and building was finally conveyed to them in satisfaction of indebtedness and garage and lot were conveyed to others, plaintiffs took subject to easement in favor of adjoining lot and encroaching garage.

4. Vendor and purchaser 🔑80

Where owners transferred garage, it was presumed that they transferred entire wall of that building including portion which encroached on property of adjoining owners. Civ.Code, §§ 1084, 3522.

5. Easements 🔑16

When owner of realty conveys portion of it, he is taken by implication to include in his grant all such easements in remaining part as are necessary for reasonable enjoyment of part which he grants, in form which it assumes at time he transfers it. Civ.Code, §§ 1084, 1104, 3522.

6. Trial 🔑397(1)

In action to abate nuisance consisting of slight encroachment of defendant's garage building on plaintiffs' property, where court found wall of garage had not been altered since its conception and hence an easement was created by initial conveyance of the garage property, court was not required to make findings concerning width of passageway, effect of encroachment on market value of plaintiffs' property, and possible cost of removing encroaching portions of wall. Health and Safety Code, § 15687.

7. Trial 🔑397(1)

Trial court need not make express finding upon issue which is implicit in findings made by court.

8. Appeal and error ⚷1033(9)

Where court found easement upon plaintiffs' land for benefit of property of defendant but failed to carry provision into judgment, plaintiffs were not in position to complain of omission. Code Civ.Proc. § 632.

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C. V. Caldwell, Los Angeles, for appellants.

I. H. Prinzmetal, Beverly Hills, and Henry Pregerson, Beverly Hills, for respondent.

WILSON, Justice.

Action to abate a nuisance consisting of a slight encroachment of defendant's garage building on plaintiffs' property. Judgment was entered in favor of defendant from which plaintiffs have appealed.

The facts agreed upon by the parties and found by the court are as follows: Prior to June, 1929, one Davies and wife were the owners of an unimproved parcel of property described as Lots 19, 21 and 23 in Tract 4738. Between June, 1929, and June, 1930, Mr. and Mrs. Davies caused two structures to be erected on the property, a 16-unit two-story apartment building on Lot 19 and the south 42 feet of Lot 21, and a two-story garage building on Lot 23 and the north six feet of Lot 21. The garage is north of the apartment and the two buildings are separated by a walk leading from the street to the side entrance of the apartment house.

About June 12, 1930, shortly after the completion of the apartment, plaintiffs loaned to Mr. and Mrs. Davies the sum of $10,000 and received a second trust deed on the apartment building and premises as security. On May 13, 1937, in satisfaction of the indebtedness, Mr. and Mrs. Davies conveyed the apartment property by grant deed to plaintiffs who, ever since that date, have been the owners thereof.

On August 10, 1932, Davies and wife conveyed the garage property to Beverly Hills National Bank and Trust Company and by mesne conveyances title thereafter became vested in defendant.

The garage wall encroaches upon plaintiffs' property a distance of 0.35 of a foot at its northwest corner and 0.15 of a foot at the northeast corner thereof. The brick wall of the garage is covered by a coat of stucco less than ¾ths of an inch thick, and near the foot of the south wall there is a moulding two inches thick and 13 inches wide. The aggregate thickness of the stucco and moulding is 2.40 inches.

The buildings are approximately parallel with each other and, exclusive of the wooden stairways (which were originally erected by Davies and wife when the buildings were constructed) on the north side of plaintiffs' apartment house, the buildings are approximately 47 inches distant from each other at all points.

Prior to the time plaintiffs made the loan of $10,000 on the apartment they had seen both buildings but made no inspection of them and no survey was made by any of the parties prior to the conveyances by Mr. and Mrs. Davies above mentioned. At the time of the respective conveyances the title reports made no reference to any encroachment.

In May, 1947, upon learning that defendant's immediate grantor was the owner of the garage, plaintiffs communicated with such owner with respect to the encroachment and negotiations were conducted by the attorneys of the parties until August, 1948, without result. Plaintiffs did not learn that defendant had become the owner of the garage until immediately before the filing of this action.

The distance between the two buildings has not been altered since their erection. Such space is used as a side entrance to the apartment building and as a means of egress from the rear thereof to the street. There is no alley or other passageway along the rear of the apartment house but there is a yard in the rear which does not border on a street or public alley. There is also a front entrance to the apartment building.

The court further found that on the southwest corner of defendant's garage there is a tower which was constructed as a part of the building and has so remained since its completion, which tower encroaches approximately 13½ inches over the line of plaintiffs' property, the bottom of the tower being approximately 12½ feet above the ground; that no action was filed by plaintiffs for the abatement of the encroachment until the instant action was filed, but about March, 1946, plaintiffs demanded of the then owner that the encroachment be removed; that the nature of the construction of the garage is not such that the encroaching portions can be removed without damage or detriment to the building; such encroachments do not constitute a nuisance and plaintiffs have not been damaged by reason thereof in any sum.

As conclusions of law the court found that to the extent of the encroachments above described there exists an easement on plaintiffs' property for the benefit of the property of defendant; that plaintiffs have not suffered any damage by reason of the encroachment and are not entitled to an injunction, damages, or any other relief.

Section 1104 of the Civil Code reads as follows: "What easements pass with property. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

[1, 2] It is a rule of real property that when an owner of the entire estate sells a portion of it, the purchaser takes the portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the grantor retains. Kallenburg v. Long, 39 Cal.App. 731, 735, 179 P. 730; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 415, 129 P. 593; Cheda v. Bodkin, 173 Cal. 7, 14, 158 P. 1025. In the latter case the court said: "Where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, when he sells one of them without making mention of the incidental burdens of one in respect to the other, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title."

[3] When Mr. and Mrs. Davies conveyed Lot 23 and the north six feet of Lot 21, the property on which the garage had been erected, it was not and will not now be assumed that they intended to transfer the garage property without conveying the entire parcel of land on which it stood, or that they intended to transfer the garage and exclude from the conveyance any portion of the wall.

[4, 5] The transfer of a thing transfers also all its incidents, unless expressly excepted. Civil Code, sec. 1084. "One who grants a thing is presumed to grant also whatever is essential to its use." Civil Code, sec. 3522. Hence, since the wall of the garage is essential to the use of the building it is presumed that Mr. and Mrs. Davies transferred the entire wall including that portion which encroaches on plaintiffs' property. When the owner of real property conveys a portion of it "he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it." Cave v. Crafts, 53 Cal. 135, 140; Southern Pacific Co. v. Los Angeles Milling Co., 177 Cal. 395, 402, 170 P. 829.

Plaintiffs contend that the court erred in failing to make findings of fact (1) as to the width of the passageway between the two buildings, for the reason that such passageway is narrower than permitted by section 15687 of the Health and Safety Code; (2) as to the truth of the allegation to the effect that the encroachment of defendant's building upon plaintiffs' premises casts a cloud upon the title to the latter and reduces its market value and salability; (3) as to the cost of removing the encroaching portions of defendant's building, which cost was alleged in the complaint to be the sum of $1,600; (4) as to whether Davies and wife had knowledge of the encroachment at the time they made the conveyance to plaintiffs and at the time they conveyed the garage property to the Beverly Hills National Bank and Trust Company. They further contend that the court erred in finding that the encroachment does not constitute a nuisance, that plaintiffs have not been damaged in any sum, and that they have not suffered any injury or loss by the continuance of the encroachment.

[6, 7] The garage building was constructed prior to June, 1930, and the first conveyance thereof was made by Mr. and Mrs. Davies in August, 1932. The court found that the wall of the garage has not been altered since its construction, hence the easement was created by the first conveyance of the garage property in 1932. Since the court's finding relating to the easement determines the rights and obligations of the parties there could be no purpose in making findings of fact concerning the width of the passageway, the effect of the encroachment upon the market value of plaintiffs' property, and the possible cost of removing the encroaching portions of defendant's wall. Inasmuch as the easement exists in favor of defendant and its property, the court could not enjoin the continuance of such encroachment or allow damages to plaintiffs by reason thereof. A trial court need not make an express finding upon an issue which is implicit in the findings made by the court. Haigler v. Donnelly, 18 Cal.2d 674, 677–678, 117 P.2d 331.

[8] Plaintiffs further contend that in its conclusions of law the court found that there exists an easement upon plaintiffs' land for the benefit of the garage property of defendant but such provision was not carried into the judgment. Plaintiffs are not in a position to complain by reason of such omission from the judgment. However, they contend that since the findings and conclusions constitute the court's decision, Code Civ.Proc., sec. 632, the judgment may possibly be modified or amended in the future, nunc pro tunc, so as to include a provision which will be in accord with the conclusion of law above mentioned. Plaintiffs will not be injured by such a modification if made, in view of the fact that the trial court and this court have determined that the easement for the benefit of defendant's property actually exists.

Plaintiffs' final complaint is that the court erred in rendering judgment that "each party take nothing except cost to defendant." The adjudication that plaintiffs are not entitled to relief has been disposed of in this opinion. The judgment that defendant take nothing "by its cross-complaint" has reference to allegations in defendant's pleading with reference to an incinerator maintained by plaintiffs which was alleged to be a nuisance and to defendant's prayer for its abatement and for damages. Since the latter part of the judgment is in plaintiffs' favor there is no ground upon which they may assert error.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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105 Cal.App.2d 258

ROJAS v. SOUTHERN CALIFORNIA EDISON CO.

Civ. 18139.

District Court of Appeal, Second Appellate District, Division 2, California.

July 2, 1951.

Action by Mike Rojas against the Southern California Edison Company, a corporation, for injuries suffered when he came in contact with defendant's high voltage wires. The Superior Court, Ventura County, William A. Freeman, J., rendered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that the plaintiff was guilty of contributory negligence.

Judgment affirmed.

1. Electricity 🔑18(1)

Where a person is warned to keep away from a high voltage wire and not to touch it and is fully informed of the danger of so doing, he is guilty of contributory negligence as matter of law if he voluntarily contacts the wire.

2. Electricity 🔑18(1)

Where employee of walnut grower had been warned of danger from high voltage wires maintained over walnut grove and was told not to allow walnut shaker to touch wires, and lifted the shaker toward top of tree, and it touched wire and employee was severely burned, employee was guilty of contributory negligence, and could not therefore, recover from power company, notwithstanding that he could not read English and therefore could not read high voltage signs affixed to poles supporting electric wires.

Alexander Ruiz, Los Angeles, for appellant.

Bruce Renwick, Rollin E. Woodbury and John J. McCue, all of Los Angeles, Sheridan, Orr, Bates & Barnes and Albert D. Barnes, all of Ventura, for respondent.

WILSON, Justice.

Plaintiff has appealed from a judgment in favor of defendant following the granting of a motion for a nonsuit. Inasmuch as the evidence is clear and uncontradicted that plaintiff was guilty of contributory negligence and no negligence can be attributed to defendant, the judgment must be affirmed.

Since 1922 defendant has maintained an electric power line across a walnut orchard owned by one Everett, near Moorpark, in Ventura County. The transmission line was energized with approximately 16,000 volts. The walnut trees are approximately 40 years old, some of them being directly under the transmission line. Plaintiff was employed by Everett during the walnut picking season; he was directed to use an aluminum shaker over 33 feet in length, with a hook on the upper end for the purpose of shaking limbs and causing the nuts to fall to the ground. Plaintiff was unable to read or speak English and therefore could not read the signs "High Voltage" on the poles supporting the electric wires; however, Everett warned him of the danger and told him not to allow the shaker to touch the wires. That plaintiff understood the danger is manifest from his evidence; he testified that Everett showed him the power line and "warned me to be careful of the wires." He further testified as follows:

"Q. When you went to work on the Ernest Everett ranch did Mr. Eldon Everett tell you to be very careful about working around those wires? A. Yes.

"Q. Did he tell you that the least little touch would probably kill you? A. No, he didn't use those words, but he told the danger, and then I thought for myself it was a danger.

"Q. You knew that if you brought the metal shaker you had in contact with those wires that were over the Ernest Everett ranch, that you might be seriously injured, didn't you, Mr. Rojas? A. Yes; that is why I didn't get too close. * * *

"Q. All right, when you picked up this long shaker, how was it lying? A. The shaker was lying in an easterly direction, and I raised it toward the top of the tree.

"Q. Now, did you see the wires above you? A. Yes, I did.

"Q. Did you see those wires before you picked up the shaker? A. Yes. * *

"Q. Did you intend to touch the wire? A. No, No, I didn't want to die."

When plaintiff lifted the shaker toward the top of the tree it touched the wire and plaintiff was severely burned. The shaker was found hooked over the wire immediately after the accident.

[1] Where a person is warned to keep away from a high voltage wire and not to touch it and is fully informed of the danger of so doing he is guilty of contributory negligence as a matter of law if he voluntarily contacts the wire. Shade v. Bay Counties Power Co., 152 Cal. 10, 13, 92 P. 62; Ergo v. Merced Falls G. & E. Co., 161 Cal. 334, 338–339, 119 P. 101, 41 L.R.A., N.S., 79; Andrews v. Valley Ice Co., 167 Cal. 11, 20, 138 P. 699; Stackpole v. Pacific G. & E. Co., 181 Cal. 700, 705, 186 P. 354.

[2] The record does not disclose evidence of negligence on the part of defendant. It had maintained its wires in the same location and in the same condition

for 26 years before the date of the accident. Defendant had nothing to do with the gathering of the walnuts or with the employment of plaintiff. There is no evidence that defendant was guilty of any negligence in the construction or maintenance of the power line or that it was maintained in violation of any statute or of any order of the Public Utilities Commission and there is no evidence from which it can be inferred that defendant might reasonably have anticipated that plaintiff would place a metal shaker over 33 feet in length in contact with the transmission wire.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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105 Cal.App.2d 274

CRAWFORD v. ELLIS.

Civ. 18018.

District Court of Appeal, Second District, Division 1, California.

July 3, 1951.

Action by Carolyn E. Crawford against R. C. Ellis for personal injuries and property damage sustained in an intersectional collision with the defendant's automobile. The Superior Court, Los Angeles County, Elmer D. Doyle, J., rendered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Drapeau, J., held that in the circumstances, negligence and contributory negligence of plaintiff and defendant became questions of fact addressed to trial judge.

Judgment affirmed.

1. Appeal and error 🔑1008(1)

In motorist's action for personal injuries and property damage sustained in an intersectional collision with defendant's automobile, where there was testimony that both parties entered intersection on a green signal, and also evidence that defendant had admitted blame for collision because he was in too much of a hurry, questions of negligence and contributory negligence became questions of fact, addressed to trial judge. Vehicle Code, § 476(a), subd. 1.

2. Automobiles 🔑244(11, 43)

In motorist's action for personal injuries and property damage sustained in an intersectional collision with defendant's automobile, evidence was sufficient to support findings that defendant had operated his automobile in a negligent, careless and unlawful manner, and that plaintiff was not guilty of contributory negligence. Vehicle Code, § 476(a), subd. 1.

C. A. Pinkham, Los Angeles, for appellant.

Dulaney W. Palmer, Hollywood, for respondent.

DRAPEAU, Justice.

Plaintiff sued to recover for personal injuries and property damage sustained in a collision between her Buick coupe and defendant's automobile.

The accident occurred at the intersection of Western Avenue and Exposition Boulevard in the city of Los Angeles, at 11:30 a. m. of April 11, 1949—a nice, clear day.

Western Avenue is sixty feet wide; runs north and south. Exposition Boulevard extends east and west, and is divided into two roadways thirty feet wide lying on either side of a railroad right of way which is thirty-eight feet in width. The north half of Exposition is white-lined for three lanes of westbound traffic; the south half carries eastbound cars.

This intersection is controlled by semaphore signal lights alternating red and green.

Plaintiff was driving west in the center lane of the north half of Exposition Boulevard approaching Western Avenue. When she was half a block east of the intersection, the signal light was red. She slowed down. When she was about four car lengths from the corner, the signal changed to green. There was no traffic immediately in front of her, but two westbound cars were standing at the corner waiting for the signal to change, i. e., one car in each lane adjacent to the center lane in which plaintiff was driving.

Traveling about fifteen miles per hour, plaintiff passed between the two stopped cars and started into the intersection. As she did so, she looked up and saw defendant's car coming north on Western Avenue. She testified that it was then "south of the tracks", to-wit: the thirty-eight foot railway right of way. Whereupon, plaintiff "stepped on the gas and tried to get out of the way." She was unsuccessful. The front of defendant's car struck the Buick back of the lefthand door. In the impact, plaintiff's car was turned around and rolled into the next block before coming to rest at the northwest corner of the intersection.

Defendant was driving north on Western Avenue in the lane close to the right-hand curb. As he approached Exposition Boulevard, his speed was about twenty miles per hour. When he was six feet from the intersection, the signal light on the southeast corner turned to green. As he entered the intersection he saw the two stopped cars in the north half of Exposition Boulevard, but saw no moving traffic. He "pulled into the intersection and started to drive right on through." When he first saw plaintiff's car, it was "right in front" of him, about four feet away. He applied his brakes, and the impact of the collision stopped his car.

The trial court interrogated defendant as follows:

"The Court: Did you keep your eye on the signal?

"The Witness: On the signal, yes, sir.

"The Court: What was it when you entered the other intersection, there, on the other half of the street, did you notice?

"The Witness: No, I didn't notice.

"The Court: You might have been driving through a red signal at that spot.

"Q. By Mr. Palmer: The last signal that you observed was the one down at the southeast corner, is that it? A. Yes, sir."

Plaintiff testified that she had a conversation with defendant shortly after the accident at which time he stated that "he was in too much of a hurry that morning * * * he said he was at fault and would take care of all the expenses; take care of the costs." Later the same day defendant called at plaintiff's home and said "he didn't want to report the accident because he had had one the first of the year * * * he repeated that he was going along there and was in quite a hurry that morning, but he felt he was to blame and didn't want me to be out any expense on the doctor bill or anything."

Defendant denied that he made any of these statements.

Plaintiff presented evidence of the injuries and damages sustained by her. The court found that defendant operated his automobile in a negligent, careless and unlawful manner, and that there was no contributory negligence by plaintiff.

From a judgment in plaintiff's favor for $897, defendant appeals.

It is here urged that the evidence fails to disclose any negligent act of appellant; that respondent's testimony shows negligence as a matter of law; therefore, appellant's motions for nonsuit and a new trial should have been granted.

Appellant contends that he was lawfully within the intersection because the signal on the southeast corner was in his favor when he started across; and that respondent should have yielded the right of way to him, pursuant to section 476(a) (1), of the Vehicle Code. That section provides that vehicular traffic facing a "Green" or "Go" signal shall proceed straight through, or may turn right or left. "But vehicular traffic [including vehicles turning right or left] shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or adjacent crosswalk at the time such signal is exhibited."

Accordingly, "When entering signal controlled intersections on the 'go' signal the entrant should look to see if cross traffic which has lawfully entered the intersection has cleared it." Freeman v. Churchill, 30 Cal.2d 453, 459, 183 P.2d 4, 7.

Here there was testimony that both parties entered the intersection on a green or "go" signal. Contrasted with this is the evidence of appellant's admission of blame for the collision, because he was in too much of a hurry.

[1, 2] In the circumstances, negligence and contributory negligence became questions of fact addressed to the trial judge. His findings against appellant on these issues find support in the record. This situation does not warrant the substitution of this court's views for those of the trier of fact.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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105 Cal.App.2d 147

WOLFSON v. HADDAN.

Civ. 4228.

District Court of Appeal
Fourth District, California.
June 26, 1951.

Rehearing Denied July 20, 1951.

Action by M. Wolfson against P. I. Haddan wherein plaintiff moved for issuance of a writ of execution more than five years after entry of the judgment. The Superior Court, San Diego County, Dean Sherry, J., made an order directing issuance of the writ, and the debtor appealed. The District Court of Appeal, Mussell, J., held that issuance of the writ was a matter within the trial court's discretion.

Order affirmed.

1. Evidence ⇨82

Where execution was issued on 1926 judgment by order of court on October 17, 1944, it would be presumed thereafter that order was made pursuant to statutory provisions and that court considered all grounds that could have been urged for and against issuance of execution. Code Civ.Proc. § 685.

2. Execution ⇨74

Order made upon merits that execution issue was a final adjudication upon a mixed question of law and fact and had all force of a judgment. Code Civ.Proc. § 685.

3. Judgment ⇨745

Where writ of execution was issued on judgment and no appeal was taken from order, judgment thereon was res judicata, and debtor could not thereafter contend that creditor had assigned his judgment, that reassignment was void and that court should have held creditor barred and estopped by reason of statement to debtor that if debtor signed waiver of notice creditor would make no further attempt to collect judgment. Code Civ.Proc. § 685.

4. Execution ⇨72

Court will not demand that needless acts should have been done before ordering issuance of execution. Code Civ.Proc. § 685.

5. Appeal and error ⇨996

In all matters in which issue is tried upon affidavits in trial court, it is rule on appeal that those favoring contentions of respondent establish not only facts stated therein, but also all facts which may be reasonably inferred therefrom.

6. Execution ⇨19

Where court issued execution in 1944 on 1926 judgment, and thereafter creditor searched records of county where debtor resided and found no property in debtor's name, and it was apparent that debtor had no assets at issuance of first execution, issuance of second execution several years later was a matter within trial court's discretion. Code Civ.Proc. § 685.

7. Appeal and error ⇨983(3)

Whether creditor has exercised reasonable diligence to enforce his judgment is a matter for trial court to determine in its discretion.

8. Appeal and error ⚷983(3)

Where court's decision to issue execution was made on conflicting affidavits and no abuse of discretion is shown, decision will not be disturbed on appeal.

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Darwin H. Wolford, Hollywood, for appellant.

Ned P. Eads, Sherman Oaks, for respondent.

MUSSELL, Justice.

Defendant, a judgment debtor, has appealed from an order directing the issuance of an execution more than five years after entry of a judgment against him in November, 1926.

[1, 2] Plaintiff's motion for issuance of the writ was filed pursuant to the provisions of section 685 of the Code of Civil Procedure and was heard on affidavits and oral testimony. It is admitted that an execution was issued on the 1926 judgment by order of the court on October 17, 1944. It must be presumed that such order was made pursuant to the provisions of section 685 of the Code of Civil Procedure, and that the court considered all grounds that could have then been urged for and against the issuance of the execution. The order, then made upon the merits, constituted a final adjudication upon a mixed question of law and fact, and it had all the force of a judgment. Helvey v. Castles, 73 Cal.App.2d 667, 670, 671, 167 P.2d 492.

[3] Appellant contends that plaintiff assigned his judgment to one Benjamin Freed in 1928 and that a reassignment thereof to plaintiff, purportedly signed by Freed on October 13, 1944, was void and of no effect; that the court erred in not holding plaintiff to be barred and estopped by reason of his statement to defendant in 1944 to the effect that if defendant would sign a waiver of notice, then he would make no further attempt to collect the judgment. Both of these contentions are without merit. Each could have been urged against the issuance of the writ in 1944 and since no appeal was taken from that order, the judgment thereon is res judicata as to both matters.

It is also argued that plaintiff failed to exercise due diligence in locating and levying upon property owned by the debtor. The question of the exercise of due diligence prior to the issuance of the 1944 execution was involved in the decision then made by the trial court and our inquiry is limited to the question of whether there was a lack of due diligence since that ruling. The record shows that plaintiff procured a search of the records of the county recorder of Los Angeles county, where defendant resided; that the search, made in November, 1949, covered a ten-year period immediately prior thereto, and no property was found to be recorded in the name of the defendant.

Appellant, in his own affidavit in opposition to the motion, stated "That about 1936 defendant went broke in Imperial Valley, and since that date as is and has been well known to the plaintiff all the time, defendant has been unable to pay said judgment," and "That this defendant does not have any property in this state subject to execution and has not had any property for five years and more."

In the affidavit of defendant's son it was averred that there was property recorded in the name of the appellant on the public records of Los Angeles county, namely, a chattel mortgage, and that at all times there was registered to the name of the defendant a Lincoln automobile. However, affiant stated that the automobile was only placed in the name of defendant originally in order to make him "feel" that he had a car; that as long ago as 1948 it was transferred; and that an investigation would show that a third party claim by the owner would be perfectly valid. It was also stated in said affidavit that the chattel mortgage referred to had long since been paid but defendant had neglected to satisfy it of record although he had returned the note to the original maker.

[4] It is quite apparent that the defendant had no assets since the issuance of the 1944 execution and it follows that the court will not demand that needless acts should

have been done before ordering the issuance of an execution under section 685. Bank of America v. Williams, 84 Cal.App.2d 562, 568, 191 P.2d 17; Mohr v. Riccomi, 14 Cal.App.2d 416, 418, 58 P.2d 659.

[5] As was said in Brainard v. Brainard, 82 Cal.App. 478, 480–481, 186 P.2d 990, 991: "In all matters in which an issue is tried upon affidavits it is the rule that those favoring the contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom. Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453."

[6-8] The issuance of an execution herein was a matter largely within the discretion of the trial court. Butcher v. Brouwer, 21 Cal.2d 354, 359, 132 P.2d 205. Whether plaintiff herein exercised reasonable diligence to enforce his judgment was for the trial court to determine in its discretion and where, as here, its decision was upon conflicting affidavits and no abuse of discretion is shown, its decision will not be disturbed. John P. Mills Organization v. Shawmut Corp., 29 Cal.2d 863, 865, 179 P.2d 570.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

105 Cal.App.2d 179

PEOPLE v. SANDELIN.

Cr. 4584.

District Court of Appeal, Second District, Division 1, California.

June 28, 1951.

Karl H. Sandelin was convicted in the Superior Court, Los Angeles County, Thomas J. Cunningham, J., of burglary and from a denial of a motion for a new trial he appealed. The District Court of Appeal, Doran, J., held that independent evidence in corroboration of testimony of accomplice, who testified for prosecution, was sufficient to sustain findings as to burglary and defendant's aiding and abetting therein.

Judgment affirmed.

Criminal law 🔑511(1)

In burglary prosecution, independent evidence in corroboration of testimony of accomplice, who testified for prosecution, was sufficient to sustain findings as to burglary and defendant's aiding and abetting therein.

Al Matthews, Doris Baker, Harold J. Ackerman and Robert P. Dockeray, all of Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant and a codefendant were found guilty by a jury of burglary. The same information also included a third defendant, one De Meo who testified for the prosecution. The information as to De Meo was dismissed.

It is contended on appeal that, "The only eyewitness testimony with respect to the commission of the crime came from the lips of Joseph De Meo, the self-confessed accomplice, who testified on behalf of the prosecution in exchange for a dismissal of the charges against him.

"The principal point which will be raised on this appeal is whether or not the independent evidence other than that of the accomplice is sufficient to constitute the corroboration required by law. It is the position of this defendant that the accomplice's testimony was not legally and sufficiently corroborated and that there is no evidence of the corpus delicti with respect to this defendant, except that found in the uncorroborated testimony of the accomplice."

The evidence reveals that a clothing store in San Pedro was entered by cutting a hole in the ceiling. Quantities of men's clothing including suits, slacks, neckties, etc., were removed. The corpus delicti was established beyond question. The only question on appeal is whether the evidence is sufficient to corroborate the testimony of the accomplice. Respondent summarizes that evidence as follows, which is supported by the record, "The above independent evidence shows, we submit, that the appellant had in his possession shortly after the crime here, articles which were taken during the burglary. Particularly considering his inconsistent and necessarily false statements concerning where he got them, and his denial to the officer that he had sold the suede jacket, the jury was justified in finding that his 'explanations' of how they innocently came into his possession, were untrue, and that such statements indicated a consciousness of guilt of the burglary with which he knew he was charged. Such evidence, we submit sufficiently corroborated the testimony of the accomplice as to the burglary and the appellant's aiding and abetting therein.

"The appellant's inconsistent statements concerning his residence in San Pedro, the town in which the burglary was perpetrated, and his statement, which the jury was justified in finding, in the light of Mr. Kanaster's testimony to the contrary, to be false, to the effect that he had never made a purchase in the Kanaster store, were further corroboration of the testimony of the accomplice."

The corroborating evidence was sufficient. The judgment and order denying motion for new trial are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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105 Cal.App.2d 45

CRAWFORD v. ALIOTO et al.

No. 14641.

District Court of Appeal, First District, Division 1, California.

June 25, 1951.

Hearing Denied Aug. 25, 1951.

Ralph Crawford sued Nuncio Alioto and others for personal injuries as the result of being struck by a truck driven by named defendant. From a judgment of the Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., on a jury's verdict for plaintiff, and an order granting a new trial on the issue of damages alone, named defendant appealed. The District Court of Appeal, Wood, J., held that the trial court's refusal of named defendant's requested instruction that evidence of a party's alleged oral admission, other than his own testimony, should be viewed by jury with caution, was prejudicial error requiring dismissal of the appeal from the judgment and modification of the order granting a new trial by providing that the new trial should be on all the issues.

Order granting new trial modified and affirmed as modified, and appeal from judgment dismissed.

1. Trial 🔑206

In action for injuries to pedestrian struck by defendant's truck, defendant's requested instruction that evidence of a party's alleged oral admission, other than his own testimony, should be viewed by jury with caution, was proper and should have been given, in view of plaintiff's witnesses' testimony as to defendant's statements soon after accident that he did not see plaintiff and was right on top of him before seeing him. Code Civ.Proc. § 2061.

2. Witnesses 🔑379(2)

In action for injuries to pedestrian struck by defendant's truck, testimony as to defendant's out-of-court statements soon after accident that he did not see plaintiff and was right on top of him before seeing him was not admissible solely to impeach defendant as witness, since he was also a party.

3. Evidence 🔑222(1), 265(1)

A litigant's declaration, contrary to his position in lawsuit, is admissible in evidence, under exception to hearsay rule, as admission constituting positive evidence tending to prove truth of matter admitted.

4. Evidence 🔑265(18)

Evidence of verbal out-of-court admissions by party to suit should be received with caution and subjected to careful scrutiny.

5. Trial ⚷206

The trial court's failure to give instruction in proper case that evidence of oral admissions of party to suit should be viewed by jury with caution is error. Code Civ.Proc. § 2061.

6. Trial ⚷140(1), 206

In action for injuries to pedestrian struck by defendant's truck, accuracy of plaintiff's witnesses, testifying as to defendant's statements soon after accident, in observing, remembering, and relating what they heard, was for jury to determine under proper instructions, including instruction, requested by defendant, that evidence of a party's oral admission should be viewed with caution. Code Civ.Proc. § 2061.

7. Automobiles ⚷242(1)

In action for injuries to pedestrian struck by defendant's truck, plaintiff had burden of proof on issue of defendant's liability.

8. Appeal and error ⚷1067

In action for injuries to pedestrian struck by defendant's truck, trial court's error in refusing defendant's requested instruction that a party's alleged oral admission, other than his testimony, should be viewed by jury with caution, was prejudicial to defendant, so as to require new trial on all issues after verdict for plaintiff, though instruction applied only to testimony of two disinterested witnesses as to defendant's statements soon after accident that he did not see plaintiff before collision, as such statements bore on issue of defendant's liability, as well as his credibility as witness, in case wherein testimony was sharply conflicting and closely balanced. Code Civ.Proc. § 2061.

9. New trial ⚷9

A limited new trial should not be granted, where substantial justice requires that a new trial, if granted, should cover all issues in case.

10. Evidence ⚷368(2)

In personal injury suit, trial court properly sustained plaintiff's objections to defendant's demand for production of written employment contract, which one of plaintiff's attorneys, as witness for plaintiff, testified that he had with plaintiff, on ground that such contract was collateral to issues in case.

11. Trial ⚷127

In action for injuries to pedestrian struck by defendant's truck, questions on plaintiff's cross-examination of defendant as to whether a man who interviewed defendant's witnesses at same time as plaintiff's attorney, according to such attorney's testimony, was investigating accident on defendant's behalf, had ever been his attorney, and was connected with his attorney's law office, were improper as intended to bring to jury's attention fact that defendant was insured by company represented by such man. Code Civ.Proc. § 2055.

12. Appeal and error ⚷1060(1)

The natural tendency of a line of examination of witness that suggests to jury that defendant is indemnified against any judgment for damages is highly prejudicial to his rights, especially in closely balanced case where evidence otherwise would be sufficient to support verdict for either party.

◆

Charles V. Barfield, Joseph L. Alioto, San Francisco, for appellant.

Robert E. Hatch, Benjamin C. Mickle, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant Nuncio Alioto appeals from the judgment entered upon a verdict for plaintiff and from an order granting a new trial upon the issue of damages alone, in an action for personal injuries.

The accident occurred in the morning of March 6, 1948, at the intersection of Fillmore and Bay Streets and Cervantes Boulevard in San Francisco. Fillmore Street runs north and south, Bay extends easterly from the east side of Fillmore; Cervantes extends northwesterly from the west side of Fillmore, its southwesterly line connecting with the west line of Fillmore at a point nearly due west of the north line of Bay extended. The day was clear and sunny, the streets dry, and visibility excellent. Respondent testified that, with his dog, he walked north on the sidewalk along the east side of Fillmore to the curb at the intersection with Bay, stopped and looked for approaching traffic, saw two vehicles on Cervantes, the nearest about 15 or 20 feet from the stop sign at Cervantes and Fillmore; that he waited for his dog, again looked for approaching traffic and then started northerly across Bay Street in the center of the marked pedestrian crosswalk; that he took several steps, and then his next recollection was when he awoke in a hospital several days later. Elmer Brunette, who operated a service station at the northeast corner of Fillmore and Bay Streets, testified that respondent came to his station two times after the accident; that, the second time, respondent said he was dragged in the crosswalk and Brunette said to him, "Crosswalk, you weren't in the crosswalk," and that respondent said, "Well, he [respondent] didn't know, he was unconscious for—I don't know how long."

Appellant testified that he drove his truck southeast on Cervantes Boulevard and stopped at the intersection of Cervantes and Fillmore. He saw respondent and a dog standing on the sidewalk on the south side of Bay, east of Fillmore, about 25 to 30 feet east of the east line of the north-south pedestrian crossing at Bay and Fillmore. Appellant crossed Fillmore and was traveling along Bay at about 15 miles an hour; when he was 20 to 25 feet east of the crosswalk, the dog ran from the sidewalk into Bay Street and respondent ran after the dog; the dog was 3 or 4 feet ahead of respondent, and respondent ran into the right front fender of appellant's truck. Appellant said he applied his brakes when respondent and the dog ran into the street, and his truck stopped within 9 or 10 feet and about 1 foot beyond the point of impact; that he saw the respondent from the time appellant stopped at the intersection up to the time of the impact; that he did not swerve his truck nor sound his horn; that he had no time to sound the horn; that he had time only to apply the brakes. Irving Brown, a parcel postman, who arrived on the scene soon after the accident, testified that he asked appellant "How did it happen?" and appellant replied, "I don't know. I didn't see the old gentleman," referring to respondent. A police officer who arrived after the accident testified that he asked appellant how the accident occurred and appellant told him, "As he [appellant] crossed the street, the glare of the sun hit his windshield and he was right on top of the man before he saw him." Appellant denied that he made either of those statements. Brunette testified he was in appellant's presence at all times after the accident that morning, and did not hear appellant make any such statements; but admitted, on cross-examination, that he did not hear all conversations.

Brunette testified he first saw the truck at the stop sign at Cervantes and Fillmore; that he saw respondent and a dog standing on the sidewalk on the south side of Bay Street, about 20 to 25 feet east of the crosswalk at Bay and Fillmore. He and his wife, Lois, both testified that they saw respondent and the dog run from the sidewalk into the street; saw them running into the street until the truck obscured the vision of the witnesses, at which time appellant's truck was traveling at 10 to 15 miles an hour, and the truck stopped in about 8 to 10 feet. They also testified that it was a common occurrence to see respondent and his dog running across the street. The police officer testified that he asked Brunette if he saw the accident and he said "No." Ben Mickle, one of respondent's attorneys, testified that when he was investigating the accident Mrs. Brunette told him she did not see the accident, and that her attention was called to it by a loud crash. She testified that he did not ask her if she knew anything about the accident and that she did not volunteer anything about it. Mickle also testified that Elmer Brunette told him that he saw respondent and the dog standing on an inspection plate at the southeast corner of Fillmore and Bay (which would place respondent between 6 and 12 feet east of the crosswalk, instead of the 20 to 25 feet stated by Brunette at the trial) and that Brunette told Mickle he did not see respondent and the dog leave the curb. A statement in evidence, written by Mickle and signed by

Brunette, was consistent with this testimony of Mickle which tended to impeach Brunette. Upon cross-examination, concerning his financial interest in the outcome of the action, Mickle testified that he had a written contingent fee contract with respondent and that his interest was one-sixth of the amount that might be recovered.

The police officer and the ambulance driver each testified that when he arrived the front end of the truck was 25 to 30 feet east of the pedestrian lane; the ambulance driver, that the truck was 12 to 15 feet from the sidewalk on the south side of Bay Street. Appellant had backed the truck about a foot from the point where the truck stopped, to release respondent's shoe, upon which the right front tire was impinging.

It appeared without conflict that respondent sustained severe injuries,—a skull fracture, a compound fracture of the right elbow, dislocated collarbone, a compound fracture of the left knee, and several fractures in the pelvic area. He was hospitalized for nine weeks. Then, on advice of his doctor, he took a trip south for the warmer climate. He had a second operation for removal of bony pieces around the elbow joint. His condition is now stationary. No substantial improvement in the future is anticipated. He has 50 per cent impairment of movement in his right elbow joint; pains and aches in the lower part of the back and in the pelvic area; some instability in his left knee; and about a 20 degree restriction of elevation of his right arm. His surgical, nursing and hospital expenses amounted to $4,181; the trip south cost $680.

Respondent had worked for the same firm for 30 years, selling industrial, mining and construction equipment, which entailed extensive traveling and the examination of the properties and plants of prospective buyers. His compensation was about $10,000 a year, plus traveling expenses. His employer had planned to send him to Manila to attend to its business in the Philippine Islands. He was to receive $10,000 a year, his living expenses at Manila, and his traveling expenses when away from Manila. He will never be able to carry on the duties of the work such as he had been doing previously. He has not been engaged in any business activity since the accident except to go down to the office occasionally. His employer has been paying him $300 a month from the time of the accident to the time of the trial, but is not obligated to do so. In his present condition he does not know of any job his employer has that he could do. The court instructed the jury that respondent has an expectancy of 14 more years but that the jury may consider the evidence of his physical condition, his habits of life, his health, and such things as would or might reduce it to less than 14 years.

The jury gave its verdict in favor of respondent in the sum of $60,000. Appellant moved for a new trial upon all grounds. The court granted the motion "as to damages only, on grounds of insufficient evidence."

Appellant, in support of his claim that the new trial should be upon all issues, assigns as error: (1) The failure of the court to give his proposed cautionary instruction concerning oral admissions of a party, (2) curtailment of his cross-examination of one of respondent's witnesses, and (3) asserted misconduct of respondent's counsel in suggesting to the jury that appellant was insured.

It is settled, of course, that there is to be a new trial, respondent not having appealed from the order for a new trial on the issue of damages. The basis for a limitation of the issues upon new trial is difficult to understand. All the conflicts in the evidence bear upon the issue of liability; none, upon the issue of damages. And the evidence on the latter issue would appear to support the amount awarded.

[1–5] The cautionary instruction which appellant requested and the court refused, read as follows: "You are instructed that evidence of the alleged oral admission of a party, other than his own testimony in the trial, ought to be viewed by you with caution." This was a proper instruction and should have been given. It was substantially in the language of section 2061 of the Code of Civil Procedure, which declares that the jury are "to be instructed by the court on all proper occasions" that "the evidence of the oral admissions of a party" ought to be viewed "with caution." The out-of-court statements of the appellant to which we have referred were not admissible merely and solely for the impeachment of appellant as a witness. He was also a party. "A declaration by a litigant contrary to his position in the lawsuit is admissible under an exception to the hearsay rule as an admission. It is positive evidence, that is to say, it is evidence which tends to prove the truth of the matter admitted." Bonebrake v. McCormick, 35 Cal.2d 16, at pages 18–19, 215 P.2d 728, at page 729. The reasons for the requirement of a cautionary instruction in respect to oral admissions of a party were clearly and cogently stated by our Supreme Court in People v. Bemis, 33 Cal.2d 395, at pages 398, 399, 202 P.2d 82, at page 84, as follows: "The dangers inherent in the use of such evidence are well recognized by the courts and text writers. People v. Thomas, 25 Cal.2d 880, 890, 156 P.2d 7; People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1; People v. Cornett [ante], 33 Cal.2d 33, 198 P.2d 877; People v. Wardrip, 141 Cal. 229, 232, 74 P. 744; Kauffman v. Maier, 94 Cal. 269, 283, 29 P. 481, 18 L.R.A. 124; Conger v. White, 69 Cal.App.2d 28, 38, 158 P.2d 415; Damas v. People, 62 Colo. 418, 421, 163 P. 289, L.R.A. 1917D, 591; Thomas v. State, 186 Md. 446, 452, 47 A.2d 43, 167 A.L.R. 390; Sylvain v. Page, 84 Mont. 424, 438, 276 P. 16, 63 A.L.R. 528; Kutchera v. Graft, 191 Iowa 1200, 1206, 184 N.W. 297, 26 A.L.R. 1257; Commonwealth v. Giovanetti, 341 Pa. 345, 362, 19 A.2d 119; Collins v. Commonwealth, 123 Va. 815, 821, 96 S.E. 826; 3 Wigmore on Evidence, § 866; 7 Wigmore on Evidence, §§ 2070, 2071, 2094; 2 Wharton, Criminal Evidence, § 643. 'It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.' 2 Jones, Commentaries on the Law of Evidence, 620. It was undoubtedly such considerations that led the Legislature to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction. See People v. Dail, 22 Cal.2d 642, 655, 140 P.2d 828. Section 2061 of the Code of Civil Procedure provides that the jury are 'to be instructed by the court on all proper occasions: * * * 4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution', and it is now settled that it is error for the trial court not to give such instructions in proper cases. People v. Koenig, supra, 29 Cal.2d 87, 94, 173 P.2d 1; People v. Cornett, supra [ante, 33 Cal.2d 33, 198 P.2d 877]; People v. Hamilton [ante], 33 Cal.2d 45, 198 P.2d 873; see People v. Dail, supra, 22 Cal.2d 642, 656, 140 P.2d 828; People v. Macias, 77 Cal.App.2d 71, 80, 174 P.2d 895."

The Bemis case, a criminal case, enunciates a principle that is of general application, one that obtains also in civil cases. See authorities cited in the Bemis case, and Freeman v. Nickerson, 77 Cal.App.2d 40, 62, 174 P.2d 688.

[6–9] Respondent contends that the failure to give the instruction was not prejudicial, for the asserted reason that its only application was to the testimony of the postman and the police officer who were completely disinterested in the outcome and never heard of either of the parties before or after the accident, to weigh whose credibility no juror needed a pedantic dissertation; that such testimony was not even primary evidence and was but cumulative of what respondent proved by physical and other undisputed evidence; hence, that the omission of this instruction could not have had more than the slightest effect on the jury in this case.

We do not so view it. This testimony put into evidence two out-of-court statements of the appellant that bore upon the issue of liability as well as appellant's credibility as a witness, in a case in which the testimonial evidence was sharply conflicting and closely balanced. The physical evidence to which respondent refers does not impress us as having the quality of indisputability which he would accord it. The accuracy of the postman and the police officer in observing, remembering, and relating what they heard, was for the jury to determine under proper instructions, including this cautionary instruction. The jury had a difficult task in determining which version to accept of what appellant said at the scene of the accident, and what weight to give it. Respondent had the burden of proof on the issue of appellant's liability. In determining whether respondent had met that burden, the jury should have had before it the cautionary instruction required by the statute. We cannot say that a different verdict would have been improbable had the instruction been given. We conclude, therefore, that the failure to give it was prejudicial and that the cause should be retried on all issues. "A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all of the issues." Shurman v. Fresno Ice Rink, 91 Cal.App.2d 469, 477, 205 P.2d 77, 81, citing Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858.

[10] In respect to the asserted curtailment of appellant's cross-examination of the witness Mickle we find no error. In response to appellant's questions, the witness said he was one of the attorneys for respondent and that as attorney he had a written contract with respondent. Appellant demanded production of the contract. The court sustained respondent's objection thereto as collateral to the issues in the case. In response to further questions, Mickle said he had a financial interest in the case, a contingent fee, one-sixth of the amount recovered, and that he had paid court costs and jury fees. Appellant again demanded the contract and the court again sustained an objection thereto upon like grounds as before. The court was within its province and entirely correct in so ruling.

[11, 12] The suggestion to the jury that appellant was insured was first made during the cross-examination of respondent's witness Brown. The witness had testified that he was interviewed at his home by respondent's attorney Mickle one or two days after the accident. Appellant's attorney asked him, "Then Mr. Mickle just came to see you out of a clear sky?" and the witness answered, "Yes, both sides came to see me, also from the insurance company." Appellant immediately assigned this as prejudicial misconduct and asked for a mistrial. The court ruled, "I will ask the jury to disregard it, and there is no evidence of any kind or character."

Later, upon rebuttal, Mickle, testifying relative to his interviews with Brunette, volunteered the fact that one Sehorn was also interviewing Brunette, as indicated by the following questions and answers:

"Mr. Hatch [attorney for respondent]: Q. Then on that day, the same day, did you discuss with Mr. Brunette what he knew about it? A. [witness Mickle] I saw Mr. Brunette three or four times, and frankly my recollection is not clear as to what the first time was. I have a definite recollection that on one occasion, about a quarter of 9:00 on the following Monday morning, which would have been about two days later—

"Q. Two days after the accident, you mean? A. Yes. There was another person there looking for witnesses to the accident, a fellow by the name of Sehorn, and so Mr. Brunette was busy with his cars and Mr. Sehorn and I both were looking for a statement, or at least an oral statement of his version of the accident and he didn't seem to want to talk to either of us at the time, so we wandered off to Montgomery Street and had coffee together—

"Q. That is, you and Mr. Sehorn? A. Yes. * * *"

Upon cross-examination, Mickle again referred to Sehorn, without mentioning him by name:

"Mr. Barfield [attorney for appellant]: Q. How many calls did you make on Mr. Brunette? A. There are three that are definitely in my mind. One, when your man was there—

"Mr. Barfield: Now, if the Court please, may that be stricken? I have no man that was there. Your Honor, could that be stricken out?

"The Court: All right, it may go out.

"A. When the man investigating for the defendant was there—

"Mr. Barfield: May that be stricken, your Honor? How does he know?"

As his last witness upon rebuttal, respondent recalled appellant under section 2055 of the Code of Civil Procedure and interrogated him concerning Sehorn's investigational activities:

"Mr. Hatch: Q. Mr. Alioto, did you have somebody in your behalf interview the Brunettes within the day or two after the accident?

"Mr. Barfield: That is objected to as not within the issues of the case.

"The Court: Overruled.

"Mr. Hatch: The court says you may answer that. A. No.

"Mr. Hatch: Q. You don't know Mr. Sehorn? A. I know of him, yes.

"Q. I am not going to ask you who he is or that, I just want to know when Mr. Sehorn was investigating this accident, was he doing it on your behalf? A. No.

"Q. Has he ever been your attorney? A. No.

"Q. And he is not connected with Mr. Barfield's law office?

"Mr. Barfield: Not of my office.

"Mr. Hatch: Q. He is not any member of the law office, put it that way. A. I don't know."

Appellant represents that in view of these episodes a jury would enter upon its deliberations convinced that appellant was insured and that for all practical purposes a verdict against appellant would be a verdict against an insurance company.

Respondent claims that Brown's mention of "the insurance company" was but the spontaneous reaction of a witness undergoing rigorous cross-examination and is not chargeable to the respondent; and that appellant did not ask the court to instruct the jury but that the court did do so, and at the close of the trial gave a formal instruction to disregard that testimony of Brown. Appellant did, however, assign that volunteer statement as prejudicial misconduct and asked for a mistrial, which the court denied, admonishing the jury to disregard the statement. Respondent invokes Packard v. Moore, 9 Cal.2d 571, 580, 71 P.2d 922, 927, and Gluckstein v. Lipsett, 93 Cal.App.2d 391, 404, 209 P.2d 98, in which the courts announced and applied the rule that " 'While courts have condemned repeatedly attempts to bring before a jury the fact that insurance exists, their condemnation extends only to cases where there is an "avowed purpose and successful attempt" to bring the fact before the jury. It does not extend to cases where the information comes in, incidentally, in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated.' " Quoting from Hughes v. Quackenbush, 1 Cal.App.2d 349, 358, 37 P.2d 99.

If the witness Brown's statement stood alone in this case, there might be some similarity to the situation which obtained in the Packard and Gluckstein cases. But the subsequent repeated references to Sehorn and his identity, in the testimony of Mickle and the questions asked of Alioto, are indicative of a purpose and a successful attempt of respondent to bring to the attention of the jury the fact that insurance exists. They presented the picture of a person interested in the case to the extent of interviewing a witness and obtaining a statement from him, a person who represented some person or agency other than the appellant or the respondent, inferably an insurance company. That testimony and those questions, respondent urges, represented merely a legitimate attempt to show that Brunette's testimony was untrue; i. e., Brunette said he gave another written statement, apparently in the possession of appellant or his attorney, which if the same as that given Mickle would substantiate Mickle's impeachment of Brunette. Such a purpose, if it existed, was but collateral to a collateral matter and did not bear upon any issue in the case. Sehorn's identity (whether he represented respondent, or whom) and his activities, had nothing to do with the accident or the circumstances of its occurrence. Such conduct upon the part of respondent is of the kind condemned in Squires v. Riffe, 211 Cal. 370, 373–374, 295 P. 517; Citti v. Bava, 204 Cal. 136, 138–139, 266 P. 954; Mahnkey v. Bolger, 98 Cal.App.2d 628, 635–638, 220 P.2d 824; Sischo v. City of Los Banos, 26 Cal.App.2d 642, 646–647, 80 P.2d 116, 1020; and Schellenberg v. Southern Cal. Music Co., 139 Cal.App. 777, 787, 35 P.2d 156. It was error to allow, over appellant's objection, the questions asked of Alioto concerning the investigator Sehorn. As stated in the Squires case, "'* * * The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. * * *'" 211 Cal. at page 374, 295 P. at page 519, quoting from Citti v. Bava, supra, 204 Cal. 136, 139, 266 P. 954. The evidence in the instant case is closely balanced on the issue of liability. From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted. In view of our holding that the failure to give the cautionary instruction was prejudicial, we do not find it necessary to decide whether the error in reference to the insurance evidence alone would be prejudicial and require a broadening of the new trial order.

The order granting a new trial is modified by providing that the new trial shall be upon all of the issues; as so modified, the order is affirmed. The appeal from the judgment is dismissed; appellant to recover costs on both appeals.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

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105 Cal.App.2d 612

PEOPLE v. YOUNG.

Cr. 2267.

District Court of Appeal, Third District, California.

July 24, 1951.

Charles B. Young was convicted in the Superior Court, Stanislaus County, H. L. Chamberlain, J., of robbery in the first degree and he appealed from the judgment sentencing the defendant for term prescribed by law, and from order denying defendant a new trial, and from order denying probation to defendant. The District Court of Appeal, Van Dyke, J., held, inter alia, that evidence was sufficient to justify finding that defendant was not intoxicated when robbery was committed, as against contention that evidence established that because of defendant's intoxication defendant could not have possessed the necessary intent for commission of robbery.

Order in accordance with opinion.

1. Criminal law ⚿570(1)

In prosecution for first-degree robbery, evidence was sufficient to justify finding that defendant was not intoxicated when robbery was committed, as against contention that evidence established that because of intoxication defendant could not have possessed the necessary intent for robbery charged.

2. Criminal law ⚿1023(9)

No appeal lies from an order denying probation to a convicted defendant, but where denial of probation is for lack of jurisdiction the order may be reviewed on appeal from the judgment.

3. Criminal law ⚿982

A 22-caliber rifle which defendant carried when committing a robbery, and which contained cartridges in the magazine which could be chambered and fired almost instantly, was a "deadly weapon" within statute prohibiting granting of probation to a defendant who used or attempted to use a deadly weapon upon a human being in connection with perpetration of robbery. Pen.Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

4. Criminal law ⚷982

The statute prohibiting granting of probation to defendant who used or attempted to use a deadly weapon "upon" a human being in connection with perpetration of robbery, did not require a defendant who carried loaded 22-caliber rifle while committing robbery to either strike or shoot person robbed, and defendant by cradling rifle in defendant's arm in position for ready use when defendant presented himself at doorway of home of person subsequently robbed, and by stating "this is a stickup", used rifle "upon" person robbed so as to prohibit court from granting probation to defendant. Pen.Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Upon".

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Mark Joseph and Jared W. Hawkins, Jr., Modesto, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Appellant was informed against by the District Attorney of Stanislaus County for the crime of robbery in the felonious and forcible taking from the presence of Johanna Reyes of a radio, and it was further charged that at the time of the commission of the offense he was armed with a deadly weapon, to-wit, a 22-caliber rifle. Upon trial he was found guilty as charged and the jury fixed the offense as robbery of the first degree. Application was made for probation and the same was denied, but in this connection it fairly appears from the record that the denial was based upon a holding by the trial court that under the provisions of Section 1203 of the Penal Code it lacked jurisdiction to grant probation. Appellant was sentenced for the term prescribed by law and from this judgment, from the order denying new trial and from the order denying probation he has appealed.

The facts are as follows: About 9 P.M. on July 14, 1950, appellant and a companion went to the home of Mrs. Reyes. When she asked what they wanted, appellant, who then had in his hand a 22-caliber rifle which contained a number of cartridges in the magazine, stated to her that it was a stick-up. The testimony of Mrs. Reyes was that appellant "was holding it [the gun] with both hands on it, just about like you have it, only at the door he pointed it just a little bit towards me. Q. He pointed it towards you? A. Yes sir." The men entered the house and appellant's companion did the talking. He demanded money and when told there was none, asked where the safe was. When told there was no safe, he walked with Mrs. Reyes to where her purse was placed, but obtained no money therefrom. The men then left but as they left defendant, who carried the gun at all times, took a table radio with him.

[1] On the appeal from the judgment and from the order denying new trial appellant contends only that the evidence is without conflict that because of intoxication he could not have possessed the necessary intent for the commission of the crime charged. That is not the state of the record. His intoxication, if it existed, was voluntary and there is sufficient evidence in the record to sustain a finding by the jury that he was not intoxicated at all. There is no merit to this contention.

[2] With respect to the appeal from the order denying probation it has often been determined that no appeal lies from such order. But it has also been held that where the denial of probation is for lack of jurisdiction the order may be reviewed on appeal from the judgment. People v. Jones, 87 Cal.App. 482, 262 P. 361; People v. Freithofer, 103 Cal.App. 165, 284 P. 484. We shall so treat it, for that such is the situation presented here is not in dispute. This is manifest from the remarks of the trial judge that he was basing his refusal to consider an application for probation and his denial thereof "solely upon the court's construction of Section 1203 [Penal Code], which in the court's opinion rendered him [appellant] ineligible as a matter of law to receive probation." The court continued: "I will base it upon that ground, so that in the event the court has

committed error in that, that error may be corrected upon an appeal."

[3, 4] The code section referred to provides that "probation shall not be granted to any defendant who shall have been convicted of robbery, * * * and who at the time of the perpetration of said crime * * * was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted." We may assume, without deciding, that defendant had a lawful right to carry the rifle, for we are satisfied that he was ineligible for probation because he used the gun upon Mrs. Reyes in connection with the perpetration of the robbery. The gun in the condition and under the circumstances prevalent here was a deadly weapon. It contained cartridges in the magazine. These cartridges could be chambered and fired almost instantly. It therefore constituted a deadly weapon. People v. Simpson, 134 Cal.App. 646, 647, 650, 25 P.2d 1008. There can be no question but that the appellant used this deadly weapon in the perpetration of the crime and the only remaining argument is that he did not, within the meaning of the statute, use the same "upon a human being". However, when he presented himself with his companion at the doorway of the home of Mrs. Reyes, cradling the weapon in his arms in a position for ready use and said to her, "This is a stickup" he used the weapon upon her. One of the common meanings of the word "upon" is "against", particularly with relation to another person. Webster's International Dictionary gives the following definition "Against (one), as in vengeance". Putting it another way, we do not think the statute means that in order to have used the rifle upon Mrs. Reyes the defendant would have had to either strike her or shoot her. We hold that the trial court correctly determined the question before it and that the appellant was not eligible for probation.

The judgment and the order denying new trial are affirmed. The purported appeal from the order denying probation is dismissed.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 475

BODMER v. TURNAGE.

Civ. 4241.

District Court of Appeal, Fourth District, California.

July 16, 1951.

H. Louis Bodmer brought an action against D. C. Turnage to recover for reasonable value of services rendered to defendant by plaintiff as an architect. The Superior Court of San Diego County, C. M. Monroe, J., rendered a judgment adverse to defendant and defendant appealed. The District Court of Appeal, Barnard, P. J., held that findings were sufficient to support the judgment regardless of whether the contract of employment was enforceable in itself.

Judgment affirmed.

1. Work and labor 🔑28(4)

In action to recover reasonable value of services rendered to defendant by plaintiff as an architect in preparing preliminary studies and working drawings and specifications for a resort defendant had planned to erect, fact that defendant after accepting the plans decided not to use the plans did not indicate an absence of benefit within rule that recovery on quantum meruit is based upon benefit received.

2. Work and labor 🔑30(4)

Findings that with full knowledge and approval of defendant plaintiff had been engaged in preparation of working drawings and specifications for a resort defendant had planned to erect, until plaintiff was notified that plaintiff's services were no longer desired, and that defendant had accepted plaintiff's plans, and that defendant for personal reasons abandoned project and indefinitely postponed erection of resort or any part thereof, were sufficient to support judgment for plaintiff for reasonable value of plaintiff's services as architect regardless of whether the contract of employment between plaintiff and defendant was enforceable in itself.

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Luce, Forward, Kunzel & Scripps, San Diego, for appellant.

H. G. Sloane, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment awarding the plaintiff payment for his services as an architect.

In July, 1948, the defendant purchased certain lots in Borrego Valley, a desert resort development. He agreed to pay $39,000 for the lots, and to spend in improving the property $100,000 the first year, $50,000 the second year, and $50,000 the third year. On August 10, 1948, he entered into a written contract with the plaintiff. After reciting that the defendant intended to erect a resort at Borrego Springs consisting approximately of thirty housing units, a club house, a cafe, a cocktail lounge, a swimming pool and roads and appurtenances, the contract provided that the plaintiff was to prepare preliminary studies, working drawings and specifications, and furnish other specified services "for the above named work"; that the defendant would pay for these services 6% of the cost of the work, one-fifth being payable upon completion of the preliminary studies and the balance as the work progressed; and that if any work designed by the plaintiff was abandoned or suspended he was to be paid for his services in that connection. During the next few months the plaintiff prepared and presented a total of five sets of preliminary studies and plans. In each instance except the last, the defendant suggested changes he desired and new plans were prepared accordingly. The fifth plan was approved by the defendant on or about January 7, 1949, and the plaintiff was told to proceed with the preparation of working drawings and specifications as rapidly as possible. Late in March, 1949, the plaintiff was told by a contractor on the job that the work was to be abandoned, and still later he was notified to this effect by the defendant.

The complaint in this action was in two counts, and sought recovery of $3192 as the agreed price, and also as the reasonable value, of the services in connection with the preliminary studies and plans, and the further sum of $1075.20 as the reasonable value of the work thereafter done in preparing working plans and specifications. The court found in all respects in favor of the plaintiff finding, among other things, that the contract above referred to had been executed; that the plaintiff had completed his work in connection with the preliminary studies and plans; that these plans were accepted by the defendant on or about January 7, 1949; that with the full knowledge and approval of the defendant the plaintiff had been engaged in the preparation of working drawings and specifications until notified that his services were no longer desired; and that the defendant had for personal reasons abandoned the project and indefinitely postponed the erection of such resort or any part thereof. It was further found that at the time the preliminary studies were completed the estimated cost of the work was $236,000; that the reasonable value of the services performed by plaintiff up to that time is $2832; and that the reasonable value of the services performed thereafter is $1075. Judgment was entered for $3907, and this appeal followed.

[1] It is first contended that the plaintiff is not entitled to recover the reasonable value of his services since recovery on *quantum meruit* is based upon a benefit received by the other party. It is argued that the defendant received no benefit from the plaintiff's services since the plans prepared were not such as he could use. This argument is based upon the defendant's main defense throughout the trial. He contended there, and contends here, that he told the plaintiff before their contract was executed, and several times thereafter, that

he could only spend some $50,000 or $60,000 in the erection of these buildings, and that he desired to erect only such part of them as could be erected within that figure. While the defendant so testified, the evidence is not only conflicting but is ample to support the court's findings. In addition to the contract, the evidence of the plans submitted, the changes requested and the many conferences and letters written, strongly support the conclusion that the plaintiff desired and ordered plans for the project as a whole. While he may have intended, at times, to erect a few buildings at first and to add more later, he kept the plaintiff working on plans for the over-all project. In the meantime he was unsuccessful in his attempt to borrow money on the project, and in selling certain property, and he finally abandoned the project. He derived the benefit he had in mind, and the fact that he later decided not to use the plans he had ordered in no way indicates an absence of benefit, within the meaning of the *quantum meruit* rule.

[2] It is next contended that the contract was too uncertain to be enforceable. It is argued that the work to be done by the architect was not sufficiently described, that there was no definite provision for the payment of architect's fees if the project was abandoned, and that the contract does not provide that the architect was to be paid for the reasonable value of his services. These contentions are without merit. Aside from other considerations the findings are sufficient to support the judgment, whether or not the contract was enforceable in itself.

It is further contended that there is an implied contract that plans must be satisfactory to the owner; that these plans were not approved by the defendant; that the plaintiff did not comply with the terms of the contract in preparing the plans since he well knew that the defendant had ordered and was trying to get plans for a set of buildings that could be erected for not more than $60,000; and that the defendant was justified in terminating the contract when he was unable to get plans for the erection of buildings which were within his means. These contentions are based upon certain conflicts in the evidence, which are not controlling. The findings were not only supported by a preponderance of the evidence but they find considerable support in the defendant's own testimony. The evidence leaves little doubt that he kept the plaintiff working for many months on plans for an elaborate scheme of building, and later found himself unable to go ahead with the project.

The judgment is affirmed.

MUSSELL, J., concurs.

105 Cal.App.2d 215

Ex parte KEDDY.

Crim. 4656.

District Court of Appeal, Second District,
Division 2, California.
June 20, 1951.

Proceeding by Murray Keddy for a writ of habeas corpus seeking discharge from custody. The District Court of Appeal, McComb, J., held that the statute providing for investigation and for commitment of sexual psychopaths is constitutional, but that one accused of being such a person was entitled to release on bail pending hearing in the Superior Court.

Order to release petitioner on bail.

Wilson, J., dissented in part.

1. Constitutional law 🔑250
Criminal law 🔑625

The statute providing for commitment of sexual psychopaths does not deny equal protection of the laws. Welfare and Institutions Code, § 5501; Const. Art. 1, § 11.

2. Constitutional law 🔑268
Criminal law 🔑625

The sexual psychopath statute providing for investigation on affidavit of probable cause and commitment does not deprive accused of his liberty without due process of law. Welfare and Institutions Code, § 5501; Const. Art. 1, § 13.

3. Criminal law ⚷625

Proceeding for investigation and for commitment of alleged sexual psychopath is civil in nature, and person committed is not confined for commission of criminal offense. Welfare and Institutions Code, § 5501.

4. Criminal law ⚷163

Statute providing for detention, investigation and commitment of alleged sexual psychopaths does not place accused who has been previously convicted of sexual offenses in double jeopardy. Welfare and Institutions Code, § 5501; Const. Art. 1, § 13.

5. Bail ⚷44

On appeal from judgment imposing imprisonment in misdemeanor case, defendant is entitled to bail as a matter of right. Pen.Code, § 1272; Const. Art. 1, § 6.

6. Bail ⚷44

Pending appeal from order denying motion for new trial after conviction of indecent exposure and lewd and dissolute conduct, defendant was entitled to bail as a matter of right. Pen.Code, §§ 311, 647, subd. 5, 1272.

7. Criminal law ⚷625

One who has been adjudicated a sexual psychopath and has been committed to state hospital for treatment has not been found insane. Welfare and Institutions Code, § 5501.

8. Bail ⚷42

Constitutional provision that all persons shall be bailable by sufficient sureties, unless for capital offenses, when proof is evident or presumption great cannot be legally set aside by civil, legislative or judicial branch of the government. Const. Art. 1, § 6.

9. Bail ⚷42

One alleged to be a sexual psychopath was entitled as a matter of right to release on bail pending hearing in Superior Court to determine whether he was such a psychopath and hence subject to commitment and treatment. Welfare and Institutions Code, § 5501; Pen.Code, § 1272; Const. Art. 1, § 6.

◆

William W. Larsen, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., Ralph F. Bagley, Deputy Dist. Atty., Los Angeles, for respondent.

McCOMB, Justice.

This is an application for a writ of habeas corpus, seeking (a) the discharge of petitioner from custody on the ground that section 5501 of the Welfare and Institutions Code is unconstitutional, or (b) the release of petitioner on bail pending the hearing in the superior court to determine whether petitioner is a "sexual psychopath" or not.

Facts: Petitioner was convicted in the municipal court on two counts of misdemeanor: (1) Indecent exposure (Penal Code section 311); and (2) Lewd and dissolute conduct (Penal Code section 647 subd. 5).

His motions for a new trial were denied and the court suspended further proceedings, certifying the matter to the superior court pursuant to the provisions of section 5501, Welfare and Institutions Code as amended (Stats. 1950, p. 439), which reads in part as follows:

> "(a) When a person is convicted of a criminal offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter."

Petitioner then appealed to the appellate department of the superior court from the order denying his motion for a new trial which appeal is now pending.

On April 27, 1951, petitioner appeared in the superior court, whereupon two psychiatrists were appointed to examine him and the hearing was set for May 7, 1951, and later continued to May 28, 1951.

Petitioner's application for bail was denied and he was remanded to the custody of the sheriff. He then filed the present application for a writ and this court released him on bail in the sum of $500 pending a hearing upon this writ.

Questions: First: *Is section 5501 of the Welfare and Institutions Code constitutional?*

Yes. Petitioner contends that the act is unconstitutional because it (1) denies to petitioner the equal protection of the laws and is not uniform under Article I, section 11, of the Constitution of the State of California;[1] (2) deprives him of his liberty without due process of law in contravention of Article I, section 13, of the Constitution;[2] and (3) places him in jeopardy twice for the same offense contrary to the provisions of Article I, section 13, of the Constitution.[3]

[1, 2] Petitioner's first and second claims have been settled adversely to his contention by the Supreme Court of the United States in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 272, 60 S. Ct. 523 (84 L.Ed. 744, 745), wherein the court held a similar statute of the State of Minnesota constitutional and that such statute did not violate the equal protection clause of the Constitution of the United States or the due process clause thereof.

[3, 4] As to petitioner's third contention, he is not being twice placed in jeopardy for the same offense. A "sexual psychopath" is not committed because he is guilty of a crime. A proceeding provided for by section 5501 of the Welfare and Institutions Code is a proceeding civil in nature, not criminal, and a person committed pursuant to the provisions thereof is not being confined for the commission of a criminal offense but because it has been determined that he is a "sexual psychopath". (In re Moulton, (96 N.H. 370) 77 A.2d 26, 28 [5-6]; Malone v. Overholzer, D.C., 93 F.Supp. 647[1]; In re Kemmerer, (309 Mich. 313) 15 N.W.2d 652, 653 [2-4]; People v. Chapman, (301 Mich. 584) 4 N.W.2d 18, 26 [11]; State ex rel. Sweezer v. Green, (360 Mo. 1249) 232 S.W.2d 897, 900 [1-3]. See, for a splendid discussion of the subject "Sane Law for Sexual Psychopaths", Stanford Law Review, Vol. 1, No. 3, page 486 et seq., April, 1949. See also 126 A.L.R. (1940) 535 et seq.) Hence petitioner clearly is not being placed in jeopardy twice for the same offense.

Second: *Is petitioner entitled to be released on bail pending the determination of whether or not he is a "sexual psychopath"?*

Yes. The Constitution of the State of California provides in Article I, section 6 as follows: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. * * *" Section 1272 of the Penal Code of California reads thus: "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: * * * 2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor. * * *" (In re Torres, 80 Cal.App.2d 579, 581[1], 182 P.2d 573.)

[5] Mr. Justice Bray in In re Torres, supra, 80 Cal.App.2d at page 581, 182 P.2d at page 574 thus emphatically states the rule:

"On appeal from a judgment imposing imprisonment in a misdemeanor case, a defendant is entitled to bail as a matter of right. (Penal Code, sec. 1272.)"

[6] Hence it is clear under the Constitution, the Penal Code and the decided cases that petitioner was entitled to bail pending

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[1] Article I, section 11, California Constitution reads: "All laws of a general nature shall have a uniform operation."

[2] Article I, section 13, California Constitution reads in part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

[3] Article I, section 13, California Constitution reads in part: "No person shall be twice put in jeopardy for the same offense * * *."

his appeal from the order denying his motion for a new trial after conviction of violating sections 311 and 647 subd. 5 of the Penal Code which were misdemeanors. This leaves remaining the question as to whether he was entitled to bail pending the hearing of whether or not he was a "sexual psychopath."

Respondent argues that since an insane person may be held without bail, petitioner, as a "sexual psychopath", was insane and therefore on an analogous principle to that applicable in insanity cases he could be held without bail pending the determination of whether or not he is a "sexual psychopath."

The fallacy in this argument is two-fold:

[7] (1) A "sexual psychopath" is not an insane person. (People v. Tipton, 90 Cal.App.2d 103, 104, 202 P.2d 330, 331.)

In People v. Tipton, supra, the court said in discussing this subject:

"But one who is declared to be a sexual psychopath is not thereby *adjudged to be insane;* nor does chapter 4, div. 6, pt. 1, of the Welfare and Institutions Code so contemplate. While one adjudicated an insane person under Penal Code sections 1368 to 1372 cannot be proceeded against on a criminal charge until he becomes sane, no such condition is imposed by the sections of the Welfare and Institutions Code which provide for the commitment of a sexual psychopath to a state hospital for treatment. *One who has been adjudicated a sexual psychopath has not been found to be insane;* and under the provisions of section 5502.5 of the Welfare and Institutions Code, when the superintendent of the state hospital has notified the court that in his opinion a sexual psychopath has not recovered from his condition and will not benefit by further treatment, his return to the court for further disposition of his case is specifically provided." (Italics added.)

Therefore any attempt to draw an analogy between section 5501 of the Welfare and Institutions Code dealing with a "sexual psychopath" and section 5040 et seq. of the Welfare and Institutions Code dealing with insane persons is obviously untenable since the code sections deal with entirely separate and distinct classes of persons.

(2) The people of the State of California through their Constitution have provided in Article I, Section 6, that "*All persons* shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." (Italics added.)

[8, 9] This mandate of the people cannot be legally set aside by the civil, legislative or judicial branch of the government. It will be observed that the people, who are sovereign, have seen fit to provide that with but one exception, to wit, where a person has been charged with a capital offense, *all persons* are entitled to bail as a matter of right. Irrespective of the villainy of the accused or the heinousness of his offense, without regard for public opinion, or for the personal views of an individual officer as to the wisdom of the constitutional provision such provision is binding without qualification upon the courts until the people have by inherited processes legally erased the constitutional mandate.

Only by strict adherence to this principle are we assured of the perpetuity of the guaranties of the Constitution in the equal administration of the laws where there are many judges of differing degrees of education, age, experience and background.

To insure the permanence of our free institutions all judicial officers must conform with the criteria established by the organic law.

No individual or public official is above, beyond or exempt from the mandates of the Constitutions, state and federal. If judicial officers do not abide by their solemn pledge to protect and defend the Constitution, as well as to observe the limitations prescribed thereby, we must expect from the average citizen only contempt for our most cherished institutions and legal concepts. If such event should occur the inevitable result will be decay of the republic, and government by men—not law—will result. Then, democracy will be abased and totalitarianism will drench the land. If the constitutional guaranties are wrong, let the people change them—not judges or legislators. Two wrongs cannot make a right.

History has demonstrated beyond a doubt that such a guaranty as is set forth in Article I, Section 6, of the Constitution is necessary for the protection of the citizen, and that it should be preserved at all hazards. Any judicial official who refuses to give his loyalty to this ideal because of his feeling of revulsion at the nature of the offense charged against the accused either does not conceive the doctrine in its full meaning or he profanes the hallowed words of the patriots who convened in Philadelphia in 1787.

In the case of In re Henley, 18 Cal.App. 1, 121 P. 933, 934, the defendant had been arrested and charged with being addicted to the use of stimulants to the extent that he had lost the power of self-control. The statute, 2185c of the Political Code, read in part as follows: "whenever it appears by affidavit to the satisfaction of a magistrate of a county or city and county, that a person is so far addicted to the imtemperate use of narcotics or stimulants as to have lost the power of self-control or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service a warrant, * * *"

It is evident that such statute is analogous to the "sexual psycopath" statute now before this court. In the cited case, in holding that petitioner was entitled to bail pending a hearing, Mr. Justice Burnett made these appropriate remarks: "It appears that bail was denied by said magistrate, but upon what ground does not appear; nor is any reason advanced here for the order, except that it is a matter of right under the provision of the Constitution of the state that 'all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.' Article 1, § 6. This is a wise and salutary measure, and the scope of it is sufficiently comprehensive to include a person charged with being an inebriate. His right as to bail should certainly not be more restricted than that of a person accused of a grave crime. In the latter contingency, no question would be raised, except in the case of a capital offense, as provided in the Constitution.

"There might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail; but, unless such a showing is made, the said provision of the Constitution should be held, we think, to apply. It is provided in said statute that the officer to whom the warrant of arrest is delivered must 'arrest and detain such person until a hearing and examination can be had.' This, of course, must be read in connection with said constitutional provision, as no one would contend that the legislative enactment could operate to modify or repeal any portion of the Constitution.

"It is ordered that petitioner be admitted to bail in the sum of $250 pending the examination, * * *."

A similar conclusion was reached by the Supreme Court of New Mexico in Ex Parte Romero, 51 N.M. 201, 181 P.2d 811, 814 et seq.

Nor is there any force in the argument that by affording petitioner the rights guaranteed to him by the people of the State of California through their duly adopted Constitution there may be released on bail a person who, for his own or the public safety, should be held in confinement. Sections 5040, et seq. of the Welfare and Institutions Code provides a full, adequate and complete procedure for the protection of petitioner or society if he is in fact insane. The district attorney is fully apprised of the information relative to petitioner's condition, and if the latter is mentally ill the district attorney or any other person may have him confined pursuant to the provisions of section 5047 et seq. of the Welfare and Institutions Code. In re Westcott, 93 Cal.App. 575, 577, 270 P. 247.

It is ordered that petitioner be permitted to remain on bail pending the determination of the superior court as to whether or not he is a "sexual psychopath."

MOORE, P. J., concur.

WILSON, Justice (dissenting).

I concur in that portion of the majority opinion which upholds the constitutionality of section 5501 of the Welfare and Institutions Code and dissent from that portion which holds that petitioner is entitled to bail while being held for examination as a sexual psychopath and from the judgment admitting him to bail.

Insofar as the misdemeanor charges upon

which petitioner was convicted in the municipal court are concerned, he is entitled to bail pending his appeal from the judgment of conviction, but that is not the question before this court. The matter which this court is called upon to decide is whether he is entitled to be released on bail pending the hearing upon the allegation as to his sexual psychopathy. The proceeding to determine whether he is a sexual psychopath is entirely separate and apart from the criminal charges in the municipal court. Upon his conviction there he was certified to the superior court in order that that court might determine the matter of his sexual psychopathy and deal with him accordingly.

One error of the majority lies in treating the sexual psychopath law as a penal statute and a proceeding thereunder as a criminal matter although it is not. Such a proceeding is not a criminal prosecution but is a "civil inquest concerning defendant's mental condition and sexual deviations." People v. Chapman, 301 Mich. 584, 4 N.W.2d 18, 26; Malone v. Overholzer, D.C., 93 F.Supp. 647. It is a civil proceeding and a commitment is not regarded as a sentence or punishment. (In re Moulton, (96 N.H. 370) 77 A.2d 26, 28.) Constitutional provisions relating to criminal trials are not all pertinent to such proceedings as that under consideration since the statute is curative and remedial instead of punitive, and inasmuch as it is not a criminal statute the constitutional inhibition against compulsory self-incrimination is not applicable. (State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 900, 901.) A person proceeded against under such a statute is not punished because of his condition. He is an unfortunate person and until cured is not fit to mingle in society and should be institutionalized until it is safe both for him and for society that he be released. In re Kemmerer, 309 Mich. 313, 15 N.W.2d 652, 653. An examination under the sexual psychopath statute is neither a criminal nor an adversary proceeding but is conducted by the state in its character as *parens patriae*. In re Masters, 216 Minn. 553, 13 N.W.2d 487, 491, 158 A.L.R. 1210, 1216.

The doctrine of *parens patriae* refers to the sovereign power of guardianship of persons under disability and the inherent and fundamental right and duty of the state to care for persons who are unable to care for themselves or who are a menace to themselves or to the health, morals or safety of others. In re Turner, 94 Kan. 115, 145 P. 871, 872; McIntosh v. Dill, 86 Okl. 1, 205 P. 917, 925–6; State v. Green, supra, 232 S.W.2d at page 902.

The Welfare and Institutions Code contains provisions for the detention, care and treatment of persons who are afflicted with abnormalities of various kinds. Division VI of the Code is titled "Mentally Irresponsible Persons", and Part I of that division relates to commitments of such persons. Contained in Division VI are provisions for the apprehension, hearing and examination of those who are mentally ill (insane after having been so declared) (secs. 5000 to 5160); feeble-minded persons and other incompetents not insane (secs. 5250 to 5264); narcotic addicts (secs. 5350 to 5361); dipsomaniacs, inebriates, and stimulant addicts (secs. 5400 to 5408); sexual psychopaths (secs. 5500 to 5518.) The proceedings relating to the apprehension, detention and custody of each class of incompetent persons is essentially the same. (See secs. 5050, 5256, 5351, 5400, 5501.)

The purpose of all the foregoing provisions, whatever may be the abnormal tendency of a person, is two-fold: (1) to protect the afflicted individual from injury to himself and (2) to remove him from contact with the public so that he will not be a menace to the safety or the health of others. Admitting such a person to bail would frustrate the intent of the statute between the date of admission to bail and the date of his hearing and commitment. If the theory of the majority opinion should be accepted as the law of the state he would be entitled to bail pending his appeal and thus would be a continued danger to himself and a menace to all others with whom he might come in contact. I cannot bring myself to believe that a sexual psychopath whose tendencies are to maltreat and abuse little children should be permitted to roam the streets and inflict himself upon other victims while the proceeding which is verily intended to remove him from society is progressing through the courts.

The fallacy of such a theory is well illustrated by petitioner's record as set forth in the order of detention. The municipal court there certifies that he was convicted in that court of a violation of subsection 1 of section 311 of the Penal Code (indecent exposure) and subsection 5 of section 647 of the Penal Code (vagrancy—lewd and dissolute person). The court further certifies as follows: "It further appears that in 1941 defendant (then aged 13), committed numerous acts of sex perversion against various children (Penal Code Section 288) and animals (Penal Code Section 286), was an habitual masturbator; and was committed to juvenile authorities pursuant to subsections (k) and (m), Section 700, Welfare and Institutions Code; that Los Angeles Police Department records of January 21, 1951 state in part: 'Arrestee's character and personal habits * * *. When a juvenile, developed excessive masturbation habits, also perverted sex drives, still masturbates, and could develop psychopathic tendencies.' That defendant was granted probation May 22, 1950 by Santa Monica Branch of the Los Angeles County Superior Court for five years, for violation of Penal Code Section 211 (robbery); * * *."

Manifestly a person with such a record of sex offenses and sex perversions as is indicated above is not a fit person to be at large.

When the statutory definitions of "mentally ill persons" and "sexual psychopaths" are analogized it will be found that there is very little difference. "'Mentally ill persons' means persons who are of such mental condition that without supervision, treatment, care or restraint they would be or might be dangerous to themselves or to the person or property of others." (W. & I. Code sec. 5040.) "As used in this chapter 'sexual psychopath' means any person who is affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality." (Sec. 5500.)

From the foregoing definitions a "mentally ill person" is one who might be dangerous to himself or to the person or property of others, and a "sexual psychopath" is one who is a menace to the health or safety of others with the conditions of either mental disease or disorder, or psychopathic personality, or both. In whichever class a person may be, he is afflicted with a mental condition or disorder and is deemed to be dangerous and a menace to others.

Furthermore, section 5501 requires the affidavit for the detention of a sexual psychopath to be substantially in the form specified for the affidavit of mental illness in section 5049. Throughout the statute the Legislature intended to and did place both groups of mentally disordered persons on the same basis as to apprehension and detention.

If the majority of the court is correct in their theory that every person is entitled to bail irrespective of his condition and without reference to the fact that he is obviously a menace to other persons, then a mentally ill person who has been apprehended and detained as provided in sections 5050 and 5050.1 of the Welfare and Institutions Code would be entitled to bail no matter how violent he might be, since such mentally ill person is not deemed to be insane until he has had a hearing and has been so adjudicated by the court. (W. & I. Code, sec. 5041.)

A person of the type of petitioner, as indicated by the order of detention, is no less a menace to society and the public than a violently insane person who, intermediate his apprehension and commitment, is regarded only as mentally ill, yet the latter is kept in confinement from the time he is taken into custody. No case has been cited, and research has disclosed none, in which a person charged with being mentally ill or insane has been held to be entitled to be released on bail pending a hearing.

In Re Henley, 18 Cal.App. 1, 121 P. 933, 935, relied on in the majority opinion, the court held that a person charged with the intemperate use of stimulants was entitled to bail pending examination. The question whether such a person was dangerous to himself or a menace to others was not involved. However, the court obviously realized that its decision in that case should not be regarded as an absolute rule applicable to all persons similarly charged when it said: "There might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail" but in the absence of such a showing he should be admitted to bail. The order of detention of petitioner in the instant proceeding clearly shows that for the safety of society he should be restrained of his liberty until the superior court conducts an examination and makes proper disposition of him.

I would discharge the petition for a writ of habeas corpus and remand petitioner to the custody of the sheriff to be dealt with according to law in the superior court.

105 Cal.App.2d 415

ELLIS v. GEIGER.

Civ. 7901.

District Court of Appeal, Third District, California.

July 13, 1951.

Action by Jasper L. Ellis against Joe Geiger to recover for cost of repairs and loss of use of an automobile involved in a collision with an automobile owned and operated by defendant, wherein defendant filed a cross-complaint for damage and for personal injuries. The Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Schottky, J. pro tem., held that the conflict in testimony presented was for trial court to resolve.

Judgment affirmed.

1. Appeal and error 🔑1010(1)

An appellate court cannot disturb a finding of the trial court if there is any substantial evidence to sustain it.

2. Appeal and error 🔑996, 1010(1)

Before an appellate tribunal is justified in reversing a judgment upon the ground of insufficiency of evidence, it must appear from the record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, and excluding all evidence and inferences in conflict therewith, it still appears that law precludes rendering of judgment in favor of such prevailing party.

3. Appeal and error 🔑931(1), 996

On appeal, evidence must be construed most strongly against losing party and every favorable inference and presumption which may fairly be deduced from evidence should be resolved in favor of prevailing party.

4. Appeal and error 🔑931(1)

On appeal, prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded.

5. Automobiles 🔑244(1)

In automobile accident case involving two automobiles, evidence sustained finding for plaintiff, even though testimony of traffic officer as to point of impact might have contradicted testimony of plaintiff and his daughter.

Clewe, Martin & Blade, Oroville, for appellant.

Goldstein, Barceloux & Goldstein; By F. R. Crable and Jordan N. Peckham, and Price & Morony, Chico, for respondent.

SCHOTTKY, Justice Pro Tem.

Plaintiff commenced this action to recover $298.33 for cost of repairs to and $140 for loss of use of his automobile, which was involved in a collision with an automobile owned and operated by defendant. Defendant cross-complained for damage to his automobile, for personal injuries to himself and was joined in such cross-complaint by his wife who sought damages for personal injuries received in the accident. The trial court, sitting without a jury, rendered judgment in favor of plaintiff for the full amount prayed for, and found against the cross-complainants on their cross-complaint.

Defendant and cross-complainant has appealed from said judgment. Appellant contends "that the judgment cannot be upheld without reliance on the testimony of plaintiff and his daughter, that such testimony with respect as to how the accident happened is incredible and contrary to the physical findings of Officer McKray, which findings were presented by the plaintiff, are uncontroverted and hence, that the judgment must fall."

[1-4] This appeal is so lacking in merit that it borders on the frivolous. If there is any rule that is well settled it is the oft-repeated rule that an appellate court cannot disturb a finding of the trial court if there is any substantial evidence to sustain it, and that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence and inferences in conflict therewith, it still appears that the law precludes the rendering of judgment in favor of such prevailing party. The evidence must be construed most strongly against the losing party and every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded.

Respondent and his daughter testified as to how and where the collision occurred and appellant and his wife and son did likewise. Their testimony was sharply conflicting. Sergeant McKray, a traffic officer and a witness called by respondent, gave testimony which appellant contends completely controverts the testimony of respondent and his daughter. Appellant argues that the testimony of respondent and his daughter is, therefore, "incredible" and must be rejected, and that the judgment cannot stand.

[5] The trial court heard all of the witnesses and was in a position to weigh their testimony, and the trial court in its opinion indicated quite clearly that it did not accept the version of appellant's witnesses. Assuming that the testimony of the traffic officer as to the point of impact contradicted the testimony of respondent and his daughter, the weight of the conflict, if any, was a question for the trial court. There is nothing inherently incredible about the testimony of respondent and his daughter, and it was certainly ample to support the judgment rendered by the court. Appellant's argument is one which could be, and no doubt was, urged in the trial court, but having failed to convince the trial court, it is of little weight in an appellate tribunal.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

FLORES et al. v. BROWN et al.

ZAVALA v. MURRAY et al.

Civ. 14528.

District Court of Appeal, First District,
Division 1, California.
June 29, 1951.

Rehearing Denied July 28, 1951.

Hearing Granted Aug. 23, 1951.*

Anita Flores and others and Maria Zavala brought actions against Ernest W. Brown and Jack R. Murray to recover for injuries and for death sustained when automobile was struck in rear by truck owned and driven by Ernest W. Brown and trailer owned by Jack R. Murray. The Superior Court of the State of California, in and for the County of Santa Clara, Leonard R. Avilla, J., entered judgments and granted a new trial, and all parties appealed. The District Court of Appeal, Peters, P. J., held that Superior Court did not abuse its discretion in granting a new trial.

Appeals from judgments dismissed, and order granting new trial affirmed.

1. Automobiles 🔑193(3)

Truck owner, who was transporting trailer at time when truck struck automobile, could have been the agent for owner of trailer, so as to render owner of trailer liable for damages resulting from the collision, if truck owner was negligent, even though truck owner was to receive no pecuniary consideration for his services in transporting trailer.

2. Automobiles 🔑244(26)

In actions against owner and driver of truck and owner of trailer for injuries and death of occupants of automobile struck in the rear by truck while it was hauling trailer, evidence was sufficient to authorize finding that at time of accident owner of truck was acting as agent for owner of trailer, so as to render owner of trailer liable for the injuries and deaths, in the event that owner and driver of truck was negligent.

3. Appeal and error 🔑1064(1)
Automobiles 🔑246(15, 60)

In actions against owner and driver of truck and owner of trailer for injuries and death of occupants of automobile struck in the rear by truck while it was hauling trailer, instruction that an inference arises that one operating the property of another is doing so as the agent of the owner and that if owner and driver of truck at time of accident was acting as agent of owner of trailer, and was acting within course and scope of his agency, then any verdict rendered against owner and driver of truck was required to be rendered against owner of trailer, was prejudicially erroneous.

4. Negligence 🔑93(3, 12)

The contributory negligence, if any, of driver of automobile which was struck by truck and trailer was no bar to recovery for injuries sustained by driver's daughter, who was an occupant of the automobile or for recovery for death of daughter's friend who was also an occupant of the automobile in actions against owners of truck and trailer which struck the automobile.

5. Negligence 🔑93(2)

If driver of automobile was contributorily negligent in operation of automobile at time when it was struck by truck and trailer, wife of driver of automobile could not recover for her injuries from owners of truck and trailer.

6. Negligence 🔑93(3, 12)

Contributory negligence, if any, on part of driver of automobile which was struck by truck and trailer was not a bar to actions by wife of driver of automobile against owners of truck and trailer to recover for death of son of driver of automobile and his wife as result of the collision.

7. Negligence 🔑90

Negligence of husband in operation of automobile can only be imputed to his wife on some theory of agency, and mere fact that husband is transporting his wife, even in an automobile owned by the community, does not raise an inference that he was acting as her agent.

8. Appeal and error 🔑781(4)

Where judgment was set aside, and new trial was granted, and no one appealed from order granting new trial, appeal from the judgment would be dismissed.

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* Subsequent opinion 248 P.2d 922.

9. Appeal and error 🔑933(4)

Where defendants based their motions for new trial on seven grounds set forth in statute, but defendants did not support motions with affidavits, it would be assumed that the new trial was not granted on the first four grounds set forth in the statute. Code Civ.Proc. § 657.

10. Appeal and error 🔑933(4)

Where trial court, in granting new trial, did not specify that the granting of the new trial was because of insufficiency of the evidence, it was necessary to presume conclusively that new trial was not granted on that ground. Code Civ.Proc. § 657.

11. New trial 🔑110

A trial court has no power to grant a new trial of its own volition.

12. New trial 🔑9

Though a trial court has power, in a proper case, to grant a limited new trial, such power, particularly when the new trial is restricted to the issue of damages, is a very limited one, and should be exercised with extreme caution. Code Civ. Proc. §§ 657, 662.

13. New trial 🔑9

If substantial justice requires that new trial be on all issues, it should not be limited, and all reasonable doubts should be resolved in favor of a general new trial. Code Civ.Proc. §§ 657, 662.

14. New trial 🔑9

Where plaintiffs moved for new trial on question of inadequacy of damages, trial court had right to grant defendants a general new trial. Code Civ.Proc. §§ 657, 662.

15. New trial 🔑8, 9

Where verdicts for personal injuries were quite small, considering the extent of the injuries, and there was a conflict of evidence on issue of liability as to both defendants and instruction, which was prejudicial to one of the defendants, was given, trial court, in exercise of sound discretion, properly granted a new trial on all issues as to all parties. Code Civ.Proc. §§ 657, 662.

Dana, Bledsoe & Smith, San Francisco (Morton B. Jackson, San Francisco, of counsel), for defendants and appellants.

James F. Boccardo, David S. Lull, San Jose (Edward J. Niland, Santa Clara, of counsel), for plaintiffs and appellants.

PETERS, Presiding Justice.

In this proceeding there are involved several appeals by the plaintiffs from an order granting a new trial, and several appeals by the defendants from judgments entered against them. The issues presented are numerous and complex.

On September 7, 1947, in Santa Clara County, there occurred a collision between an automobile and a truck-trailer. The automobile was a Chevrolet coupe, equipped with a pick-up box. Riding in the front seat of the automobile were Herman Flores, the driver, and his wife Anita Flores, who was holding a young baby in her arms. In the pick-up portion of the vehicle were Miss Anita Flores and Felipe Flores, both minors and children of Herman and Anita, and Nellie Zavala, a minor and friend of the Flores family. The truck, at the time of the collision, was being driven and was owned by defendant Ernest W. Brown. Attached to the truck was a semi-trailer owned by the defendant Jack Murray.

The truck-trailer and the automobile were both proceeding in the same direction when the truck-trailer ran into the rear of the Chevrolet pick-up. In the resulting collision Herman Flores, the father, Felipe Flores, his son, and Nellie Zavala received injuries from which they died. Anita Flores, the mother, and her daughter, Miss Anita Flores, survived but were injured.

As a result of the accident two complaints were filed, one on behalf of the Flores family containing eight causes of action, and the other on behalf of the Zavala family containing two causes of action. The first complaint, as amended, can be summarized as follows:

1. A cause of action for the wrongful death of Herman Flores brought by his wife Anita, and by their three surviving children, Anita, Joe and Herman. So far as defendant Murray, the owner of the

trailer, is concerned, the theory of this cause of action is that Brown was hauling the trailer as the agent of Murray.

2. The second cause of action was also for the wrongful death of Herman, brought by the same plaintiffs named in cause of action numbered 1, but, as to Murray, the allegations are that he owned the truck and trailer which were being operated by Brown with Murray's permission and consent.

3. The third cause of action was brought by Anita Flores, the mother, for her own personal injuries. As to Murray, this cause of action is based on the agency theory.

4. The fourth cause of action was the same as three, but, as to Murray, was based on the theory of permissive use.

5. The fifth cause of action was on behalf of Miss Anita Flores, the daughter, brought by Mrs. Flores as the guardian ad litem. This cause of action, as to Murray, is based on the agency theory.

6. This cause of action was the same as number 5, but based, as to Murray, on the theory of permissive use.

7. The seventh cause of action was for the wrongful death of Felipe brought by his mother, Anita Flores. As to Murray, this cause of action was based on the agency theory.

8. This cause of action was the same as the seventh except that as to Murray it was based on permissive use.

The Zavala complaint, as amended, was for the wrongful death of Nellie Zavala and was brought by her mother, Maria Zavala. It contained two causes of action, which we will designate as the ninth and tenth causes of action.

9. The ninth cause of action, as to Murray, was based on the agency theory.

10. The tenth cause of action, as to Murray, was based on the theory of permissive use.

The answers denied that Brown had been negligent, put in issue the amount of damages, and, as to Murray, put in issue the questions of agency and permissive use. Contributory negligence of all plaintiffs was alleged generally, and specifically it was alleged that the accident was proximately caused by the negligence of Herman Flores.

The two actions were consolidated for trial. Plaintiffs abandoned all of their causes of action based on permissive use, because it was discovered that Brown owned the truck in question and the trailer, owned by Murray, is not a "vehicle" within the meaning of section 402 of the Vehicle Code, the so-called permissive use statute. Miller v. Berman, 55 Cal.App.2d 569, 131 P.2d 18. Thus, the 2nd, 4th, 6th, 8th and 10th causes of action were dropped out of the case and need not be again mentioned. The case was submitted to the jury as against both defendants on the 1st, 3rd, 5th, 7th and 9th causes of action, resulting in the following verdicts:

1. In the first cause of action for the wrongful death of Herman, verdicts in favor of both defendants.

3. In the third cause of action for the injuries of Mrs. Flores verdicts against both defendants in the sum of $5,000.

5. In the fifth cause of action for injuries to Miss Anita Flores against both defendants for $15,000.

7. In the seventh cause of action for the wrongful death of Felipe, against both defendants for $5,000.

9. In the ninth cause of action for the death of Nellie Zavala, against both defendants for $5,000.

Judgments were entered on these verdicts. Motions for new trials were then made as follows:

1. By defendant Brown, on all the statutory grounds, as to the 3rd and 7th causes of action. No mention in this motion is made as to the 5th and 9th causes of action. The first cause of action, as already pointed out, was decided in favor of both defendants.

2. By defendant Murray, on all the statutory grounds as to the 3rd, 5th, 7th and 9th causes of action.

3. By all of the plaintiffs as follows:

a. As to the first cause of action—wrongful death of Herman—on the grounds of insufficiency of the evidence, that the verdict was against the law, and error in law.

b. As to the 3rd, 5th, 7th and 9th causes of action solely on the ground of the inadequacy of damages. These motions asked for a new trial of these causes of action limited to the issue of damages.

The trial court granted a new trial as to all of the issues, and as to all of the parties. In making this order the trial judge rendered an opinion in which he pointed out that he was motivated in granting the new trial as to all issues and all parties by the following factors:

1. None of the verdicts were unanimous, three being 10 to 2, and two being 9 to 3.

2. In two of the causes, instructions on contributory negligence were given but not in the other three, that issue not being involved in those three causes of action.

3. The verdicts in cause of action 1 (wrongful death of Herman) and in cause of action 3 (for injuries to Mrs. Flores) are inconsistent under the instructions, because the court instructed that, if Herman was guilty of contributory negligence, such contributory negligence must be imputed to his wife. Nevertheless, the jury found for defendants in the first cause of action, and for Mrs. Flores on the third cause of action.

4. The number of motions made for a new trial on general or limited grounds, the different grounds urged for the granting of the motions, and the complicated issues presented, if each motion were separately considered, might result in some of the motions being granted and others denied, thus further complicating the problems involved.

5. The various polls of the jury suggest that the verdicts were compromise verdicts.

6. The inter-dependence of the various causes of action suggest that either five separate new trials should be granted or one new trial of all issues and as to all parties. "Substantial justice" suggests the latter.

The memorandum opinion contains the following: "* * * where substantial justice requires that a new trial should be granted the new trial ordinarily should be ordered on all issues and as to all parties. The question of limiting the new trial to certain specific issues is said to be a 'very serious one.' Keogh v. Maulding, 1942, 52 Cal.App.2d 17, 125 P.2d 858. And where the Court determines to grant a new trial as to some issues, it appears to be within the sound discretion of the trial court also to determine that substantial justice requires that the new trial be ordered upon all the issues presented. * * *

"It is the opinion of this court that a new trial of all issues and as to all parties should be granted in the interest of substantial justice, and it is so ordered. It follows that a decision on the merits of each of the motions made is, by reason of this order, unnecessary, and the issues raised by the motions may be determined in the course of the new trial granted."

Following this order the following appeals were taken:

1. By Anita Flores and her daughter Anita, from the order granting the new trial in action number 5 (for Miss Flores' injuries), and by Mrs. Flores in action number 7 (for the wrongful death of Felipe).

2. By Maria Zavala, from the order granting the new trial in action number 9 (for the wrongful death of Nellie Zavala).

3. By Brown, from the judgment in action number 7. Rule 3(a) of the Rules on Appeal.

4. By Murray from the judgment in actions 3, 5, 7 and 9. Rule 3(a) of the Rules on Appeal.

As a result of these appeals, all of the causes of action are before this court except action number 1, for the wrongful death of Herman Flores. The judgment in that action was in favor of defendants. A new trial has been granted. No one appeals from the order granting the new trial, so that this cause of action is not before us for review.

The following contentions are made by the respective appellants:

1. Murray, as appellant, urges that there was no evidence to show that in operating the trailer Brown was Murray's agent.

2. Brown and Murray urge that the trial court erroneously instructed that the negligence of Herman Flores, the father, was not a bar to Mrs. Flores' action for the wrongful death of Felipe.

3. The Flores' appellants, and Maria Zavala, agree that the verdict in action number 3 for injuries to Mrs. Flores is inconsistent with the verdict in action number 1, and that there should be a new trial on all issues and as to all parties on these two causes of action. As to actions 5, 7 and 9, these appellants, including Maria Zavala, urge that the new trial should be limited to the issue of damages, the only ground of their motion.

The Accident.

The basic facts of the accident are as follows:

The accident occurred on the clear dry evening of September 7, 1947, at about 8:30 p. m. on Highway 101 near Madrone in Santa Clara County, south of San Jose. The highway in this area is straight and practically level, and consists of three lanes, the lanes being indicated by white lines.

Defendant Brown was engaged in the trucking business and was the owner of the truck or tractor involved in the collision. The truck, unloaded, was pulling an empty semi-trailer owned by defendant Murray. Empty, they weighed 28,000 or 29,000 pounds, the truck weighing 16,000 or 17,000 pounds. Brown had started his trip from Los Angeles, had driven to Lakeport with his truck, picked up the trailer there, and was on his way back to King City when the accident occurred. He testified that on his way from Lakeport he stopped in San Francisco to eat for about 15 or 20 minutes sometime between 5 and 6 o'clock in the evening, and that at that time he checked his lights, all of which he found to be in good operating order; that he made no stops after leaving San Francisco until the accident occurred; that northbound traffic on the highway was heavy; that at the time of the impact he was travelling in the extreme right lane for southbound traffic at about 35 to 40 miles per hour; that his truck was equipped with a governor that limited its top speed to 40 miles per hour in the gear in which he was travelling, but that the truck could go faster in a higher gear; that the rear wheels of the truck and the wheels of the trailer were equipped with air brakes; that he could not remember whether he had applied the brakes just before the impact; that he first saw the Flores' car, which was travelling south as was Brown, when it was 15 to 30 feet in front of him; that when first observed, the Flores' car was moving from the center lane of traffic into the extreme right lane but had not completed that maneuver; that the Flores' car had no rear lights or reflectors, but that he did see legs hanging over the back of the pick-up; that the truck and trailer ran into the back of the Flores' car which caused Brown to lose control of his equipment; that the two vehicles, locked together, continued down the road for some 250 feet where they finally came to rest some 40 feet to the right of the highway against a guy wire.

The Flores' car was a 1931 Chevrolet coupe equipped with a pick-up box. The car belonged to a relative of Herman Flores, who had loaned it to the Flores family to make this trip. The family had left a ranch near Madrone at about 8 p. m., with Mr. Flores and his wife, who had a sleeping baby in her arms, in the front seat, and Anita and Felipe Flores and Nellie Zavala, sitting in the pick-up. Mrs. Flores testified that just before they left on the trip she observed that the rear lights of their automobile were lit. This testimony was corroborated by several relatives and friends of the family who observed the car when it left on the fatal trip. Mrs. Flores estimated the speed of the pick-up just prior to the accident at about 25 to 30 miles per hour. Neither Mrs. Flores nor her daughter Anita, who, with the baby, were the only surviving passengers in the Flores car, were able to give much information as to what happened just before the collision.

Traffic officers who arrived at the scene shortly after the accident occurred testified as to what they observed. There were gouge marks and skid marks that commenced at the same point on the highway. One police officer, over objection, was permitted to testify from what he observed after the accident, including the skid and gouge marks and the respective weights of the colliding vehicles, that, in his opinion, the Brown truck was travelling between 50 to 55 miles per hour. No point is made on appeal concerning the admission of this opinion evidence. Several truck drivers testified that Brown had passed them on the highway before the accident, and they estimated his then speed at from 35 to 50 miles per hour. Brown was the only witness of the collision who testified in any detail as to the events immediately prior and at the time of the impact.

Relationship between Defendants Brown and Murray.

Brown testified that he had known Murray since 1936; that both he and Murray had been engaged in the trucking business at Lakeport during the summer of 1947; that during this period he had a contract with a packing company to haul pears, but did not have enough equipment to handle the job so he hired Murray and his equipment to assist him on a trip-to-trip basis; that both owned their own equipment—trucks and trailers; that during the period that Murray worked for him, Murray was also hauling for other people; that he, Brown, had no interest in these jobs, and did not assist Murray with them; that on the packing company job he, Brown, collected for the hauling, and then paid Murray for the trips made by him; that during the hauling season Murray had one truck and two trailers at Lakeport; that at the conclusion of the pear season Murray brought down the truck and one trailer, thus leaving an unmotored trailer at Lakeport; that Murray told Brown that he had to go up to Lakeport to pick up his trailer; that he, Brown, told Murray that he might be going to Lakeport and would pick up the trailer; that Murray replied that he might have the trailer brought down before Brown went to Lakeport; that the two agreed that if the trailer was still at Lakeport when Brown made his visit that Brown would bring it back as a favor to Murray. The evidence shows that Brown drove his heavy truck weighing between 16,000 and 17,000 pounds from Los Angeles to Lakeport and picked up the trailer, after first ascertaining by a telephone call to Lakeport that the trailer was still there. Nevertheless, Brown testified that he went to Lakeport on his own personal business; that he did not go just to return the trailer; that Murray did not know that he had picked up the trailer until Brown arrived at King City; that Brown had made no arrangements with Murray to use the trailer but was merely returning it to King City where Murray wanted it; that the trailer was parked on the grounds of the packing company at Lakeport; that when he arrived at the packing plant there was no watchman around and he did not know if anyone saw him take the trailer; that he was not employed by Murray to bring the trailer down from Lakeport; that Murray did not even request that he bring it down, nor did Brown positively promise to bring it down; that the understanding was that, if the trailer was still at Lakeport when Brown arrived, he would bring it down as a favor to Murray; that his purpose in going to Lakeport was to make a contact as to possible future business; that this would have required but five or ten minutes, but when he arrived at Lakeport, the prospective customer was out of town. He admitted that he could have telephoned to this prospective customer and saved himself the long trip, but believed that personal contacts gave better results. He also admitted that he could have taken his automobile to Lakeport for his business call, and admitted that he would have done so had he not intended to bring back the trailer for Murray.

Murray was not present at the trial, but his deposition had been taken and was read into evidence. He denied that he had requested Brown to bring the trailer down from Lakeport, and denied that he had agreed to compensate Brown for this service, or that Brown was going to use the trailer in and about King City. He testified that all business connections with Brown had been terminated about two weeks before the accident.

The Injuries, the Damages and the Verdicts.

Herman Flores died as a result of the injuries received in the accident. The action for his wrongful death resulted in a verdict in favor of both defendants.

Mrs. Anita Flores was 48 years of age at the time of trial. She was rendered unconscious in the accident, remained so for four days, was in the hospital for 13 days, was in bed for 3 months at home, and at the time of trial (some two years after the accident) was still under a doctor's care. She had a severe compression of her chest cage, upper back and sternum. The lower end of the sternum was fractured, and there were numerous fractures of various ribs. There was fluid in her chest caused by the rib fractures, and the pain was so severe that narcotics had to be administered at frequent intervals. The fourth dorsal vertebra was fractured, resulting in a 40 per cent collapse of that vertebra. The tendons in her shoulder were probably torn. She had numerous bruises and contusions about her entire body. At the time of trial she still complained of shoulder pains, chest pains and difficulty in breathing. A doctor opined that such pains and disability existed. The injuries undoubtedly aggravated a pre-existing arthritic condition. Her doctor bills were about $500. The jury awarded her $5,000 against both defendants.

Miss Anita Flores, the daughter, aged 14 at the time of the accident, suffered very severe injuries. When brought to the hospital she had lost much blood and was in severe shock. Ordinary transfusions were not possible, because of her condition, and such were given first by exposing the veins, and, when this was found to be too slow, by a femoral puncture. She was given transfusions equal to about three-fifths of her total blood volume. She had severe lacerations of her face, a fractured jaw, multiple bruises, and compound fractures of both thigh bones just above the knees. Her jaw was wired, and pins placed to hold the thigh bones together. She was placed in a complete body cast and put in traction. She was in the hospital about three months. She has a noticeable three-inch scar on her forehead, and scars on both arms, legs and thighs. She has a permanent disability of both legs, particularly in her knee joints, resulting in a "knock-kneed" deformity that is quite noticeable when she walks or stands. She is unable to squat and cannot run. Both legs show muscle atrophy and weakness, with more than a 20% loss of flexion. The disability to both knees is permanent, and that to the right knee is progressive. Degenerative arthritis is almost certain to result from the destruction of the ligaments about the knee joints. She can no longer play games or engage in athletic activity. She lost one year of school because of her injuries. The jury returned a verdict in her favor in the sum of $15,000 against both defendants.

Felipe Flores was 19 at the time of the accident, was killed in the collision, and then had a life expectancy of 43 plus years. He was not married or engaged. He lived with his parents, was a healthy sober boy, and family relations were harmonious. At the time of the accident he was working for a packing company earning between $45 to $60 per week. He gave all of his earnings to his mother, except $5 a week. The Flores family were apparently migratory laborers, and Felipe worked primarily in canneries. Funeral expenses came to $471.10. The verdict was for $5,000 against both defendants.

Nellie Zavala was 17 at the time of the accident, was killed in the collision, and had a life expectancy of some 44 years. She lived with her mother, worked in the canneries, and gave her mother between $40 to $50 per week. She was not married or engaged. She was the eldest of the eight Zavala children, and a loving thoughtful child. Her funeral expenses came to $468.08. The verdict was for $5,000 against both defendants.

Is the Evidence and the Reasonable Inferences therefrom Sufficient to Sustain the Implied Finding of the Jury that, at the time of the Accident, Brown was the Agent or Employee of Murray?

Was the Jury properly Instructed on this Issue?

Assuming negligence on the part of Brown, Murray can be held liable, if at all, only on the theory that, in transporting the trailer from Lakeport, to King City, Brown was acting as the agent of Murray. As already pointed out, the theory of liability based on permissive use was dropped from the case, a trailer of this type not being within the permissive use statute. There is no direct evidence of the existtence of an agency. If an agency exists it must be found in reasonable inferences from the evidence. The key question is whether, under the evidence, an inference of agency is reasonably permissible.

The trailer was admittedly owned by Murray, and admittedly Brown had Murray's permission to bring it from Lakeport to King City. Brown and Murray contend that the evidence shows only ownership and permissive use, and claim that these two facts are not sufficient to raise an inference of agency. They emphasize that they testified that Brown was to receive no compensation for transporting the trailer, that it was done gratuitously as a favor, and that Brown was under no obligation to perform this service. Brown was not the employee of Murray, and never had been. In fact, the prior relationship was one where Murray had worked for Brown. According to Brown and Murray, even this relationship had been terminated two weeks before the accident. However, this is not all of the evidence on the subject. The trailer was a business vehicle. The transaction was a business transaction. Both Brown and Murray were engaged in the hauling business, and they had been closely associated together in that business. To have the trailer transported from Lakeport to King City was of great economic benefit to Murray. Moreover, their explanation of their relationship is unconvincing. They tried to convince the jury that Brown drove a heavy truck weighing between 16,000 and 17,000 pounds, and which obviously used a great deal of fuel, all the way from Los Angeles to Lakeport and back to King City, a two-day trip, for the purpose of interviewing, for five or ten minutes, a prospective customer in Lakeport, a customer that he did not even take the trouble to ascertain if he would be in Lakeport, and who, in fact, was not there when Brown arrived. Although Brown did not telephone to Lakeport to ascertain if the alleged customer would be at home when he arrived, he did telephone to the packing company to ascertain if the trailer was there. If Brown was so desirous of interviewing this customer it is clear that he could have telephoned to him from Los Angeles, which would have been a normal procedure, or, if he desired to see him personally, he could have used his automobile, which would not only have been much faster, but much cheaper to operate. While Brown's story that the picking up of the trailer was a mere incident to his main business of interviewing the prospective customer is not inherently improbable, it is, to say the least, somewhat unconvincing. From the evidence the inferences are reasonable, although not inevitable, that Brown went to Lakeport for the main purpose of transporting Murray's trailer back to King City, and that this was done pursuant to a prearranged agreement between Murray and Brown. The question is, under that state of the evidence, could the jury infer that Brown was the agent of Murray?

[1] It is quite clear that Brown could be the agent for Murray although he was to receive no pecuniary consideration for his services. Tucker v. Cooper, 172 Cal. 663, 158 P. 181; Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729; Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; Graf v. Harvey, 79 Cal.App.2d 64, 179 P.2d 348; Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218; 1 Restatement of Agency, § 225. In other words, the absence of a pecuniary compensation to the alleged agent, while an important factor, is not a conclusive one on the issue of agency.

There have been a great many cases, not all of which are consistent, discussing the problem of what facts must be proved before an inference of agency may be drawn by the jury. Most of these cases involve the use of motor vehicles owned by one party and driven by another with the permission of the owner, and the issue is whether the jury could infer agency, and thus impose unlimited liability on the owner, or is limited by the terms of section 402 of the Vehicle Code, the permissive use statute. Of course, in order to raise the liability imposed by section 402 all that need be shown is ownership and permission. It also seems to be the law that proof of ownership and permission is not sufficient to permit the jury to infer agency, although there are some cases that hold or imply that these two factors alone are sufficient to permit the inference even in a non-family or non-employer-employee relationship. See Kananakoa v. Badalamente, 119 Cal.App. 231, 6 P.2d 338; Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518.

One of the leading cases on this subject, heavily relied upon by appellant Murray, is Stewart v. Norsigian, 64 Cal.App.2d 540, 149 P.2d 46, 150 P.2d 554. There LaFontaine, a used car dealer, sold an automobile to Blair on a conditional sales contract. LaFontaine then assigned the contract to Pacific Finance Corporation, and the registration showed the corporation as the legal owner and Blair as the registered owner. Later Blair redelivered the car to LaFontaine because he was unable to keep up the payments. LaFontaine had the legal right, under his contract with Pacific Finance Corporation, to resell the car, and was obligated to pay the corporation the balance due on the car. Norsigian, an employee of LaFontaine, told LaFontaine that he might want to buy the car in question but first wanted to take it out for a demonstration. While so driving the car he injured the plaintiff. The plaintiff recovered judgment against the corporation for $25,000. This was reduced to $5,000 on appeal. The court held that the corporation's liability was limited under section 402 of the Vehicle Code to $5,000, and that there was no basis for an inference of agency between Norsigian and the corporation. The court specifically held that mere possession and permissive use were not sufficient to raise the inference of agency, because to so hold would render the limited liability of section 402 meaningless. The court discussed many cases and held that the inference of agency may be drawn where the evidence shows only ownership and permissive use in but two types of cases:

1. Where the operator of the car belongs to the family group of the owner; and

2. Where the operator of the car is the employee of the owner.

In denying a rehearing in that case the court rendered a second opinion discussing and analyzing many cases where general language was used to the effect that the inference of agency may be based on the facts of ownership and permissive use, and finds that they either fell within the two exceptions above noted or involved some other fact. The court concluded its discussion with the following observation, 64 Cal.App.2d at page 553, 149 P.2d 46, 150 P.2d 554, 556: "Thus the cases relied upon by plaintiff do not establish the rule that mere permissive use of an automobile raises the inference of agency. They do not cause us to change our views that, in addition to permissive use the plaintiff must also prove either employment of the operator by the owner, or that the operator was a member of the family group of the owner, or was operating the car under the control of or for a member of the family group of the owner in order to justify the inference of agency." See, also, on the same general principle, Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453; Wilson v. Droege, 110 Cal.App. 578, 294 P. 726; Walton v. Donohue, 70 Cal.App. 309, 233 P. 76; Newman v. Steuernagel, 132 Cal.App. 417, 22 P.2d 780.

The Stewart case, and the other cases cited, at most, establish the proposition that proof of the facts of possession and permissive use, plus proof of family relationship or employment, are sufficient to raise the inference. Neither the Stewart case nor the other cases cited held that proof of ownership and possession, plus other facts tending to show agency, was not sufficient to raise the inference; in fact, the Stewart case distinguished several of the cases mentioned in the opinion on the ground that they involved other facts.

In the instant case we have proof of ownership and permissive use. We also have evidence that both Brown and Murray were engaged in the hauling business and that they had been closely associated in that business. The trailer was a business vehicle. Its transportation to King City was of great economic benefit to Murray. The inferences are permissible and reasonable that Brown went to Lakeport for the main purpose of hauling Murray's trailer from there to King City, and that this was done pursuant to a pre-arranged business agreement with Murray.

[2, 3] These facts, in our opinion, are sufficient upon which to base the inference of agency. But while the issue of agency was properly submitted to the jury, this should have been done by a proper instruction or instructions. The instruction given was not only erroneous, but also prejudicial. The instruction reads: "On the question of agency you are instructed that it is admitted that the trailer in question was owned by defendant Murray. From this fact an inference arises that one operating the property of another is doing so as the agent of the owner. It is for you to determine, under all of the facts and circumstances of this case, whether or not at the time of the accident defendant Brown was acting as the agent of defendant Murray, and if you so find that defendant Brown was the agent of defendant Murray and that he was acting within the course and scope of his agency, then any verdict you render against defendant Brown must also be rendered against defendant Murray."

Thus, the jury was told that from the fact of ownership alone the inference of agency arises. That is not the law. Not only does this instruction ignore the element of permission, but it ignores the requirement that, in addition to those two elements, there must be the element of economic benefit and the other factors already mentioned. The instruction is obviously misleading and erroneous. The giving of such erroneous instruction clearly sustains the action of the trial court in granting a new trial to Murray in the four cases in which judgments were rendered against him—numbers 3, 5, 7 and 9.

In Action Number 7 for the Wrongful Death of Felipe, assuming that the Father, Herman, was Contributively Negligent, is such Contributory Negligence a bar to an Action by the Wife for the Wrongful Death of her Child?

The trial court instructed the jury on this issue as follows: "As to the causes of action of Mrs. Anita Flores for the death of her son Phillips [Felipe], Miss Anita Flores for her own injuries, and Mrs. Zavala for the death of her daughter Nellie, these plaintiffs are not to be charged with any negligence of which you may find Herman Flores guilty, if you should so find. The negligence of Herman Flores, if any, cannot be imputed to these plaintiffs in their causes of action. They were guests in the automobile Herman Flores was driving. If you find that defendant Brown was negligent and that his negligence proximately contributed in any degree to the injuries and death in these causes of action complained of, you will find in their favor even though Herman Flores was also negligent."

[4] There can be no doubt that this instruction correctly states the law as to actions numbered 5 and 9, that is, as to the action for the injuries to Miss Anita Flores, and as to the action for the wrongful death of Nellie Zavala. The contributory negligence of Herman Flores, if any, is no bar to recovery in these actions. No contention is made to the contrary.

[5] It is equally clear that in action number 3, that is, by Mrs. Anita Flores for her own injuries, if Herman Flores, the husband, was contributively negligent the wife cannot recover. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461; Duncan v. Duncan, 6 Cal.App. 404, 92 P. 310; see criticism of the rule 33 Cal.L. Rev. 627, particularly fn. 29, on p. 632.

[6] The question that we are presented with is whether in action numbered 7, that is, the wrongful death action brought by Mrs. Anita Flores for the death of her son Felipe, the contributory negligence of Herman Flores, if any, is a bar. The instruction told the jury that in such action the contributory negligence of the father, if any, was not a bar to the action brought

by the mother for the death of her son. We think that the instruction correctly states the law.

There are three cases cited by Brown and Murray that do hold that if a child is killed and the *mother* was contributively negligent, the *father* is barred from recovery. These cases seem to be based either on the theory that the mother in caring for the child is acting on behalf of the community, of which the father is the head, and that the mother is therefore the agent of the father, or upon the theory that, where both parents are alive, the recovery would be community property. The first case relied upon is the frequently cited (and often distinguished) case of Keena v. United Railroads of San Francisco, 57 Cal. App. 124, 207 P. 35, where the mother was contributively negligent, and the child was killed. The father alone brought the action for the wrongful death of the child. Both parents were alive and living together. It was held that the contributory negligence of the mother was a defense in the action by the father because the recovery would be community property. The Supreme Court, in denying a hearing of the case, rendered the following opinion, 57 Cal.App. at p. 132, 207 P. at page 38: "We approve of that portion of the opinion holding that the proceeds of the judgment in favor of the father is community property, but we disapprove of that portion of the opinion to the effect that the proceeds of the judgment pass to the parents, one-half to each. The contributory negligence of the mother is a defense to the action on behalf of the community to recover for the death of the child, not because of her interest in the community property, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband."

The rule of the Keena case has been followed in at least two other cases. In Cossi v. Southern Pacific Co., 110 Cal.App. 110, 293 P. 663, a mother and son were killed when an automobile driven by the mother was struck by defendant's train. The mother had been living separate and apart from her husband and had been supporting their children. It was held that the father of the child could not recover for the child's death, first, because the jury was justified in finding that he had suffered no pecuniary damage by the death of his son, and second, because "If the mother was negligent and thereby injured the child, the father's recovery is barred because she represented the community." 110 Cal.App. at page 113, 293 P. at page 664.

The same rule was announced in Dull v. Atchison, T. & S. F. Ry. Co., 27 Cal.App.2d 473, 81 P.2d 158, which was an action by a husband and father for the death of his wife and two minor children, all killed when the automobile which the mother was driving, and in which the children were riding, was struck by a train. A verdict was directed for defendant, and the judgment entered on this verdict was affirmed. After holding that the evidence showed no negligence on the part of the railroad, and that it demonstrated contributory negligence on the part of the mother and wife, the court, relying upon the Keena and Cossi cases, stated, 27 Cal.App.2d at page 479, 81 P.2d at page 162: "The final question presented is whether the negligence of the wife bars a recovery by the husband for the death of the minor children. It is the law that the contributory negligence of the mother is a defense to an action on behalf of the community to recover for death of the children, because in caring for the children she represents and acts for the community and for the husband as head of the community. And her negligence, if any, in caring for the children is the negligence of the husband."

The precise theory upon which these cases are based is not entirely clear. If the husband and wife are living together, as in the Keena case, the theory might be that the recovery would be community property. All three cases involved situations where the mother was contributively negligent, and the action was by the father. The theory, most clearly expressed in the Dull case, seems to be that the husband is head of the community, that the wife in caring for the children is acting as agent of the community, and therefore her negligence is chargeable to the husband, under the doctrine of imputed negligence.

[7] In the present case it is the father who was driving the automobile. It is he who is charged with contributory negligence. The action is brought by the mother to recover for her pecuniary loss caused by the death of her son. The husband was the head of the family and the wife had no legal right of control over her husband. The doctrine of imputed negligence is completely out of place in such a situation. The negligence of the husband can only be imputed to the wife on some theory of agency. The mere fact that a husband is transporting his wife, even in a car owned by the community, does not raise an inference that he was acting as her agent. Cox v. Kaufman, 77 Cal.App.2d 449, 175 P.2d 260.

The only theory upon which the contributory negligence of Mrs. Flores would be a bar to her action for the wrongful death of Felipe would be that the recovery would be community property. But the recovery by Mrs. Flores solely for her pecuniary damage caused by the death of her son, where the husband is dead, would not be community property. This was clearly illustrated in a recent case written by this court. Christina v. Rose, 100 Cal.App.2d 46, 222 P.2d 891. There a husband and wife had three children. They separated and the wife took custody of the children. The husband contributed nothing towards their support. While the children were in the custody of the wife one of them was killed in an automobile accident. Thereafter, the wife secured an interlocutory decree of divorce. She then instituted an action to recover her damages caused by the death of her son. She recovered judgment, and thereafter secured her final decree of divorce. The husband then instituted an action to recover one-half of the judgment she had received on the theory that such judgment was the community property of the parties. This court held that the recovery by the wife was on her own behalf to recover for her own damages, and that the amount recovered was her separate property, and not community property. In so holding we stated, 100 Cal.App.2d 54, 222 P.2d at page 896: "Appellant's [husband] argument that the cause of action for wrongful death and the proceeds of the judgment in such action are community property, is based primarily on the rule announced in Keena v. United Railroads of S. F., 57 Cal.App., 124, 130, 207 P. 35, 38. In that case a father brought an action for the wrongful death of a minor child. It was held that the mother's contributory negligence barred any recovery by the father because 'The proceeds of a favorable judgment in such an action become community property.' [57 Cal.App. at page 130, 207 P. at page 35]. That rule is based upon, and is a refinement of, the rule that damages suffered by a wife, even though recovered in an action brought by her alone, are, in this state, community property. [Citing cases.] But in the Keena case, and in the many cases in which it was held that damages for personal injuries to the wife are community property, the wife was living with the husband. We have found no case in this state where it has been held that damages to a wife living separate and apart from her husband are community property, or holding that damages in a wrongful death action recovered by a wife living separate from her husband and having custody of their child, is community property. Cogent reasons exist why the recovery in such cases should be considered the separate property of the wife."

Certainly if the recovery by a wife living separate from her husband for the death of their child is not community property, the recovery by a wife for the damages suffered by her for the death of their child where the husband is dead cannot be community property, and this is so whether or not the father outlived the son who was killed in the same accident.

Since the husband was not the agent of his wife in the driving of the automobile, and since the recovery by the wife where the husband is killed in the same accident is not community property, the contributory negligence of the husband, in an action for the wrongful death of a child, is not a bar to the action by the wife. The challenged instruction, therefore, correctly stated the law.

Did the Trial Court Properly Grant a New Trial as to all Parties and as to all Issues?

The facts in reference to the verdicts, the motions for new trials, the action of the trial court, and the nature of the appeals have all been set forth.

In action numbered 1, for the death of Herman Flores, the verdict was for defendants. The plaintiffs moved for a new trial, which was granted. No one appeals from this order, so that a new trial as to this cause of action as to all parties and issues will necessarily follow.

[8] In action numbered 3, by Mrs. Flores for her injuries, the verdict was for her against both defendants for $5,000. Brown and Murray moved for a new trial on all of the statutory grounds. Plaintiff moved for a new trial solely on the ground of insufficiency of the damages. The motion was granted on all issues and as to all parties. No one appeals from the order granting the new trial in this action. The only appeal is by Murray from the judgment. Since the new trial has been granted, and since no one appeals from the order granting it, the judgment has been set aside and the appeal therefrom should be dismissed. This applies to all of the appeals by Murray and Brown from the judgments. Incidentally, it is quite clear that the verdicts in actions 1 and 3 are inconsistent.

In action numbered 5 we have a complicated situation. This was the action for the injuries to Miss Anita Flores in which the verdict was for $15,000 against both defendants. The plaintiff moved for a new trial solely on the ground of insufficiency of damages. Murray moved for a new trial on all of the statutory grounds. Brown did not move. The new trial was granted on all grounds, and as to all parties. Plaintiff appeals from the order granting the new trial on all issues, and Murray appeals from the judgment. Thus, as to this cause of action the primary question is whether, on the limited motion of the plaintiff for a new trial on the ground of inadequacy of damages, the trial court had power to grant a general new trial as to Brown, who did not move for a new trial. This question as to the power of the court to grant a general new trial on a limited motion is also common to actions numbered 7 and 9.

Defendant Murray moved for a new trial in actions 3, 5, 7 and 9 on all statutory grounds. Inasmuch as the instruction on agency was prejudicially erroneous as to Murray, it is obvious that the trial court, as to Murray, had the legal right to grant a new trial in these four actions, on the ground of error in law.

[9, 10] It should be here pointed out that, although Murray and Brown based their respective motions for a new trial on all seven grounds set forth in section 657 of the Code of Civil Procedure, neither supported their respective motions with affidavits. This being so, it will be assumed that the new trial was not granted on the first four grounds set forth in the section. McCulloch v. Superior Court, 91 Cal.App.2d 641, 205 P.2d 689; Greer v. Freitas, 66 Cal.App.2d 335, 152 P.2d 15; Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680. The fifth ground set forth in the section is excessive damages. In view of the serious and permanent nature of the injuries to this girl, the damages were clearly not excessive; in fact, if anything, they were inadequate. The sixth ground set forth in the section is insufficiency of the evidence. The court did not specify this ground in its order, so it must be conclusively presumed that it was not granted on that ground. The seventh and last ground set forth in the section is error in law. The order of the trial court simply specified that substantial justice required a new trial, that the verdict may have been a compromise verdict, and that all issues were interdependent. The trial court, as already pointed out, could have granted Murray's motion for a new trial because of the erroneous instruction on agency. Thus, as to action numbered 5, the sole question is the propriety of granting the new trial as to Brown on the limited motion of plaintiff.

In action numbered 7, which was by Mrs. Flores for the death of Felipe, the verdict was for $5,000 against both defendants. Brown and Murray moved for a new trial on all of the statutory grounds. Plaintiff moved for a new trial solely on the ground of inadequacy of damages. The new trial was granted on all issues, and as to all parties. Mrs. Flores appeals from the general order granting the new trial, while Brown and Murray both appeal from the judgment. As to Murray, the new trial was properly granted because of the error in the instruction on agency. As to Brown, the question is whether the trial court properly granted the new trial on all issues. This will be discussed later.

In action numbered 9, which was for the wrongful death of Nellie Zavala, the verdict was for $5,000 against both defendants. The legal situation is identical with that in action numbered 5, that is, Mrs. Zavala moved for a new trial solely on the ground of inadequacy of damages, Murray moved on all of the statutory grounds, while Brown made no motion. The new trial as to all parties and issues was granted. Mrs. Zavala appeals from the order granting the general new trial, and Murray appeals from the judgment. The general new trial as to Murray was properly granted on his motion because of the erroneous instruction on agency. Thus, the question is whether the court had power on the limited motion of the plaintiff to grant a general new trial as to Brown, who did not move for a new trial.

Under these facts there can be no doubt that the general new trial was proper as to action numbered 1 (there being no appeal), and as to Murray in actions 3, 5, 7 and 9. The action of the court in granting a general new trial as to all parties and issues in action numbered 3 is not challenged by anyone. Thus, the only question left for consideration is whether, in actions numbered 5, 7 and 9, the trial court had the power to grant an unlimited new trial to Brown on the limited motions of the respective plaintiffs, which were based solely on the ground of inadequacy of damages.

The solution of the problem as to whether, on a limited motion, the trial court can grant a general new trial is by no means clear. At common law a trial court of general jurisdiction possessed the power to grant a new trial of its own volition. In the great majority of states the enumeration of the grounds for a new trial by statute has been construed simply as a limitation on the right of the parties to move for a new trial and not a limitation on the power of the court to act of its own volition. (See notes 25 Cal.L.Rev. 114; 22 Cal.L. Rev. 579; 40 L.R.A.,N.S., 291.)

[11] In California, however, the law on this subject has developed somewhat differently. In the early case of Duff v. Fisher, 15 Cal. 375, 380, there appears a strong dictum that a trial court possesses the power to grant a new trial on its own motion, but this dictum was not followed by later cases. When section 662 was originally adopted authorizing the court of its own volition to grant a new trial on certain limited grounds, it was held that the power to grant a new trial of the court's own volition was limited to the grounds enumerated in the statute, and that it had no inherent power to go beyond these limitations. Townley v. Adams, 118 Cal. 382, 50 P. 550; Eades v. Trowbridge, 143 Cal. 25, 76 P. 714. Then section 662 of the Code of Civil Procedure conferring this limited power to act *sua sponte* was repealed in 1915. Since that date the law is now settled in this state that the trial court has no power to grant a new trial of its own volition. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357; Manufacturers' Finance Corp. v. Pacific Wholesale Radio, 130 Cal.App. 239, 19 P.2d 1013; Quevedo v. Superior Court, 131 Cal.App. 698, 21 P. 2d 998; Cooper v. Superior Court, 12 Cal. App.2d 336, 55 P.2d 299; Laumann v. Conner, 12 Cal.App.2d 631, 55 P.2d 1225.

These cases, and perhaps others that could be cited, definitely have determined that a trial court in this state has no power to grant a new trial in the absence of a motion for a new trial, and that the court, in any case, can only grant a new trial for the reasons specified in section 657 of the Code of Civil Procedure. In other words, the notice of intention is deemed to be jurisdictional and the trial court has no power to act *sua sponte*.

But the determination that a trial court cannot grant a motion for a new trial of its own volition is not necessarily determinative of the further question as to whether the trial court, when the motion for a new trial is on limited grounds, can grant a new trial on all grounds as long as its order can be supported by any one of the grounds specified in section 657 of the Code of Civil Procedure. On this question the decisions are in hopeless conflict. There is one case, Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998, where the appellate court has held that not only is a notice of intention to move for a new trial jurisdictional (which is in accord with the cases above cited), but also that the trial court is limited to the foundation made by the motion and cannot go beyond it. The court held that when the motion is made on limited grounds—in that case on the ground of inadequacy of damages—the trial court is without power to grant a general new trial on the issue of liability as well as on the issue of damages.

No hearing was asked in the Quevedo case. It has been cited with approval in several cases, but mainly in support of the proposition that a trial court cannot grant a motion for a new trial of its own volition. In some respects, but not on the issue under consideration, the case has been specifically overruled. Phelan v. Superior Court, 35 Cal.2d 363, 368, 217 P.2d 951. It is directly contrary to some later appellate court opinions, and it is our view that the rule that the trial court is limited to the foundation made by the motion is unsound and should not be followed.

While not mentioning the Quevedo case, there are several cases later in time directly contrary to it. The leading case is Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858, in which a hearing was denied by the Supreme Court. There the plaintiff moved for a new trial on the ground of inadequacy of damages. This limited motion was granted. On appeal the court held that it was error for the trial court to have granted the limited new trial, and that it should have granted it on all issues. After reciting the evidence that tended to indicate that the small verdict may have resulted from a compromise by the jurors, and after pointing out that limiting the new trial to the issue of damages under the evidence was an abuse of discretion, the court made the following order, 52 Cal.App.2d at page 22, 125 P.2d at page 860: "The order granting a new trial as to the single issue of damages is modified to provide a new trial upon all the issues framed by the pleadings and raised by the evidence. And so modified the order is affirmed, and the cause remanded for a new trial." Thus, the appellate court told the trial court that it had committed error in granting the limited motion for a new trial and should have granted a new trial on all issues. Yet, if the trial court had entered the very order the appellate court stated it should have entered, and which was entered by the appellate court, it would have been reversible error under the rule of the Quevedo case. See, also, Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, and Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745.

[12–15] While a trial court has power, in a proper case, to grant a limited new trial, §§ 657, 662, Code Civ.Proc., this power, particularly when the new trial is restricted to the issue of damages, is a very limited one, and should be exercised with extreme caution. If substantial justice requires that the new trial be on all issues, it should not be limited, and all reasonable doubts should be resolved in favor of a general new trial. Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398; Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745; Gasoline Prods. Co. v. Champlin Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188. We think that the true rule is and should be that, while a trial court is not a self-starter on motions for a new trial and cannot act *sua sponte* in the absence of a motion for a new trial, once started by a general or limited motion it has complete power, and within the confines of section 657 of the Code of Civil Procedure, may deny or grant a general or limited new trial as justice may require. It certainly is logically and legally absurd to believe that a trial court's power is limited in this respect, but that of the appellate court is unlimited. The rules announced in the Quevedo and the Keogh cases cannot both stand. They are completely inconsistent. We think that the rule of the Keogh case is sound and should be followed. In the present case, in view of the small verdicts in actions 7 and 9, and considering the extent of the injuries involved and the quite small verdict in action 5, considering the conflict of evidence on the issue of liability as to both defendants, considering the erroneous instruction as to Murray on the issue of agency, considering the confusion that obviously existed over the issue of the contributory negligence of Herman, the trial court, in the exercise of a sound discretion, decided that substantial justice required that the new trial be granted on all issues as to all causes of action, and as to all parties. That conclusion was not an abuse of discretion and was amply justified under the circumstances.

The appeals from the judgments are dismissed. The order granting a new trial as to all causes of action, as to all parties, and on all issues is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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105 Cal.App.2d 370

NESBITT v. BRUCE EELLS & ASSOCIATES.

Civ. 18338.

District Court of Appeal, Second District, Division 1, California.

July 12, 1951.

Action by Norman Nesbitt against Bruce Eells & Associates, a corporation, on joint venture contracts. The plaintiff filed a motion to dismiss an appeal which was taken by defendant from the trial court's interlocutory judgment. The District Court of Appeal, Hanson, J., held that the trial court's interlocutory judgment, which declared that two written joint venture contracts were invalid; ordered return of certain personal property involved in joint venture; directed that an accounting be held before referee who was empowered to examine parties and witnesses; directed referee to submit findings to court, and ordered that thereafter a final judgment for balance, if any, shown by accounting to be due shall be awarded, was not a final judgment and was not appealable.

Motion to dismiss appeal granted.

Appeal and error 🔑80(4)

Interlocutory judgment, which declared that two written joint venture contracts were invalid; ordered return of certain personal property involved in joint venture; directed that an accounting be held before referee; directed referee to submit findings to court, and ordered that thereafter a final judgment for balance if any shown by accounting to be due shall be awarded, was not a final judgment and was not appealable. Code Civ.Proc. § 963, subd. 1.

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Julius A. Leetham, Los Angeles, for appellant.

Long & Levit, by Richard H. Millen, Los Angeles, for respondent.

HANSON, Justice Pro Tem.

Respondent moves to dismiss the appeal taken by appellant, who was the defendant below, on the ground that the judgment appealed from is not a final judgment.

The judgment which the trial court, in terms, designated as interlocutory declared that two written joint venture contracts were invalid; ordered the defendant to return forthwith to the plaintiff certain personal property involved in the joint venture; directed that an accounting be held before a referee named who was empowered to examine the parties and witnesses; directed the referee upon the taking of the account to submit his findings and conclusions to the court; and, ordered that thereafter a "final judgment for the balance if any shown by the * * * accounting to be due shall be awarded to the party to whom such balance is shown to be owing." The judgment further directed that the costs of the accounting should be borne equally by the parties and that the plaintiff "shall have judgment against defendant for his costs of suit in the sum of $20.25."

The question for decision is whether the judgment entered below is to be regarded as final for purposes of review, where it contains a provision for future accounting, the result of which is to be embodied in a final decree. The answer to the question depends upon the meaning to be ascribed to the words "final judgment" as those words are used in the statute which permits an "appeal * * *

"From a final judgment entered in an action * * *." Code Civ.Proc. sec. 963, subd. 1.

The common law allowed an appeal only after final decision, i. e., after the last of all possible decisions in the progress of an action. Metcalfe's Case, 11 Coke 38a [1614]. This rule followed by Chief Justice Marshall in 1835 in the case of the United States v. Bailey, 9 Pet. 267, 34 U.S. 267, 272, 9 L.Ed. 124, is likewise the rule in California. Gunder v. Gunder, 208 Cal. 559, 282 P. 794. The reason back of the rule as stated by Chief Justice Marshall is to prevent the delay and expense incident to repeated trials of error on appeal from various decisions reached in the progress of an action, and to have instead one trial of error on appeal from final decision.

Appellant contends that the judgment should be regarded as a final judgment despite the fact that the trial court designated it as interlocutory, because the finality of the judgment appears from the imperative form of its provisions, as for instance, that "defendant shall forthwith return and deliver to plaintiff" certain personal property. The short answer to the contention is that the trial court would exceed its jurisdiction if it attempted to enforce the provision, if the judgment is interlocutory rather than final. That the judgment must be regarded as being interlocutory we think is plain under the controlling decisions in this state.

The case before us is not distinguishable in its material facts from that of Gunder v. Gunder, 208 Cal. 559, 282 P. 794. In that case, as in this, the interlocutory judgment purported to decide all the issues except to determine by means of an accounting the amount due from one of the parties to the other. As this involved a further decree in that case it was held the judgment was not final and hence not appealable. The same is true here.

Some of the seeming exceptions to the general rule in the decisions of this state, to which our attention is called by appellants are not exceptions to the rule, as we view them, and at all events are distinguishable and not applicable here. Among the cases thus cited to us are Zappettini v. Buckles, 167 Cal. 27, 138 P. 696, and Clark v. Dunnam, 46 Cal. 204. In distinguishing these two cases from the case it had before it the Supreme Court said in the Gunder case [208 Cal. 559, 282 P. 795]: "It is contended by the appellant that the judgment is a final judgment, in accordance with the rule stated in the case of Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. As stated by the court in that case, however, the decree there was similar to the decree from which an appeal was taken in the case of Clark v. Dunnam, 46 Cal. 204, and the decision of the latter case was followed by the court in the Zappettini Case. In neither of those cases did the decree involve a reference for an accounting, but in each case it ordered a sale of property and specified the distribution to be made of the proceeds. There was, therefore, in those cases *no further judicial action* required on the part of the court to adjudicate finally the rights of the parties." (Italics supplied.) Later in Hollar v. Saline Products, Inc., 3 Cal.2d 80, 82, 43 P.2d 273, 274, it was said: "In the Di Blasi Case, supra, this court affirmed the ruling in the Gunder Case and said, 209 Cal. [at] page 754, 290 P. [7], 8, that an earlier case (Zappettini v. Buckles, 167 Cal. 27, 138 P. 696) might be distinguished, 'but even if this were not so, said case would have to be considered as modified to conform to the holdings' referred to, i. e., the Gunder Case." Accordingly, it follows from the holdings in these cases that we may not entertain the appeal.

The motion to dismiss the appeal is granted.

WHITE, P. J., and DRAPEAU, J., concur.

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McGAW et al. v. MASTER CRAFT HOMES et al.

MASTER CRAFT HOMES v. McGAW et al.

Civ. 7879.

Sac. 6127.

District Court of Appeal, Third District, California.

July 5, 1951.

Rehearing Denied Aug. 1, 1951.

Hearing Denied Aug. 30, 1951.

S. M. McGaw and W. S. Good, a copartnership, transacting business under the firm name and style of S. M. McGaw Company, brought an action against Master Craft Homes, a corporation, and others, to foreclose a mechanic's lien, and the action was consolidated for trial with an action by Master Craft Homes, a corporation, against S. M. McGaw and W. S. Good, individually, and as copartners transacting business under the firm name and style of S. M. McGaw Company, and others, for a declaration of rights and to determine future liability under contracts. The Superior Court, San Joaquin County, R. M. Dunne, J., rendered a judgment adverse to the defendants in the first recited action and the defendants appealed, and rendered a judgment adverse to the plaintiff in the second recited action and plaintiff appealed. The appeals were consolidated. The District Court of Appeal held, inter alia, that a contract whereunder the plaintiff in the first recited action was to install streets and other improvements in a subdivision was a unit contract and not a lump sum contract.

Order in accordance with opinion.

1. Contracts 🔑143

Court must so construe a written instrument as to give force and effect not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to intention of parties or would lead to some absurdity. Code Civ.Proc. § 1858.

2. Contracts 🔑232(1)

A contract for plaintiff to do work of installing streets and other improvements in subdivision partially owned by defendant, wherein work contemplated was divided into items, each of which was to be done for specified amount of money, was a unit contract and not a lump sum contract, so that plaintiff was entitled to be paid for amount of actual work installed at unit price where quantities necessary exceeded quantities shown by contract which followed bid furnished by defendant to plaintiff which contained erroneous quantities necessary to do work required by city in which subdivision was located.

3. Mechanics' liens 🔑132(1)

Where contractor installed streets and other improvements pursuant to contract with owner of part of subdivision, and work was subject to acceptance by city council, time within which contractor's claim of lien was required to be filed did not commence to run until city accepted work. Code Civ.Proc. § 1191.

4. Damages 🔑45

Where engineering firm employed by owner of part of subdivision negligently and erroneously estimated quantity of work required to install streets and other improvements in subdivision, and owner was bound by contract with city to construct subdivision in accordance with submitted plans, and record contained no evidence that subdivision could have been constructed for less sum of money than it cost contractor to construct subdivision for owner, and no evidence indicating that owner suffered loss as result of such mistakes, owner could not recover damages from engineering firm although as a result of mistakes construction cost owner more than anticipated under estimates of engineering firm.

◆

Courtney L. Moore, Partridge & O'Connell by John Whitney, San Francisco, for appellant.

Jones, Lane & Weaver, Stockton, Chadeayne & Wilkinson, Tracy, Overton, Lyman, Plumb, Prince & Vermille, Los Angeles, for respondent.

PER CURIAM.

S. M. McGaw and W. S. Good, contractors and copartners, doing business as S. M. McGaw Company, filed action No. 43247 against Master Craft Homes, Goheen Construction Company, Marin Capital Company, corporations, and a number of fictitious defendants, to foreclose a mechanic's lien.

Master Craft Homes filed action No. 43525 against S. M. McGaw Company and the partners thereof, Howes & Whitaker, copartners, Goheen Construction Company and Marin Capital Company, asking for a declaration of rights and to determine future liability under contracts.

The two actions were consolidated for trial and the appeals from the judgments in both cases have been consolidated.

Appeal in Mechanic's Lien Action

In this action the court found that prior to August 13, 1946, appellant Master Craft Homes was the owner of a portion of a subdivision commonly known as Seven Oaks Addition No. 1 in the City of Stockton; that pursuant to ordinance, Master Craft Homes entered into an agreement with the City of Stockton whereby Master Craft Homes was permitted to improve the subdivision by the installation of streets, street paving, curbs, gutters and sidewalks by private contract, subject to the ordinance and to the satisfaction of the city engineer; that in preparing to make the improvement, Master Craft Homes employed Howes & Whitaker, licensed engineers, to do the engineering work, and to draw plans for such improvement; that said engineers and Master Craft Homes procured from the city engineer's office the city's standard forms for specifications for street work; that thereafter said engineers submitted the plans and specifications to the city for approval; that at that time the city engineer's office discovered the quantities of material set forth in the specifications were in error and not sufficient to cover the area shown on the plans; that the city engineer pointed out said errors to Master Craft Homes and its engineers; that thereafter Master Craft Homes submitted said plans and specifications to S. M. McGaw Company, requesting that they make a bid for doing the work described in the plans and specifications; that Master Craft Homes so submitted the plans and specifications to S. M. McGaw without correcting the errors as to the quantities required; that the specifications so furnished to S. M. McGaw Company on which to bid were standard forms of specifications used by the City of Stockton, furnished by the City of Stockton to Master Craft Homes, which provided, among other things:

"* * * It is the intent of these specifications to provide for the proper construction of the work herein referred to and it is understood that the contractor agrees to furnish everything necessary for the construction of the work notwithstanding any errors or omissions in the plans or specifications. The work shown upon the plans and not mentioned in the specifications or vice versa shall be done the same as if shown on both.

* * * * * *

"Bidders must examine and judge for themselves as to the location of the proposed work and satisfy themselves as to the nature, character and quantity of the labor and materials required to build the completed work, by a personal examination of the plans, specifications and location of the work.

"The plans for the work show conditions as they are supposed or believed by the City Engineer to exist, but it is not intended or to be inferred that the conditions as shown thereon constitute a representation by the City, or its officers that such conditions are actually existent, nor shall the City nor any of its officers be liable for any loss sustained by the contractor as a result of any variance between conditions as shown upon the plans and the actual conditions revealed during the progress of the work or otherwise."

The court further found that S. M. McGaw Company, prior to making the bid and prior to entering into the contract, did not examine or judge for themselves as to the quantities of the labor and materials required to build the completed work; that thereafter S. M. McGaw Company completed the bid form furnished by Master Craft Homes and submitted a bid based thereon; that said bid form contained the erroneous quantities of labor and materials required, which erroneous quantities were set forth in the specifications by Master Craft Homes, as aforesaid; that thereafter, on or about August 13, 1946, S. M. McGaw Company and Master Craft Homes entered into an agreement in writing whereby S. M. McGaw Company agreed to furnish the labor and material and to construct, lay, place and install for Master Craft Homes certain works, to wit: Excavation and fill, street paving, curbs, gutters, sidewalks and grading in said subdivision upon the streets, lots and blocks designated upon the plans showing said work; that Master Craft Homes agreed to pay S. M. McGaw Company for such work of construction at the rates per unit of cubic yards, square feet and linear feet set forth after each specific item contained in the written agreement; that after the execution of the agreement a change was made in the grade of certain streets, and by mutual consent it was agreed that S. M. McGaw Company should be compensated for the extra grading and fill required by the change of grade, in the sum of $4,829.40; that the written agreement set forth and described the erroneous quantities contained in the specifications, as aforesaid; that the quantities set forth in the written agreement were not sufficient to cover the area to be improved as shown upon the plans for the work of improvement; that the written agreement, by reference thereto, incorporated the plans and specifications, and the agreement further provided: "That notwithstanding the fact that the work contemplated by this contract is divided into items in the next preceding paragraph the said work is to be treated as a unit contract and the said second parties agree to perform the whole thereof as one contract"; that S. M. McGaw Company have fully kept and performed the agreement in all the things to be by them kept and performed and have furnished to defendants and have installed grading and fill, paving, curbs, gutters and sidewalks in the quantities, for the price and of the values hereinafter set forth as follows, to wit:

4875 cu. yd. of Excavation at 0.45¢ per cu. yd.	$ 2,193.75
4250 cu. yd. of Fill at 0.45¢ per cu. yd.	1,912.50
Extra excavation & fill by mutual agreement	4,829.40
225,641.0 sq. ft. Asphalt Paving 2" thick at 0.065 per sq. ft.	14,666.67
225,641.0 sq. ft. Gravel Base, 4" thick at 0.0525	11,846.15
7,527.6 Lineal Feet 7′ Combined Curb, Gutter & Sidewalk at $2.90	21,830.04
2,455.8 Lineal Ft. 8′ Combined Curb, Gutter & Sidewalk at $3.25	7,981.35
2,575.4 Lineal Ft. 2½′ Curb, Gutter at $1.60	4,120.64
2,380.90 Lineal Ft. 5′ Sidewalk at $1.40	3,333.26
463.0 Lineal Ft. 7′ to 8′ returns at $3.40	1,574.20
370.4 Lineal Ft. 7′ to 7′ returns at $3.25	1,203.80
205.8 Lineal Ft. 8′ to 8′ returns at $3.50	720.30
171.5 Lineal Ft. 8′ to 7½′ returns at $3.45	591.67
121.2 Lineal Ft. 6½′ to 7′ returns at $3.00	363.60
Total * * *	$77,167.28

The court went on to find further that the work of improvement and construction was commenced before November 4, 1946; that the sum of the items in said written agreement containing the erroneous statement of quantities as aforesaid was $59,498.64; that pursuant to the written agreement Master Craft Homes deposited $59,498.64 in Central Bank of Oakland, California, with instructions to pay same to S. M. McGaw Company in accordance with progress payment estimates, based upon the acceptance certificate of the city engineer; that after the work commenced and on or about May 13, 1947, at a time when the work required by the contract was only partially completed, the city engineer issued a progress payment estimate which showed on its face that there was a variance between the amount of work done and the erroneous quantities set forth in the specifications and the agreement; that said progress payment estimate was mailed by the city engineer to Master Craft Homes and to S. M. McGaw Company in accordance with the progress payment estimate, which showed that S. M. McGaw Company had completed and installed 866 lineal feet of 7′ curb and gutters and sidewalks in excess of the amount set forth in the agreement and specifications; that notice of the excess came to S. M. McGaw Company and Master Craft Homes by means of said progress payment estimate made by the city engineer on or about May 13, 1947; that S. M. McGaw Company themselves did not give Master Craft Homes any notice that the quantities required to improve the area shown in the plans were in excess of the quantities set forth in the specifications or written agreement; that the total price of the work, labor and material so performed and furnished pursuant to the written agreement was the sum of $77,167.28; that at the time the action was commenced there had been paid on account the sum of $45,376.02; that pending the trial there was paid on account the further sum of $18,951.98, leaving due, owing and unpaid the sum of $12,839.28; that S. M. McGaw Company have waived interest on all sums except on $12,839.28; that the whole of said Seven Oaks Addition, Unit No. 1, is required for the convenient use and occupancy of said streets, gutters and sidewalks and is benefited and improved thereby; that all the work was subject to acceptance by the City Council; that the work was accepted by the City Council on November 10, 1947; that payment of the total unpaid balance of $31,791.31 became due at the expiration of 35 days from November 10, 1947, to wit, on December 16, 1947; that at the date of the agreement of August 13, 1946, Master Craft Homes was the owner and reputed owner of said lands; that defendants Goheen Construction Company and Marin Capital Company are successors in interest to Master Craft Homes and are the owners and reputed owners of a portion of the lands and they became such successors with actual notice of said agreement and of the work and construction; that on December 23, 1947, S. M. McGaw Company filed for record a notice of claim of lien upon said property in writing duly verified by S. M. McGaw, which notice is in all respects in the form required by law and in all respects in compliance and conformity with the contract; that the claim of lien was filed within 60 days after the work of contraction was accepted by the City Council; that the action to foreclose the claim of lien was filed within 90 days of the filing of the notice of claim of lien, to wit, on March 9, 1948.

From the findings thus made, and which are amply supported by the record, the trial court concluded that S. M. McGaw Company were entitled to judgment against Master Craft Homes for $12,839.28 for work, labor and material, and against all three corporations defendant for $2.90 for verification and recording the claim of lien and for costs; that S. M. McGaw Company have a lien on the property for $12,841.18, together with interest and costs of suit, and that S. M. McGaw Company were entitled to a judgment of foreclosure of the lien on all the property.

All three corporate defendants have appealed from the judgment entered in accordance with said findings and conclusions, and have also appealed from the order denying their motion for a new trial and from the order denying their motions under sections 663 and 663a of the Code of Civil Procedure to set aside and vacate the judgment and enter another judgment.

Appellants make a number of contentions for a reversal of the judgment and orders, but their principal contention is that the evidence does not sustain the finding that the contract was an "item contract," but that the evidence shows that the contract was a "lump sum" contract. Appellants assert that the trial court not only failed to construe the contract correctly, but in effect made a new contract for the parties.

[1] It is, of course, elementary that "it is the duty of a court to so construe a written instrument as to give force and effect not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the parties * * * or would lead to some absurdity." (6 Cal.Jur., p. 259.) And as stated in section 1858 of the Code of Civil Procedure: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

We have read the record carefully and it appears that the plans and specifications were prepared by Walter H. Chase, an engineer employed to do that work by Howes & Whitaker, and he also made the map of the project and omitted to include 8th street and thereafter the error was discovered and amendments included 8th street for which Master Craft Homes paid S. M. McGaw Company $4,829.40 aside from the main contract. Then Chase, while correctly delineating the area to be improved in the plans, erred in computing the quantities when making up the estimates in the specifications.

It also appears, as testified to by S. M. McGaw, that his company subcontracted much of the work to Stockton Construction Company and paid it $50,652.52, and he learned of the error shortly after the grading started. He later testified that he first learned of the error toward the end of the job; that some items ran under his bid by which Master Craft Homes benefited; that before bidding he read the plans and specifications but did not examine them for errors, and he never notified Master Craft Homes of any error or "overrun" until after the job was completed; that he learned of "overrun" about May 13, 1947, from Second Progress Estimate issued by the city engineer; then testified he did not know of overrun until final figures were furnished by the city engineer, and that the overrun could be determined by comparing the city engineer's progress estimate reports with original balance stated to be due.

Lyle Payton, Stockton City Engineer, testified how "unit" and "lump sum" contracts are construed and that it is customary to bid on the "unit basis"; that a "lump sum" contract does not specify any units.

A reading of the contract reveals that the contractor agreed "to do all of the following work of construction and to supply all labor, materials, tools and equipment therefor and for the prices set opposite each item as follows, to-wit: 4,875.00 cubic yards of excavation at $0.45 per cubic yards * * * $2,193.75." Then follow the 14 items for units of work, each figured as above, and at the bottom a total of the items, $59,498.60.

The trial court stated in his memorandum opinion:

"This itemized agreement follows the bid furnished to the bidder and indicates very clearly that the plaintiff, when he signed this agreement, undertook to do each item for a certain amount of money and no more. I am of the opinion that this special language controls over the incorporation of some equivocal language contained in the specifications furnished to the bidders. If Master Craft desired a lump sum contract it would have been very simple to provide that the contractor agreed to do the work according to the plans and specifications for the sum of $59,498.60. But this they failed to do, and I do not believe you could have a unit contract and also a lump sum contract in the same document.

"The paragraph following the above, 'that notwithstanding the fact that the work contemplated by this contract is divided into units in the next preceding paragraph, said work is to be treated as a unit contract and the said second parties agree to perform the whole thereof as one contract' creates no liability for extra work due to errors in the specifications. It merely means that the contractor will not divide the work up and do it piecemeal, but will perform the entire contract as a whole.

"The fact that plaintiff required the total of the units to be deposited in a bank before he commenced work indicates nothing more than a security transaction. It does not, in my opinion, indicate that he believed he was performing a lump sum contract."

It should be borne in mind that the contract, maps, plans and specifications were all prepared by Master Craft Homes and S. M. McGaw Company prepared none of the instruments, and the error in quantities was made by Howes & Whitaker, employed to draw the plans and specifications by Master Craft Homes. It must also be kept in mind that the erroneous quantities expressed in the specifications were insufficient to cover the project as delineated in the plans and as required by the city of Stockton. In other words, to do the job as contemplated and demanded by the city, the excess quantity claimed had to be supplied.

Also important is the fact that both parties received regular progressive estimates issued by the city engineer to the Central Bank upon which the bank made progressive payments, and these estimates showed the percentage of work done, the value thereof and balance. It is admitted that a careful reading of these estimates would reveal that the job was "overrunning" the quantities stated in the specifications and contract, but not in the plans, which plans showed the quantities upon which the city engineer issued the progressive estimates. Mr. Bell, Vice President and General Manager for Master Craft Homes, testified that Master Craft Homes must have received the progressive estimates but he did not examine them nor did he see them. Of course his failure to see or examine them when received at his office was his own negligence. He also made the statement that he did not check nor even read the plans and specifications because he relied on his engineers, Howes & Whitaker.

[2] We believe that the trial court was correct in its conclusion that the contract was a "unit contract" and not a "lump sum" contract and that respondents were entitled to be paid for the amount of actual work installed at the unit price.

A case closely in point is Frazer v. City of Ardmore, 103 Okl. 31, 229 P. 143. In that case, the city approved plans and specifications and estimates for street paving, detailing therein the quantities of the several items necessary to go into the improvement together with the cost per item, amounting in the aggregate to the sum of $20,076.51. Upon the approval of these plans and specifications, bids were called for and the contractor inserted on the bidding sheet opposite the estimated quantities the price per unit at which he would offer to do the work. These figures were extended on the bidding sheet so that they amounted in the aggregate to the sum of $19,915.92. A contract was entered into between the city of Ardmore and the contractor by the terms of which the contractor agreed to perform the work and improvements in accordance with the plans and specifications on file in the office of the city clerk. The specifications were made a part of the contract and contained a provision that the contractor should receive the sum of $19,915.92. When the work was completed the engineer submitted the ascertained cost for the completed improvement showing the actual quantities and the price per unit as given in the contract, the total of which amounted to the sum of $23,730.14. The contractor was compelled to sue for the difference between the total sum of his bid in the amount of $19,915.92 and the total cost of the items actually installed as shown by the engineer's report in the amount of $23,730.14. The trial court held that the unit prices based upon the final ascertained estimate of quantity as determined by the engineer governed in making the final payment. In affirming the judgment the appellate court said, 229 P. at pages 144–145:

"A careful examination of the record convinces us that the court committed no error in placing this construction upon the contract. If this had been a lump sum contract, as distinguishd from a unit price contract, we can see no good reason for carrying into the contract the unit prices as shown by the plans and specifications, and in observing in minute detail in the proceedings leading up to the contract the units of measurement and the prices per unit, as was done in the engineer's estimates of quantity and bidding sheet attached to the plans and specifications, and we do not think the provision in the contract that the contractor should receive for the work the sum of $19,915.92 necessarily inconsistent with the contract when taken and construed as a whole, in the light of the surrounding circumstances, and in the light of the entire record.

* * * * * *

"Our conclusion is that the proper construction to be placed upon the contract in the instant case is to consider the specifications and bidding sheet and the estimate together with the proposal of the contractor in determining what was the true meaning of the contract, and when taken together the proper construction of the contract is that it was intended that the contractor should receive pay only for the work performed at the unit prices named in his proposal."

Another case to the same effect is City of Hobart v. Dailey, 170 Okl. 107, 39 P.2d 44. In that case the contractor made a bid showing the total price and further showing that it was computed upon items of so much a square yard and cubic yard. In that case the engineer's report on the quantities actually installed shows that the quantities actually used on the job were less than the quantities stated in the bid and the city paid only on the basis of the actual quantities installed. The contractor attempted to recover on the basis of a lump sum contract and did recover judgment in the lower court. Upon appeal the judgment was reversed, the court following Frazer v. City of Ardmore, supra, and stating 39 P.2d at page 46, "The above rule is applicable to the case under consideration, and in our opinion the contract is not susceptible of any reasonable construction other than that the contractor was entitled to compensation on the unit price basis. The plans and specifications, as well as the notice to the contractors, called for bids on a unit price basis, and as we construe the contract the plaintiff's bid was made on that basis." And as was said in the case of Platte Valley Ditch & Reservoir Co. v. H. C. Lallier Construction & Engineering Co., 91 Colo. 317, 14 P.2d 1079, 1081, by the Supreme Court of Colorado in 1932: "If it had been the intention of the engineer to fix a lump sum price for the entire work and the materials furnished, it was a superfluous thing for him to use the title: 'Quantities and unit prices' for the work of construction. If the defendant corporation, through its engineer, intended to fix a lump sum price for the entire work and materials, such language as 'Quantities and unit prices' would not have been inserted in the contract, as they would be inconsistent therewith."

Appellants contend further that "there is a fatal variance between the contract set forth in the Notice of Lien and the contract as found by the Court." We find no merit in this contention. The Claim of Lien as filed recited that the amount of the contract price was $59,468.20, and that extras furnished on said job of construction were in the sum of $17,668.73. Appellants argue that there was no express contract for extras and that no contract can be implied from the facts. But, as appellants themselves assert in their brief that respondents were obligated to perform all of the work covered by the plans, it is difficult to understand why they should be precluded from including the amount of work performed and furnished in addition to the amount of the items specified in the contract.

Section 1203 of the Code of Civil Procedure provides: "No mistake or errors in the statement of the demand * * * shall invalidate the lien * * *." And in Stone v. Serimian, 198 Cal. 520, 523, 246 P. 45, 47, in which said section 1203 was referred to the court said: "While the claim of lien does not contain an exact or correct statement of the agreed terms of payment, * * *. The claim of lien was, therefore, not invalidated by the erroneous statement." Furthermore, section 1187 of the Code of Civil Procedure does not make the requirement complained of here material to the validity of the claim of lien. In the case of Baird v. Ocequeda, 8 Cal.2d 700, at page 703, 67 P.2d 1055, 1057, the court said: "The trial court found all of the allegations of the complaint as amended to be true. Defendants urge that the effect of this is to permit plaintiff to recover on asserted inconsistent theories of express and implied contract. Even if this [should] be conceded, it is not fatal to the judgment. Examination of the record discloses that there is evidence to support a recovery on either theory. This being so, the findings on the inconsistent theory may be disregarded as surplusage. Epstein v. Gradowitz, 76 Cal.App. 29, 31, 243 P. 877. It is immaterial that the claim of lien is based solely on an express contract, for under section 1187, supra, as it now reads, it is not necessary for the lien claimant to state in the claim of lien 'the terms, time given and conditions of his contract.' The quoted provision has been deleted from the section for many years and cases decided under the law as it formerly read are not in point."

[3] Appellants contend also that the claim of lien was filed too late and that therefore the complaint must be dismissed. There is no merit in this contention. Section 1191 of the Code of Civil Procedure provides: "* * * in cases where the improvement made or work done is subject to acceptance by any municipal board or officer, the time for filing claims of lien shall not commence to run until after such acceptance shall have been made."

The city accepted the work on November 10, 1947 (Plaintiffs' Ex. No. 23) and under section 1187 of the Code of Civil Procedure the contractors had 60 days from November 10, 1947, within which to file their claim, and the claim of lien was recorded December 23, 1947 (Defendants' Ex. No. F).

The delay in acceptance by the City Council was thus explained by the city engineer, Lyle Payton: "Well, it's the practice of the City Engineer's Office not to issue the final certificate to the Council until the owner has paid the—to the City the engineering fee. A bill was rendered to Master Craft on August 5th but it wasn't paid by them until October the 3rd."

Furthermore, the contract between Master Craft Homes and the city (Plaintiffs' Ex. No. 1) provided that the work was to be done "under the provisions of Ordinance No. 433 * * *," and section 4, paragraph 3, of the Ordinance (Plaintiffs' Ex. No. 3) provides as to all street work done by private contract that "the said Council may accept the same in the manner by law provided." Under section 3 of the Ordinance the work must be done to the satisfaction of the Council.

Therefore, it is clear that the delay in acceptance by the Council was the result of the fault of Master Craft Homes in failing to pay the fees as per its contract with the city and that the notice of claim of lien was filed in time.

No other points raised by appellants upon this appeal require discussion.

Appeal in Declaratory Relief Action

Master Craft Homes, a corporation, commenced this action for declaratory relief, joining as defendants S. M. McGaw Company, the contractors, Howes & Whitaker, the engineers, Goheen Construction Company and Marin Capital Company, seeking to have the court in said action determine the rights, duties and liabilities of the various defendants with reference to the mechanic's lien and the contracts. The facts are substantially as set forth in our discussion of the appeal in the mechanic's lien case.

In this case the court found: "That said Howes & Whitaker have fully and completely performed each and all and every term, condition and covenant on their part to be performed under and pursuant to said oral contract *except they negligently and erroneously estimated the quantity of work required* and that plaintiff has sustained no damage by reason of having entered into said contract or the performance thereof."

The trial court in its Memorandum Opinion said: "In reference to Master Craft's claim against Howes & Whitaker, the evidence indicates negligence upon the part of the latter in the preparation of the tabulation for the estimations of the amount of work and material necessary to perform the contract. Master Craft, however, was bound by contract with the City to construct the subdivision in accordance with the plans submitted. There is no evidence in the record to the effect that the subdivision could have been constructed for any less sum of money than plaintiff did it for. Nor is there any evidence in the record indicating any financial loss suffered by Master Craft by reason of Howes & Whitaker's mistakes. True they must pay more than they expected to pay, but no more than they should pay."

Master Craft Homes has appealed from the judgment that it take nothing against any of the defendants in said declaratory relief action, and contends that the court erred in holding that it did not suffer any damage as a result of Howes & Whitaker's negligence and carelessness. Appellant argues correctly that with negligence found by the trial court the sole question to be decided is whether or not appellant suffered any damage as a result of Howes & Whitaker's error.

[4] Appellant argues further that the portion of the finding that Master Craft Homes suffered no damage disregards the fact that it suffered damage in the amount of the judgment obtained by McGaw Company. But, if, as we have hereinbefore held, the agreement between Master Craft and McGaw is a contract for which payment is to be computed on a unit basis, then appellant Master Craft would be paying for nothing more than what it agreed to pay for, and would consequently suffer no legal damage in that respect.

While it is not difficult to understand that appellant might well have been damaged by the error of Howes & Whitaker, the trial court found that no damage resulted to appellant, and appellant has not been able to point out any evidence in the record upon which a finding of damage could be predicated. Although it is not incumbent upon us to search the record to find evidence contrary to the finding of the trial court, we have read the record carefully and find no such evidence.

In view of the foregoing the judgment and the order denying defendants' motion to set aside and vacate the judgment in action No. 43247, the mechanic's lien action, are affirmed. The judgment in action No. 43525, the declaratory relief action, is affirmed. The orders denying a motion for a new trial in each case being nonappealable, the appeals therefrom are dismissed.

Hearing denied; SPENCE, J., dissenting.

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105 Cal.App.2d 335

WOOD v. SHIPP et al.

Civ. 18015.

District Court of Appeal, Second District,
Division 1, California.
July 10, 1951.

Ellsworth Wood, as executor of the estate of Elaine Shipp, sued Everett S. Shipp and others for declaratory relief and an accounting as to community property. The Superior Court, Los Angeles County, Ingall W. Bull, J., rendered judgment in favor of defendants, except with reference to certain household effects, and plaintiff appealed. The District Court of Appeals, Doran, J., held that the evidence sustained the trial court's findings to the effect that the furniture and household effects acquired during the marriage constituted the only community property in which the wife's estate would have any interest.

Affirmed.

1. Pleading 🔑236(3)

Trial court is possessed of broad discretionary power in reference to allowance or disallowance of amendments to pleadings during course of trial.

2. Evidence 🔑546

In deceased wife's executor's suit for declaratory relief and accounting as to community property, there was no prejudicial error in trial court's exclusion of hypothetical testimony of alleged expert witness as to "reasonable value" of husband's services as corporate officer, in absence of abuse of discretion of trial court in concluding, after voir dire examination, that witness was not qualified.

3. Appeal and error ⚿1056(1)

In deceased wife's executor's action for declaratory relief and accounting as to community property, where complaint contained no allegation of fraud or scheme by which husband had deliberately planned to reduce community property and trial court was not called upon to determine whether salaries received prior to marriage compared favorably or unfavorably with those received thereafter, there was no prejudicial error in exclusion of testimony as to amount of salary received by husband during eight years preceeding marriage.

4. Appeal and error ⚿1056(1)

In deceased wife's executor's action for declaratory relief and accounting as to community property, trial court did not commit prejudicial or reversible error in refusing to admit in evidence a piece of paper on which husband had written certain figures, where such evidence was offered as bearing upon matter of reasonable salary of husband and with reference to a "disregard of corporate entity", in view of the indefinite nature of the so-called "doodlings" contained on the paper and in view of the entire state of the record.

5. Appeal and error ⚿931(1), 996

The reviewing court is without power to substitute its deductions for those of trial court, and every favorable inference which may fairly be deduced from evidence should be resolved in favor of prevailing party and evidence favoring prevailing party must be accepted as true by appellate tribunal and contradictory evidence must be disregarded.

6. Husband and wife ⚿264

In deceased wife's executor's action for declaratory relief and accounting as to community property evidence sustained trial court's finding to effect that furniture and household effects acquired during marriage constituted only community property in which wife's estate would have any interest.

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Waters, Arditto & Waters, by James J. Arditto, Los Angeles, for appellant.

J. Edward Haley, and MacFarlane, Schaefer & Haun, by Henry Schaefer, Jr., and E. J. Caldecott, all of Los Angeles, for respondents.

DORAN, Justice.

The complaint herein alleges that Elaine Shipp who died testate on July 27, 1948, was married to the respondent Everett S. Shipp at Las Vegas, Nevada on April 11, 1940; that no children were born of said marriage; that the parties had accumulated certain community property consisting of stocks, bank accounts, etc., the nature and extent of which the court is asked to determine. The decedent's will specifies certain alleged community property, and after specific bequests leaves the residue to Ellsworth Wood, decedent's brother, also named as executor. Answers filed by Everett S. Shipp, the husband, and by various corporations, deny that decedent possessed any community interest in corporate stocks, etc., described therein, and aver that such items are the separate property of Mr. Shipp. The trial court found in favor of the respondents except in reference to certain household effects.

The record discloses that Everett S. Shipp, aged 47 years at the time of the marriage, had resided in Los Angeles since 1916, and for many years prior to said marriage had possessed valuable stock interests in several corporations, namely, Metropolitan Finance Corporation, Metropolitan Finance Corporation of California, and Chesley Finance Corporations. These interests were estimated as being worth a sum in excess of $250,000. Other corporations such as Investors Realty Corporation and Summit Realty Corporation were organized by Shipp after the marriage to decedent; there was evidence, controverted by appellant, to the effect that shares in these corporations were purchased with Shipp's separate funds. In some instances, as shown in a report prepared by Accountant Wright, respondent's stock holdings had increased since the marriage.

On March 1, 1948, Everett S. Shipp commenced a divorce action against Elaine Shipp; the wife filed a cross complaint for separate maintenance asking for an accounting and division of community funds. While this divorce action was pending, Elaine Shipp died. The present action for declaratory relief, accounting as to community property, etc., was filed by Elaine Shipp's executor, and names as defendants the various corporations hereinbefore mentioned, the husband Everett S. Shipp, and two sons by a previous marriage to whom the husband, on March 8, 1948, had transferred 1,200 shares of stock in Summit Realty Corporation.

Specifically, the present action seeks an accounting of alleged community funds which it is said the respondent husband improperly expended: "(1) $10,689.95 expended on the Fuller Street house * *; (2) Community funds expended for State and Federal taxes on allegedly separate income of Everett S. Shipp * * *; (3) $2,710.14 paid * * * out of community funds as interest and principal payments on allegedly separate property obligations * * *; (4) $8,819.56 in gifts by Everett S. Shipp to members of his family through prior marriages * * *; (5) $30,258.99 expended under the Pagel Property Settlement Agreement (with a former wife of Everett S. Shipp)".

At the trial, appellant's motion to amend the complaint to conform to proof in reference to stock in three corporations alleged to be community property, and to cover an accounting of community funds alleged to have been expended for non-community purposes, was denied. Following the trial the matter was submitted to the trial judge on exhaustive written briefs. As hereinbefore indicated, all issues were decided against the appellant except in reference to certain furniture and household effects acquired after the marriage.

[1] Appellant's first contention, that the trial court erred in denying the motion to amend the complaint to conform to the proof, presents no cause for reversal. As mentioned in respondents' brief, and conceded by the appellant, the trial court is possessed of broad discretionary power in reference to the allowance or disallowance of amendments to pleadings during the course of a trial. No abuse of that discretionary power has been pointed out in the instant case.

[2] The same may be said in respect to appellant's argument that the trial judge committed prejudicial error in excluding hypothetical testimony of appellant's alleged expert witness as to "reasonable value" of the husband's services as a corporate officer. After voir dire examination the trial court concluded that the witness was not qualified. Since this matter, like that of amendment, was one involving the trial court's discretion, and no abuse of discretion appears, appellant's contention is untenable.

[3] Alleged error in the exclusion of testimony as to amount of salary received by the husband during the eight years preceding the marriage, must be decided against the appellant's contention. As respondents have pointed out, the complaint contains no allegations of fraud or any scheme by which Mr. Shipp deliberately planned to reduce the community property, and the trial court was not called upon to determine whether the salaries received prior to the marriage compared favorably or unfavorably with those received thereafter. Again it may be said that no prejudicial error has been pointed out.

[4] Complaint is made of the trial court's refusal to admit in evidence a piece of paper upon which Mr. Shipp had written certain figures, offered as bearing upon the matter of "reasonable salary" of the husband, and in re a "disregard of Corporate Entity". Appellant's counsel at the trial referred to this paper as having "a lot of doodlings on it that I think the Court will find interesting". The manner in which appellant had procured the paper appears to be a controversial subject, respondents' theory being that it was "procured from the wastebasket which would seem to indicate that it had been discarded

by Mr. Shipp as worthless. There is no evidence that the document was ever issued, put in circulation or used for any purpose other than the making of an analysis of some kind by Mr. Shipp". Regardless of its source, however, the exclusion of such a paper containing so-called "doodlings", cannot, in view of its indefinite nature and the entire state of the record, be deemed prejudicial or reversible error in the instant case.

[5, 6] The appellant's argument on this appeal is largely concerned with the proposition that the trial court's findings to the effect that furniture and household effects acquired during the marriage constitute the only community property in which the wife's estate would have any interest, are not supported by the evidence. It is appellant's contention that the trial court should have found that a large part of the stock holdings, etc., were community property. The theory advanced, as hereinbefore indicated, is that Mr. Shipp had deliberately diverted community funds into separate property channels for the purpose of defeating the wife's interest therein.

Appellant insists that "a husband cannot, through the simple device of incorporating and manipulating his transactions through alleged corporate forms prevent his spouse from receiving her just and proper community property interest". It is further averred that "whatever was earned during the marriage in question herein, by the five alleged Corporate Respondents, is attributable primarily to the efforts, management, skill and ability of Everett S. Shipp", and that such earnings are therefore community property. Respondents' brief points out, however, that "His method of operation was established long before his marriage and did not change thereafter", and that there is substantial evidence supporting the trial court's findings that the property in question was separate and not community property.

It is at once apparent that appellant seeks to have the reviewing court draw from the evidence other and different conclusions than those found by the trial judge. The usual rule that an appellate court will not attempt to weigh the evidence where the record discloses substantial evidence in support of the trial court's findings is conceded by the appellant. That rule must govern, and in the present case can only result in a decision adverse to appellant's contentions. In the one hundred odd pages of appellant's opening brief are set out various items of evidence from which are drawn conclusions favorable to appellant's position. This partisan survey of the evidence relates not only to corporate stocks acquired and owned by the husband and certain increase in Mr. Shipp's equities during the marriage. It also relates to a residence at 641 Toyopa Drive, Pacific Palisades held in the name of the Metropolitan Finance Corporation of California, and to proceeds of the sale of what is known as the "Fuller Street Home", both of which items are claimed as community property. Other items are similarly claimed.

The record discloses that all these matters were gone into exhaustively at the trial. There was, for example, a detailed report by Charles H. Wright, a certified public accountant, dealing with the books and records of the corporate respondents and of Everett S. Shipp. The accountant was called as a witness by the appellant and the accountant's report was used extensively by both parties, each seeking to draw therefrom conclusions favorable to its contentions. Much other evidence, documentary and testimonial, was offered; the matter was finally submitted to the trial judge upon briefs. From the record as a whole, rather than from isolated items as culled by the appellant, the trial court found in favor of the respondents except as to household items. It can hardly be doubted that the trial court gave due consideration to the various points now raised by appellant.

Considering the accountant's report in connection with all of the other evidence, whether contradicted or uncontradicted, it cannot be said that the trial court's findings are unsupported. Such being the situation, as has been so often reiterated in the California cases, "the reviewing court is without power to substitute its deductions for those of the trial court." In the language of Church v. Headrick, 101 Cal.App.2d 396, 402, 225 P.2d 558, 562, "Every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. Evidence favoring the prevailing party must be accepted as true by the appellate tribunal and contradictory evidence must be disregarded". No prejudicial error has been made to appear, and appellant's various contentions are untenable.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

ANGER v. BORDEN et al.

Civ. 17879.

District Court of Appeal, Second District, Division 1, California.

June 29, 1951.

Hearing Granted Aug. 23, 1951.*

Action for partition by C. F. Anger against Harry I. Borden, City of Pasadena and others. The Superior Court of Los Angeles County, Otto J. Emme, J., adjudged title to be quieted as to plaintiff and the defendant city as tenants in common against all claims and demands of defendants and that plaintiff was entitled to a lien on a certain parcel in sum of $55.00 and city entitled to a lien in sum of its tax deed and assessments plus general taxes accruing subsequent to time it obtained its tax deed and entered a similar decree as to another parcel and plaintiff appealed. The District Court of Appeal, White, P. J., held that city was entitled to lien for general taxes accruing on parcels subsequent to time it obtained its tax deed and that trial court properly declined to allow plaintiff attorney's fees so far as quiet title aspect of proceedings was concerned.

Judgment affirmed.

1. Limitation of actions ⚷6(5), 167(1)

Where action by petitioner to enforce lien of street improvement bonds on realty which had been deeded to state for delinquent county taxes was commenced more than four years after maturity of bonds, cause of action was barred by statute of limitations enacted after issuance of bonds and lien of bond was therefore extinguished. Civ.Code, § 2911.

2. Taxation ⚷824

City, as purchaser of its own tax deed, was entitled to a lien, in a partition suit by owner of county tax deed, for amounts of unpaid general taxes and penalties due for each subsequent year to time city obtained its tax deed. Revenue and Taxation Code, §§ 3695, 3771 to 3912, 3900.

3. Costs ⚷172

A party is not entitled to attorney's fees except where authorized by statute or by contract.

4. Taxation ⚷818

In action by owner of county tax deeds against defendant city and others for partition and to quiet title trial court properly declined to allow plaintiff attorney's fees so far as quiet title aspect or proceeding was concerned. Revenue and Taxation Code, § 3695; Code Civ.Proc., §§ 796, 798.

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Jacob Forst, Los Angeles, for appellant.

H. Burton Noble, City Atty., of Pasadena, Frank L. Kostlan, Asst. City Atty., Robert E. Michalski, Deputy City Atty., Pasadena, for respondent.

WHITE, Presiding Justice.

This action comes before us upon a settled statement, from which it appears that plaintiff and appellant, C. F. Anger, brought an action for partition and to quiet title against several defendants, including defendant and respondent City of Pasadena. The dispute here presented involves only said appellant and respondent city, concerning two parcels of land.

Parcel 1 was deeded to the City of Pasadena by its city treasurer on May 29, 1925, for nonpayment of city property taxes and special assessments totaling $24.52. The amount claimed by the city to be necessary to redeem this property from such sale on the date of the trial was the sum of $247.91. The property was also sold at a tax sale by the State of California on February 16, 1945, it having been deeded to the state in 1937 for delinquent Los Angeles County taxes. The purchaser at the latter sale paid $55 for the tax deed, and thereafter conveyed his interest to appellant. Appellant also holds Street Improvement Bond 1, Series A, Improvement of Willard Place, issued April 12, 1927, under the Improvement Act of 1911 (Stats. 1911, p. 730, now Div. 7, Streets & Highways Code). This bond matured on January 2, 1937, and had not been foreclosed by court action or sale through the City Treasurer's Office. The court, on motion of respondent struck the improvement bond from the record on the ground that the lien evidenced by such bond had been extinguished under the provisions of section 2911 of the Civil Code.

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* Subsequent opinion 238 P.2d 976.

As to Parcel 2, it appears that the property was deeded to respondent city by its treasurer on May 21, 1934, for nonpayment of city property taxes and special assessments totaling $52.29. The amount claimed by respondent city to be necessary to redeem the property was $1,415.96. Appellant purchased the property at a tax sale held by the State of California on August 5, 1948, the property having been previously deeded to the state in 1934 for delinquent county taxes. Appellant paid $20 for this deed.

The points raised by appellant in the statement of appeal are as follows:

"1. That the claim of the City of Pasadena for its general taxes accruing after the said City of Pasadena received the deed from (the city tax collector of) the City of Pasadena should not be allowed.

"2. That plaintiff is entitled to a lien for the balance due on Bond 1, Series A, Improvement of Willard Place, 1927, as shown by the coupons attached thereto * * *." (This contention refers only to Parcel 1.)

"3. That plaintiff is entitled to a reasonable sum for attorney's fees for quieting the titles involved, which sum should be fixed by the trial court at the time of trial."

[1] Appellant's first point on appeal is stated in his brief as follows: "In a partition suit, what are the rights of a street bond on which the last payment is more than four years old?" Appellant then points out that this question was presented in Sipe v. Correa, Cal.App., 227 P.2d 59, (hearing granted by Supreme Court, April 2, 1951), and appellant adopts the brief therein by reference. The case was decided by this court subsequent to the filing of appellant's brief herein, and adversely to the contentions of the appellant in that case. Following the rule laid down in the cited case, as well as in the cases of Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588, (hearing denied by Supreme Court), Gordon v. Rombotis, Cal.App., 227 P.2d 548, and Scheas v. Robertson, Cal.App., 224 P.2d 760, it must be held that the trial court, upon the record presented, did not err in holding that the lien of appellant's street bond had been extinguished under the provisions of section 2911 of the Civil Code.

Appellant's second point is presented as follows:

"Is a city, which owns its own tax deed, entitled to a lien, in a partition suit, arrived at upon a different and greater basis than the lien of the county tax deed which has passed into private hands?"

By its decree as to Parcel 1, the court adjudged "that the title of said C. F. Anger and the City of Pasadena thereto, as tenants in common, is hereby adjudged to be quieted against all claims and demands of the said defendants, who are hereby forever debarred from asserting any claims * * *. That the plaintiff (appellant) is entitled to a lien on said property in the sum of $55, and that the City of Pasadena is entitled to a lien in the sum of $24.52, the sum of its tax deed and assessments, *plus general taxes accruing subsequent to the time it obtained its tax deed,* in the further sum of $223.39, making a total lien of the City of Pasadena, in the sum of $247.91." (Emphasis added.) A similar decree was entered as to Parcel 2, the lien of appellant amounting to $20.60, and that of respondent city amounting to $1,424.80. The effect of the decree is that the respondent city is given a lien against the property for the full amount of the Pasadena delinquent taxes and penalties for all the years following the first delinquency although Parcel 1 had been sold to the city in 1925 and Parcel 2 in 1934, whereas appellant's lien is limited to the amount paid for his tax deed from the State of California. (The court found that plaintiff paid all taxes against the property due to the County of Los Angeles at the time of filing the complaint, and had made no claim for said sums and was given no judgment therefor.) The finding as to the amount of the city's lien was based on testimony of the City Assessor, Tax and License Collector of Pasadena as to "the amount necessary to redeem said property on the date of the trial."

A portion of appellant's argument is as follows:

"In Elbert [Ltd.] v. Nolan, 32 Cal.2d 610, 197 P.2d 537, it is held that when a lien has become a deed, the deed holder receives only the amount paid for the deed, plus one-half of the surplus, if any, on partition sale. If the lien has not gone to deed, the amount of the lien is to be paid, but without half of the surplus.

"In this case appellant, a private party, got the amount paid for the county tax deed, but the respondent City got the amount paid for its deed, plus the full amount of what the taxes would have been had it not elected to get a deed, plus one-half of the surplus, if any, on partition sale.

"Section 3950, Revenue and Taxation Code, compels a tax deed buyer to pay all taxes, after the tax deed, to the time of filing suit if he wishes to sue. (Each tax deed pays taxes due to the date of the deed.) This can only be for the purpose of urging the prompt clearing of titles and providing a penalty for delays. Appellant paid such taxes, and got nothing for the payment. The City was given the privilege of being a property owner, and collecting taxes also. It is forgiven its laches as only citizens must act promptly and pay taxes. The doctrine of parity should place the City in the same position as a private party.

"Because unpaid taxes, with interest and penalties, pile higher than the value of the property, general statutes, applicable to private parties, were once applied to cities to check this evil. ([City of] San Diego v. Higgins, 115 Cal. 170 [46 P. 923]; Clark v. [City of] San Diego, 144 Cal. 361 [77 P. 973]; Dranga v. Rowe, 127 Cal. 506 [59 P. 944].)

"The cities had this changed by statute in their favor, and the evil of properties off the tax rolls because of huge taxes got so bad that section 3900, Revenue and Taxation Code, was passed and upheld.

"One of respondent's tax deeds was issued in 1925. If the City would act to get a new tax deed, this new tax deed would wipe out the old one and its back taxes. (Helvey v. Bank of America [Nat. Trust & Savings Ass'n], 43 Cal.App.2d 532, 111 P.2d 390.) However, the city prefers not to act and to receive more for its lack of diligence."

Appellant further argues: "While respondent never raised this point in pleadings, findings, judgment, trial brief or settled statement, it may be relying on Section 3695, Revenue and Taxation Code. This section provides that if a taxing agency does not object to the sale of a county tax deed, all its taxes and assessments are eliminated. If it does object, 'the lien of its taxes or assessments or any rights' are not affected."

It is further argued that giving respondent the full benefit of the section just cited, nevertheless respondent's own charter, section 15, "commanding it to pattern its laws as nearly as practical to the laws of the State of California, would seem to compel a respect for section 3900, Revenue and Taxation Code, and the decisions affecting other taxing agencies and private parties." Under the city ordinance, appellant urges, assessments are provided for only until the land is deeded to the city, but that a redemptioner must pay assessed back taxes and an amount "based upon the respective rates effective the year not so assessed." Under the decisions in Sutter-Yuba Inv. Co. v. Waste, 21 Cal.2d 781, 136 P.2d 11, and Imperial Irr. Dist. v. Varney, 87 Cal. App.2d 264, 196 P.2d 820, "ordinarily there are no taxes subsequent to the deed to a taxing agency for its taxes." Therefore, concludes appellant, "even under section 3695, Revenue and Taxation Code, and its own charter and ordinances, respondent city is not entitled to taxes not assessed after it got its tax deed. It is limited to the words 'or any rights' meaning its rights as a tax deed holder under section 3900, Revenue and Taxation Code, which places it on a parity with other deeds of a governmental origin."

Respondent, conceding that the respective tax lien claims of the city and appellant are on a parity, Monheit v. Cigna, 28 Cal. 2d 19, 168 P.2d 965, 167 A.L.R. 995; Rev. & Tax. Code, sec. 3900, urges "that the quantum of its (respondent city's) lien is the amount necessary to redeem on the date of partition." The tax ordinance of respondent city (Ord. No. 3108) does not provide that the right of redemption shall terminate upon execution of a deed to the city, but provides for termination of such right of redemption after the city has become the owner either by sale, by entry and use for a public purpose, or by notice. To apply the rule in the Monheit case strictly, it is urged, the city would be forced to elect one of three methods of termination rather than to hold the property subject to the right of redemption until the owner decides to redeem, as has been the city's policy in the past. "Such a decision would compel the city to terminate the right of redemption on the date a deed is issued to the city contrary to the intent of the tax ordinance." Taxation for municipal purposes, argues the city, is a "municipal affair" citing Keyes v. City and County of San Francisco, 177 Cal. 313, 173 P. 475; Brewer v. Feigenbaum, 47 Cal. App.2d 171, 117 P.2d 737. "Whereas now the owner of property cannot redeem without paying all the taxes, interest and penalties to the date of redemption, the purchaser of a deed from the state under appellant's theory could get clear title to the property upon payment of only six years' city taxes. The property thus escapes taxation for intervening years, the city is deprived of revenue, contingent as it may be, a speculator is favored over the owner, and the city's tax system becomes a shambles and a nullity.

"Should the court accept appellant's theory, an owner would be foolish, indeed, to redeem his property at great cost if through the medium of a dummy buyer at a county tax sale he could acquire the state's title and after partition obtain clear title by paying only six years' city taxes. The city could not save itself from this anomalous situation by putting up for sale the hundreds of lots to which it holds a tax deed at the full price as required by section 57 of its tax ordinance because no person would be naive enough to buy knowing that he could avoid all delinquency penalties and all taxes for the years after the deed to the city by buying the property at a county tax sale and then partitioning. * * * The protection of the integrity of the city's tax ordinance demands that the city's lien be fixed at the full amount necessary to redeem."

Section 15 of Article 12 of the Charter of the City of Pasadena provides that: "The city shall have such other rights, claims and liens for the amount of such municipal taxes as may now or hereafter be given to or exercised by the people of the State of California for and on account of the assessment of State and County taxes levied in Los Angeles County. The mode and manner of collecting such municipal taxes and enforcing such tax lien, and the proceedings thereafter, shall be prescribed by ordinance and shall conform, as nearly as practicable to the general law governing county taxes; * * *."

Section 16 of Article 12 provides that all sales for delinquent taxes shall be made to the City of Pasadena unless otherwise regulated by ordinance.

When Parcel 1 was sold to the city Ordinance No. 490 was in effect. It was superseded in 1933 by Ordinance No. 3108. Ordinance No. 490 provided that upon the date fixed for sale by the city tax collector of delinquent property, all such property shall by operation of law and the declaration of the city tax collector be sold to the City of Pasadena. Section 44 of the ordinance provides that a redemption may be made by the owner or any person in interest within five years from the date of sale to the city, "or at any time prior to the entry upon or sale of said land by the city." Section 45 provides that "If the property is not redeemed within the time allowed by law for its redemption, the Tax Collector, or his successor in office, must make the city a deed of the property * * *." Section 54 provides: "In case property assessed for taxes is purchased by the city pursuant to the provisions of this ordinance, *it shall be assessed each subsequent year for taxes until a deed is made to the city therefor in the same manner as if it had not been purchased.*" Section 55 contains the following provision: "In case an assessment is made under the provisions of Section 54 of this ordinance, and the land is not redeemed from the previous sale had under the provisions of this ordinance, no sale shall be had under the assessment authorized by Section 54." Section 56 provides: "In case property is sold to the city pursuant to the provisions of this ordinance, and is subsequently assessed pursuant to Section 54 of this ordinance, no person shall be permitted to redeem from such sale except upon payment also of the amount of such subsequent assessment costs, fees, penalties and interest."

Ordinance No. 3108, adopted in 1933, and superseding Ordinance No. 490 (except as to proceedings theretofore had under Ordinance No. 490) provided that property on which taxes were delinquent should be sold, "by operation of law and the declaration of the * * * tax collector" to the city. Section 47 of the Ordinance provides: "In all cases where property has been sold or may hereafter be sold to the City for delinquent taxes *and the City has not disposed of same, or made entry thereon,* the person whose estate has been or may hereafter be sold, his heirs, executors, * * * shall, at any time after the same has been sold to the City *and before the City shall have disposed of the same, or made entry thereon,* have the right to redeem such property by paying to the City Controller of the City:

"(1) The amount of taxes, penalties for delinquencies and costs due on said property at the date of such sale; (2) All taxes that were a lien upon the said property at the time said taxes became delinquent; (3) All unpaid city taxes of every description assessed against or which are a lien against the property for each year since the sale and all penalties and costs as shown on the delinquent assessment roll, and if not so assessed, then such taxes as may be fixed by the City * * * Tax Collector. * * * at the time of redemption for each of said years not so assessed. * * *."

Under section 53 of Ordinance No. 3108, if the property is not redeemed within five years after sale to the city for nonpayment of taxes, the city tax collector must deed the property to the city. Under section 57, when the city has by deed become the owner of property sold for taxes pursuant to section 53, the legislative body *may* direct the sale of the property or any part thereof, and the right of redemption terminates at the time fixed for sale, whether a sale is effected or not, unless the sale is legally postponed pursuant to section 57(a). If the sale is not legally postponed, the right of redemption is terminated, and the city may thereafter deal with the property as its own.

The language of the ordinances hereinabove quoted supports the argument of respondent city that the right of redemption under such ordinances does not terminate upon the execution of a deed to the city, but continues until the city has disposed of the property by sale, or has entered thereon for a public purpose, or has given notice as provided in subdivisions (g) to (k) of section 57 of Ordinance No. 3108. This ordinance contains the further provision in section 57 that when the city has become the owner of property sold for taxes and a deed has been filed and recorded, the legislative body may direct the tax collector to sell the property at public auction, but that no bid shall be accepted for less than the amount of all the taxes levied upon such property and all costs and penalties for every year delinquent and also all tax liens up to the date of execution of the deed to the city, all expenses to date of sale, and also the redemption penalties required under section 47 of the ordinance, unless the legislative body by resolution declares that the property is not of sufficient value to be sold for the amount of all taxes, penalties, costs, and expenses due and that it would be to the best interest of the city to sell the property for a lesser sum.

In Imperial Irrigation Dist. v. Varney, 87 Cal.App.2d 264, 196 P.2d 820, an irrigation district held deeds issued to it for nonpayment of assessments levied by the district, the several deeds each having been given for one year's delinquency. The defendant county treasurer was proceeding to foreclose certain improvement bonds upon the property, and the irrigation district sought to enjoin the foreclosure. It was held that the foreclosure should proceed and that the bondholder was entitled to receive deeds upon such foreclosure and to hold the property as tenant in common with plaintiff "under an ownership now known as the parity rule." See Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. There is nothing in the decision in the cited case to support appellant's argument.

It may be conceded that taxation for municipal purposes is not purely a "municipal affair" when questions of overlapping tax liens arise, Brewer v. Feigenbaum, 47 Cal.App.2d 171, 174, 117 P.2d 737, and cases cited. But we are cited to no case, and our research has revealed none, indicating that the mode of taxation provided in the ordinances of the city of Pasadena pursuant to its charter is in conflict with superseding general law. On the contrary, the provisions of Chapters 8 and 9 of Division 1, Part 6, of the Revenue and Taxation Code, confirm the view that the city is entitled to receive the amount which it claims.

The views expressed in the case of Sutter-Yuba Investment Co. v. Waste, 21 Cal.2d 781, 784, 785, 136 P.2d 11, 13, 14, also lend support to respondent's position. In that case, the purchaser of a deed from a reclamation district contended that in redeeming from county tax delinquency no taxes should be computed for the period during which the district held the property after deed to it for delinquent district assessments, on the theory that the property owned by the district was exempt from taxation under section 1, Article XIII of the California Constitution. The contention was rejected. The court sustained the validity of statutes there involved requiring payment of an amount equivalent in taxes for the unassessed years, and stated: "The immunity of such property from taxation does not preclude, any more than the immunity of property deeded to the state, the imposition of such conditions to redemptions as the state deems advisable." Further the court said: "In the interest of returning tax delinquent property to the tax rolls, the State has enacted liberal provisions for the redemption of such property, so designed as to discourage tax avoidance. If they did not require that redemption take into account the taxes that would be imposed had the property not been deeded to the state, owners would find it advantageous to allow their property to be deeded to the state with the intention of delaying redemption as long as possible to escape the taxes that attend ownership, secure in the knowledge that the state must give them notice before disposing of the property. * * * Likewise he (the taxpayer) cannot escape such taxes by allowing his property to be deeded to any other taxing unit such as a reclamation district and subsequently regaining the title free of intervening taxes. * * *"

[2] In our view, similar reasoning answers appellant's contention that it is inequitable to permit the city to have the property sold to it for delinquent taxes, then await a sale for delinquency of county taxes, and thereafter to be reimbursed the taxes which would have been due the city for intervening years. We perceive no inequity in this procedure, because were the rule otherwise, a property owner could permit his city taxes to become delinquent, then permit the county taxes to become delinquent, await an eventual sale of tax-deeded property and purchase from the state, thus extinguishing the city's claim for its unpaid taxes. The inequity of such a situation is recognized by section 3695 of the Revenue and Taxation Code, which provides for the preservation of the liens

of all taxing agencies who object to the sale by the state. There is no showing in the record before us that respondent city did not so object, as it had a right to do.

[3, 4] Appellant's contention with respect to the allowance of attorney's fees is without merit. A party is not entitled to attorney's fees except where authorized by statute or by contract, Los Angeles Trust & Sav. Bank v. Ward, 197 Cal. 103, 239 P. 847. Section 796 of the Code of Civil Procedure authorizes the allowance in a partition action of attorney's fees expended by a party for the common benefit. The trial court in the instant case, with reference to the parcels sold and as to which no appeal was taken, fixed attorney's fees as to such parcels and allowed no fees incurred in quieting title. Under section 798 of the Code of Civil Procedure, a party is entitled to reimbursement for expense of other actions or proceedings necessarily prosecuted or defended "for the protection, confirmation, or perfecting of the title * * * *except counsel fees,* * * *." The court properly declined to allow attorney's fees so far as the quiet title aspect of the proceedings was concerned. See Deacon v. Deacon, 101 Cal.App. 195, 281 P. 533.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

37 Cal.2d 539

SOUZA v. PUBLIC UTILITIES COMMISSION et al.

S. F. 18245.

Supreme Court of California, in Bank.

July 6, 1951.

Rehearing Denied Aug. 2, 1951.

Daniel H. Souza, doing business under the name of City Drayage Company, brought a writ of certiorari against Public Utilities Commission of the State of California, and R. E. Mittelstaedt, and others, as members of and constituting the Commission, to review an order of the Commission suspending petitioner's licenses as a radial highway common carrier and a highway contract carrier. The Supreme Court, Edmonds, J., held that petitioner was not under the evidence a highway common carrier.

Order annulled.

Traynor, J., dissented from denial of rehearing.

Automobiles ⚷76

Evidence did not establish that service rendered by trucker who transported principally drugs, candies and toilet preparations under contracts with 23 shippers, and who refused to give service to shippers other than those with which petitioner had contracts, had been dedicated to a public use and was therefore performed for or the commodities delivered to the public or any portion thereof, and petitioner under evidence was not a highway common carrier. General Laws, Act 6386, § 2(dd).

Phillips & Avakian and Spurgeon Avakian, all of Oakland, for petitioner.

Everett C. McKeage, Boris H. Lakusta, J. Thomason Phelps, John K. Power and Wilson E. Cline, all of San Francisco, for respondents.

EDMONDS, Justice.

By writ of certiorari, Daniel H. Souza, doing business under the name of City Drayage Company, is challenging an order made by the Public Utilities Commission by which it suspended his license as a radial highway common carrier and a highway contract carrier. The question for decision is substantially the same as that presented in Samuelson v. Public Utilities Commission, 36 Cal.2d 722, 227 P.2d 256.

As in the Samuelson case, the facts are not in dispute. It appears that in 1946, after working for 11 years for a trucking company, Souza started his own business. At the time of the hearing, he owned eight trucks. He maintains an office and a loading dock in Oakland and provides service, daily in some instances, between San Francisco and Oakland and points within a distance of 50 miles. The principal commodities transported are drugs, candies, and toilet preparations. In smaller volume he carries salted nuts, tires, soap, margarine, electric bulbs and coffee and tea extracts.

Souza serves 23 shippers and he has a contract with each of them. Six of the contracts are written; the remainder are oral. Three of the written contracts require a minimum of 100 pounds of freight per month; the fourth calls for a quantity to be determined by the shipper in accordance with the demands of its business.

The duration of the written contracts is for a definite period and thereafter until canceled upon written notice given by either party. Souza entered into seven of the contracts in 1946, nine of them in 1947, and the remainder in 1948. The compensation agreed to be paid is based upon the minimum rates prescribed by the commission.

At no time since he commenced his operations has Souza served more than 26 shippers. Except to obtain his first customer, he has never solicited business. Each new account came to him as a result of the shipper seeking his services. He has consistently refused to give service to firms other than those with whom he has contracts, although additional business is offered to him two or three times a month.

Souza has built his business by providing a particular kind of service for his customers. Drugs and medical supplies are transported on an emergency basis.

Deliveries of such shipments are usually made the same day they are received or, at the latest, the following morning. In some instances, single packages are called for and given special attention, although the driver has to alter his usual route to do so. Emergency service is also provided for candies, salted nuts, tools and occasionally for tires.

Souza's fast service obviates the necessity of refrigerating equipment for the transportation of yeast. On shipments of coffee, pickups are made from an unmarked stock or supply at the shipper's plant. No segregation or individual markings are necessary for each consignment of coffee, as the drivers make deliveries from a single manifest or bill of lading.

According to Souza, his equipment has no special features, nor do his drivers require any special training. He testified that his intention is to maintain a restricted operation, distinguished from common carrier service by the close personal attention and supervision he gives each shipment and the facilities he provides for emergency deliveries. He personally dispatches each shipment and, on occasion, he makes emergency deliveries himself.

Souza holds permits authorizing him to do business as a radial highway common carrier and also as a highway contract carrier. Upon findings of fact which are substantially in accord with the foregoing statement of the evidence, the commission revoked these permits and ordered him to cease all operations until he shall have obtained a certificate of public convenience and necessity authorizing him to do business as a common carrier.

In the opinion upon which the order was based, the commission held that the number of shippers served by Souza "* * * is too large to afford the close identity and association which is ordinarily attributable to the relationship between a contract carrier and shipper. The wide variety of commodities handled, without need of special equipment in addition to the broad area served, frequency of service and employees who require no unusual training indicate an operation characteristic of a highway common carrier. Although respondent does personally supervise and dispatch shipments and provide an emergency service, which is the exception and not the general nature of his operations, these factors are not in themselves, when viewed in light of all of the evidence sufficiently restrictive to constitute respondent's operations those of a contract carrier."

From these facts, the commission concluded that Souza "is and has been operating as a highway common carrier". That conclusion, it declared, followed "the guide posts" which it set up in Pacific Southwest R. R. Assoc. v. Nielsen, 49 Cal.P.U.C. 216.

In an order denying a rehearing, the commission stated that its decision "* * * is somewhat cryptic and, therefore, [it] * * * takes occasion here to spell out in more detail the underlying reasoning". The evidence, it declared, showed "* * * a holding out to serve the public or a limited portion thereof, despite the existence of contracts. * * The record further revealed an operation of a permanent or indefinitely continuing nature, with service daily between some points and service less than daily between others. The entire operation was conducted as a single integrated business unit with the use of the same personnel, equipment and facilities for all portions thereof. Under such circumstances, the conclusion was justified, upon the reasoning of * * * Pacific Southwest Railroad Association v. Stapel, 49 Cal.P.U.C. 407 * * *, that Souza's entire operation constituted highway common carriage."

In the main, the grounds relied upon by Souza in attacking the determination of the commission are:

(1) The order includes findings which show that he did not hold out his services to the public generally as a common carrier.

(2) There is no evidence to support the implied conclusion that he has been con-

ducting his operations between the fixed termini or over the regular routes mentioned by the commission.

(3) There is no basis in law for the commission's holding that if a trucker operates as a highway common carrier at some points or over some routes, he is necessarily a highway common carrier at all points and routes which he serves with the same personnel, equipment and facilities.

(4) The commission, in effect, applied a presumption of illegality to his operations and placed upon him the burden of proving his operations to be lawful because of its rule that prima facie a highway contract carrier who has 10 or more contracts is engaged in highway common carriage.

In its answer, the commission argues that the order should be upheld upon the principles which it stated and applied in the Nielsen and Stapel cases. However, since the Souza order was made, this court held, in Samuelson v. Public Utilities Com. [36 Cal.2d 722, 227 P.2d 262] supra, that the test of "substantial restrictiveness" devised by the commission as determining whether a trucker is a common carrier, "* * * largely eliminates the factor of a dedication or holding out of service to the public or a portion thereof * * *" and ignores the statutory definition of a common carrier "* * * when considering the scope of a permittee's operations." That conclusion is determinative of the present proceeding.

There is nothing in the uncontradicted evidence which the commission recited in its findings which reasonably can be said to show that the service which Souza provides has been dedicated to public use and, therefore, "is performed for or the commodity delivered to the public or any portion thereof." Sec. 2 dd, Public Utilities Act, Gen. Laws, Act 6386, § 2(dd). As was said in the Samuelson case, "* * * the common law test of common carriage, as repeatedly stated by this court, requires an unequivocal intention to dedicate property to a public use. The 'substantial restrictiveness' doctrine excludes this intention, or at least reduces it to only incidental importance." 227 P.2d at page 262.

The rule laid down by the commission in the Stapel case is that it will not consider a carrier's operations in segments, with each pair of termini representing a distinct segment of its business. By its reliance upon the Stapel decision in the present proceeding, the commission indirectly concedes that some of Souza's operations do not come within the definition of common carriage. The refusal to separate those of a permittee's operations which, as it views them, are common carriage from those which it deems to be contract carriage need not here be considered in view of the conclusion that Souza is not a common carrier.

The order is annulled.

SHENK, CARTER, and SCHAUER, JJ., concur.

Rehearing denied; TRAYNOR, J., dissenting.

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37 Cal.2d 544

ROYER v. CARTER.

L. A. 21857.

Supreme Court of California, in Bank.

July 10, 1951.

Action by Mary C. Royer against Helena Carter for damages for breach of contract to purchase real property. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment for the plaintiff, and defendant appealed. The Supreme Court, Traynor, J., held that the damages should be computed as of date of purchaser's breach rather than as of date of resale.

Judgment reversed with directions.

Prior opinion, 224 P.2d 767.

1. Vendor and purchaser 🔑**329**

In action against purchaser for damages for breach of contract to purchase real property, evidence was sufficient to show that vendor was able to convey the property in accordance with terms of contract.

2. Vendor and purchaser ⚷322

Where contract for sale of realty provided that amount paid thereunder could be retained at option of vendor upon default of purchaser as consideration for execution of agreement, retention by vendor of $1,000 down payment upon default by purchaser was not inconsistent with vendor's right to elect to hold purchaser responsible for damages where vendor had notified purchaser of her intention to hold purchaser liable for actual damages. Civ. Code, §§ 1670, 1671.

3. Vendor and purchaser ⚷329

In action against purchaser for damages for breach of contract to purchase real property, evidence sustained finding that purchaser had not relied upon statement of real estate broker that if purchaser breached contract she would only lose her deposit, or that purchaser mistakenly believed that clause in contract providing that vendor could upon breach of contract retain deposit as consideration for execution of agreement meant that forfeiture of deposit was the full extent of her obligation. Code Civ.Proc. § 1981.

4. Vendor and purchaser ⚷330

Statute reciting that in estimating damages, value of property to seller thereof is deemed to be the price which he could have obtained therefore at market nearest the place at which it should have been accepted by buyer and at such time after the breach of the contract as would have sufficed with reasonable diligence for seller to effect a resale, being limited by its language to sales of personal property, was inapplicable in determining damages for breach of sale of real property, and damages for breach of sale of real property were therefore to be computed as of the date of the breach of the agreement to purchase and not as of the date of resale. Civ. Code, §§ 3307, 3353.

5. Vendor and purchaser ⚷330

Where contract for sale of real property was breached by purchaser, vendor was entitled to recover the market value of the property at the time of the breach and the expenses of resale which were the natural consequences of the breach. Civ. Code, §§ 3307, 3358.

6. Vendor and purchaser ⚷330

In action against purchaser for damages for breach of contract to purchase real property, where it appeared that vendor under terms of agreement with broker was not obligated to pay full commission in case of purchaser's default, trial court should have determined the market value of the property at the time of the breach, and then allowed an amount equal to the difference between the cost of selling property at its value at time of breach and $780.00, the amount the anticipated expenses of first sale were reduced by purchaser's default.

7. Vendor and purchaser ⚷330

In determining damages to vendor caused by purchaser's breach of contract for sale of real property, failure of trial court to make deduction for value of certain personal property included in first sale, but not the second sale, constituted error.

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Oliver B. Schwab and Arthur Livingston, Beverly Hills, for appellant.

Kenneth D. Holland, Beverly Hills, for respondent.

TRAYNOR, Justice.

Defendant has appealed from a judgment for damages for breach of a contract to purchase real property. On August 23, 1948 defendant agreed to buy plaintiff's house and lot for $24,000 and paid $1,000 down. Because she was unable to secure the additional funds necessary to complete the purchase, defendant defaulted on the contract, and plaintiff put the property back on the market late in September. The following December plaintiff was able to resell the property for $18,500. The trial court awarded damages equal to the difference between the contract price and the price at which the property was resold plus the expenses incurred in connection with the first sale, but less the amount of the down payment.

[1] Defendant contends that because a policy of title insurance was not issued, plaintiff failed to prove that she was able to convey the property in accord with the terms of the contract. There is no merit in this contention. Plaintiff deposited all the necessary papers in escrow, and there is substantial evidence that a policy of title insurance could and would have been issued had defendant not repudiated the contract.

[2] The contract provided "That should the purchaser fail to pay the balance of the purchase price, or fail to complete the purchase, as herein provided, the amounts paid hereon may, at the option of the seller, be retained as the consideration for the execution of this agreement by the seller." Defendant contends that under this provision plaintiff had an option to retain the down payment instead of suing for damages and that she exercised this option by retaining the deposit. The retention of the deposit was not, however, inconsistent with plaintiff's right to elect to hold defendant responsible for damages. Independently of any rights she may have had under the option clause itself, see, Civil Code, §§ 1670, 1671; Freedman v. Rector Wardens, etc., Cal.Sup., 230 p.2d 629, plaintiff had the alternative right to retain the down payment as a set off against her actual damages. Baffa v. Johnson, 35 Cal.2d 36, 40, 216 P.2d 13. Her retention of the money was consistent with the choice of either remedy. Since she informed defendant of her intention to hold defendant liable for actual damages, if the latter did not perform the contract, and since her conduct was not inconsistent with the election of that remedy, the trial court was justified in finding that the "deposit was retained by her to apply on damages sustained by reason of defendant's breach of contract."

[3] As an affirmative defense defendant pleaded that she entered the contract under the mistaken belief that the clause giving plaintiff the option to retain the down payment would limit her liability to the amount of the down payment and that plaintiff knew of this mistake on her part. The sale was negotiated through the joint efforts of Mrs. Ries, a real estate broker to whom plaintiff had given an exclusive listing, and Mr. Medica, a real estate agent who worked for another broker. Defendant had sought Mr. Medica's asssitance in locating an apartment, but he succeeded in interesting her in buying plaintiff's property instead. After visiting the property she returned to Mr. Medica's office and discussed with him the possibility of its purchase. On conflicting evidence the trial court found that Mr. Medica had pointed out the clause giving the seller the option to retain the down payment and "stated to defendant that in his opinion if she did not complete the purchase of said real property she would only lose the $1,000 deposit she was to put up." The trial court also found, however, that "said statement of Mr. Medica's was not relied upon by defendant and did not furnish any inducement for her to enter into said contract," and that it was not true that "Defendant mistakenly beieved that the purchase agreement that she entered into and the contract as reduced to writing provided and meant that the deposit could be retained by the seller but that such a forfeiture was the full extent of the defendant's obligation thereunder."

It is unnecessary to consider defendant's contention that Mr. Medica was plaintiff's subagent whose knowledge was imputable to plaintiff, for in any event the burden was upon defendant to prove that she was mistaken as to the meaning of the contract, Code Civ.Proc. § 1981, and the trial court was not required to find in accord with her testimony on this issue. Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Blank v. Coffin, 20 Cal.2d 457, 461–462, 126 P.2d 868. Moreover, the clause giving plaintiff an option to retain the down payment as consideration for the execution of the agreement did not purport to limit defendant's liability. Rather it provided an additional remedy for plaintiff. Defendant's testimony as to her concern over her liability, if she could not complete performance of the contract, indicates that she knew that one who enters a contract may be liable in damages for its breach. The trial court could reasonably conclude that since defendant had such knowledge she did not enter into the contract under the mistaken belief that the clause giving an optional remedy to plaintiff also limited defendant's liability.

[4] The trial court awarded damages based on a finding that the value of the property to plaintiff under Civil Code section 3307[1] was equal to the resale price of $18,500. The resale took place approximately three months after the date of defendant's breach, and it is undisputed that the value of the property was declining during that period. Various witnesses gave their opinions as to the value of the property at the time of the breach, the lowest estimate being $22,500. Although the resale price was evidence of the value of the property to plaintiff at the time of the resale, Bagdasarian v. Gragnon, 31 Cal.2d 744, 757–758, 192 P.2d 935 the trial court's failure to make an adjustment for the admitted decline in the market was erroneous, unless the damages are to be computed as of the date of resale rather than as of the date of the breach. Plaintiff contends that under Civil Code section 3353[2] it was proper for the trial court to determine the value as of the later date.

Under the provisions of section 3353 the value of the property is to be determined, not as of the date of the breach of the contract, but as of such time thereafter "as would have sufficed, with reasonable diligence, for the seller to effect a resale." Defendant contends, however, that the reference to "the market nearest to the place at which [the property] should have been accepted" makes clear that the section was intended to apply only to sales of personal property.

The language defendant relies upon is apposite to contracts for the sale of personal property. It sets forth the elements of performance of such contracts, and indicates a physical change of possession at a particular place. Such language does not describe any of the duties of a vendee of an estate in real property. At most such a vendee is obliged to accept a conveyance; he need not take possession of the property itself. Similarly the reference to the nearest market indicates concern with personal rather than real property. The seller must deliver the property to a certain place, and if the buyer refuses to accept it the seller may then dispose of it in the nearest market. Thus the language of the statute itself suggests that it is limited to sales of personal property.

Before the adoption of the Uniform Sales Act, Civil Code, § 1721 et seq., in 1931, section 3353 was invoked by the courts to define the term "value to the seller" as used in former Civil Code section 3311, which stated the measure of damages for breach of an agreement to accept and pay for personal property. See, e.g., Hill v. McKay, 94 Cal. 5, 17–18, 29 P. 406. In cases involving sales of real property, however, it has generally been held that the value of the property to the seller is to be determined as of the date of the breach. Drew v. Pedlar, 87 Cal. 443, 450–451, 25 P. 749; Baffa v. Johnson, 35 Cal.2d 36, 39–40, 216 P.2d 13; Dean v. Hawes, 21 Cal.App. 350, 355, 131 P. 885; Shurtleff v. Marcus Land etc. Co., 59 Cal.App. 520, 523, 211 P. 244; Caspar Lumber Co. v. Stowell, 37 Cal.App. 2d 58, 61, 98 P.2d 744; Employees' Participating Ass'n v. Pine, 91 Cal.App. 2d 299, 301, 204 P.2d 965; see also, McCormick on Damages, § 186, pp. 710–711; annotation, 52 A.L.R. 1511, 1512. Thus the rule that has been consistently followed in determining the damages for breach of an agreement to purchase an estate in real property is inconsistent with the provisions of section 3353. Although its applicability in such cases has apparently never been directly adjudicated, the fact that it was regularly invoked in cases involving personal property convinces us that it was not considered in real property cases because it was regarded as inapplicable, not because it was overlooked. We conclude that section 3353 has no application to sales of real property, and that the damages should therefore be computed as of the date of the breach of the agreement to purchase the property.

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[1] "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

[2] "In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

Defendant contends that the trial court also erred in allowing as additional damages $45 in escrow charges, $40 in title charges, and $420 in broker's fees paid in connection with the first sale. When, as under section 3307, the measure of damages is designed to assure to the vendor the benefit of his bargain, additional damages should not be allowed for expenses that would have been incurred had the contract been performed. To do so would place the vendor in a better position than he would have been in had there been no breach. Civil Code, § 3358. Thus, plaintiff would have paid the expenses from the proceeds of the sale had the contract been performed. If she is given the equivalent of the proceeds of the sale under section 3307 she is not also entitled to expenses that she would have incurred in any event.

[5] In many cases, however, the vendee's breach may make it necessary for the vendor to incur additional expenses to realize the benefit of his bargain. Given the rule that the value of the property to the seller under section 3307 is ordinarily the market value at the time of the breach, Employees' Participating Ass'n v. Pine, 91 Cal.App.2d 299, 301, and cases cited, injustice could result if the vendor were not allowed to recover damages for additional expenses caused him by the vendee's breach. Thus in a case where the property is sold at the market value and that value remains constant until after the breach, and the property is then resold at the same price, the vendor could recover no damages under section 3307. He would be forced to pay, however, in addition to the expenses of the first sale, the expenses of the resale. When such additional expenses are the natural consequence of the breach, they may be recovered in addition to those provided for in section 3307. Yocum v. Taylor, 50 Cal.App. 294, 295, 195 P. 62; accord, King v. Globe Grain, etc., Co., 58 Cal.App. 105, 114, 208 P. 166, adopting same rule with respect to former Civil Code section 3311; see, 5 Corbin on Contracts, § 1036, p. 186. The statements in Morgan v. Dibble, 43 Cal.App. 116, 184 P. 704, and Maloney v. Houston, 51 Cal. App. 585, 197 P. 661, indicating that section 3307 provides the exclusive measure of damages were not necessary to the decisions in those cases and are disapproved.

[6] It does not follow that the actual expenses of the first sale will necessarily be equal to the additional expenses caused by the vendee's breach. If all of the contemplated expenses of the first sale are actually paid and the property does not change in value, ordinarily the additional expense of reselling made necessary by the breach will be equal to those incurred in the first sale. In the present case, however, it appears that all the contemplated expenses of the first sale were not paid and that the cost of reselling at the market value at the time of the breach would have been less than the cost of selling at the contract price. Under the terms of her agreement with the broker plaintiff was not obligated to pay the full commission on the first sale in case of defendant's default. She paid only $420, thus saving $780 of the anticipated expense of the first sale.

Since the cost of a sale under the usual brokerage contract is five percent of the purchase price, what that cost would have been at the time of defendant's breach cannot be determined in the absence of a finding of the market value of the property at that time. On retrial, the trial court, in computing the additional damages caused by defendant's breach, should allow an amount equal to the difference between the cost of selling the property at its value at the time of the breach and $780, the amount the anticipated expenses of the first sale were reduced by defendant's default.

[7] In fixing the damages on the basis of the resale price, the trial court failed to make a deduction for the value of certain personal property included in the first sale but not in the second. On retrial the value of the personal property agreed to be sold with the realty should be taken into consideration.

The judgment is reversed and the trial court is directed to retry only the issue of damages in accordance with the views expressed herein. Each party is to bear her own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER JJ., concur.

SCHAUER, Justice.

I concur in the judgment and generally in Justice Traynor's opinion. In so doing, however, I deem it proper to note that I consider the resale price obtained by plaintiff as constituting some evidence of the value of the property to her on the date of the breach. The fact that there was a falling market on and following that date must be considered in connection with the price finally obtained in order to estimate the value as of the date of breach, but that fact also must be considered as affecting the price reasonably obtainable by a seller who first learns on the date of breach that a new purchaser must be obtained.

In other words, an appraiser in estimating, and a court in finding, the value to the seller on the date of breach must necessarily take into consideration the fact that some appreciable time is ordinarily required to find a purchaser ready, able and willing to buy. The value to the seller on the date of breach should be the price obtainable on an offering of the property on that date with allowance for a reasonable time within which to find a purchaser. Certainly the seller who does not breach his contract should not have to anticipate a breach by the contracting purchaser nor should such a seller have to stand all or any part of the loss necessarily flowing from the purchaser's breach. Thus, if the price finally obtained in a falling market is the best price which reasonably could be procured, with due diligence, on an offering made as of the date of breach, the value to the seller as of such date would be no more than the price actually obtained.

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37 Cal.2d 527

CAPITAIN v. L. A. WRECKING CO. et al.

L. A. 21870.

Supreme Court of California, in Bank.

July 3, 1951.

Rehearing Denied Aug. 2, 1951.

Action by Joseph Capitain against the L. A. Wrecking Company and others to recover amount paid as purchase price of building destroyed by fire. The defendants filed a cross-complaint. The Superior Court of Los Angeles County, Ralph McGee, J., rendered judgment for plaintiff, and the defendants appealed. The Supreme Court, Carter, J., held that, where a contract for sale of house required sellers to move house to buyer's lot and contained notation that balance due was to be paid by buyer when the house was lowered onto foundation, and roof had been removed during moving and had not been replaced when house was destroyed by fire while setting on blocks on buyer's lot, title to house would not pass until house was lowered onto foundation and the roof restored, and hence risk of loss was upon sellers at time of fire, notwithstanding that buyer had entered into agreement with lender furnishing money for purchase of house that lender would insure the house.

Judgment affirmed.

Prior opinion, 225 P.2d 287.

Sales 🔑200(4)

Where contract for sale of house required sellers to move house to buyer's lot and contained notation that balance due was to be paid by buyer when the house was lowered onto foundation, and roof had been removed during moving and had not been replaced when house was destroyed by fire while setting on blocks on buyer's lot, title to house would not pass until house was lowered onto foundation and the roof restored, and hence risk of loss was upon sellers at time of fire, notwithstanding that buyer had entered into agreement with lender furnishing money for purchase of house that lender would insure the house. Civ. Code, §§ 1738, 1739, rule 5, 1742.

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Bloom & Bloom, Hollywood, and Eleanor V. Jackson, Los Angeles, for appellants.

Barry Sullivan, Los Angeles, for respondent.

CARTER, Justice.

The trial court found that on December 17, 1947, defendants, L. A. Wrecking Company, a partnership, and the partners, the owners of a house situated on a lot in Los Angeles, entered into an agreement to sell the house to plaintiff and move it to Bandini, California, for a total sum not exceeding $6500 delivered. A $500 deposit or down payment was made and thereafter on April 2, 1948, a second deposit of $3000 was made and accepted while the house was still at its original location. The balance of $3000 was to be paid when the house was placed on the foundation at the new location. Defendants employed the M & M House Moving Company to move the building, which it did on May 3, 1948, and placed it on "sills and blocks," the property of the mover, at the new location. It was to be lowered to the foundation by the mover. For the purpose of moving, a "top portion" of the top of the building had to be removed. On May 10, 1948, seven days after the moving, the house was destroyed by fire. At that time the portion of the roof had not been replaced, defendants had placed tarpaulins on the house to protect it, tools and equipment for replacing the roof were in the house, materials for the job were present at the new location and the house had not been placed upon the foundation. The court concluded that at the time of the fire, defendant had possession and control of the building and plaintiff should recover $3587.50—the amount deposited plus sales tax—from defendants and the latter take nothing on its cross-complaint.

Defendants contend that title to the house had passed to plaintiff when it was placed on the blocks and sills, and therefore the risk of loss was upon plaintiff at the time of the fire.

The applicable legal principles are conceded by the parties. With certain exceptions not here pertinent, the risk of loss falls upon the seller if title has not passed, and on the buyer, if it has. Civ.Code, § 1742. "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." Civ.Code, § 1738. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Civ.Code, § 1739. It remains therefore to ascertain whether the evidence was sufficient to support the conclusion that the risk of loss rested with defendants—sellers.

The contract was dated December 17, 1947, drawn under the letter-head of defendants, and recited that $500 had been paid by plaintiff to defendants as a deposit on the house at a specified location "which is to be moved to approximately S. E. Cor. of Couts and Panocha Streets, Bandini, California." "Full price of" house—$3500—less $500 deposit to be paid by plaintiff when application to move has been approved by Los Angeles. The "sale (is) subject to approval of buyer to the additional cost of moving." The total price is not to exceed "$6500.00 delivered." Defendants have the right to cancel the contract under specified contingencies by refunding all money received. On April 2, 1948, plaintiff had made arrangements for payments under the contract to be made by Atlantic Savings and Loan Association, with whom he had arranged for a loan. On that day in the presence of plaintiff and Chain, one of the defendants-partners, a notation was made in handwriting on the contract by Dinoto, a representative of Atlantic, that "4/2/48, I, John Capitain, [plaintiff] hereby authorize the Atlantic Savings and Loan Association, to pay to L. A. Wrecking Co. [defendants] balance due on the contract when building is [placed] on the foundation. Signed: John Capitain." The notation was made ensuing a conversation between plaintiff and Chain as to when the balance of $3000 would be paid, and plaintiff had said he would pay when the house was on the foundation and, according to plaintiff's testimony, the wording of it was dictated by Chain. Another notation placed on the contract at the same time by Chain reads: "Received $3087.50 as a further deposit, balance due $3000." In other conversations defendants agreed to replace the portion of the roof and some bay windows which were removed in the process of moving; that the house was to be placed on the ground at a point designated by plaintiff; that "after the foundation was made the defendants were to lower this house down onto the foundation, secure it to the foundation"; and that defendants told plaintiff the house was fully covered by insurance until delivered and all work finished. In the agreement between defendants and the mover, for moving the house, the mover agreed to lower it onto the foundation.

Defendants do not dispute, and it is clear from the contract, that it was one for the sale of property which was to be delivered to a certain place by the sellers,—defendants, and thus rule 5 of section 1739 of the Civil Code, quoted supra, applies. The only question remaining is when the delivery to the place was consummated. It is true the contract in the first part mentions delivery to the lot alone. There are, however, other factors and circumstances which would justify an inference that the delivery would not be complete, and therefore, title would not pass, until the house was lowered onto the foundation and the roof restored. There is the first notation made thereon on April 2, 1948, at defendants' dictation, that the $3000 balance is to be paid when the house is lowered onto the foundation, indicating that the delivery by the sellers was not to be completed until the building was on the foundation. The plaintiff was purchasing a whole house as a unit, not in parts, hence it may be said that the house was not delivered until the roof, which had been removed, had been restored, and thus a complete house delivered. The house was setting on blocks which belonged to the mover. It is true, that it was plaintiff's obligation to build the foundation, and he had not done so when the fire occurred, but there was no time fixed for the construction of the foundation, and only 7 days, not an unreasonable time, had elapsed since the house was placed on the blocks. There had been a long delay on defendants' part in moving the house. Defendants had lumber and equipment on the property to be used in replacing the roof, and some work had been done in that respect. Considering all of the circumstances it may be inferred that title did not pass before the fire.

Defendants refer to evidence that plaintiff, in arranging for a loan with Atlantic Savings and Loan Association, agreed with the latter to insure the house. That is not controlling, as the contract gave plaintiff an insurable interest, and he had a right to protect the lender regardless of where title was. It is not conclusive that plaintiff understood or intended title to pass. Moreover, defendants repeatedly assured plaintiff that they were fully covered by insurance, with respect to the house, even while it was on the blocks. The same comment is applicable to the assertion that the full price of the house—$3500—was paid before it was moved. That might indicate that title was to pass then but it is not conclusive. There was still a balance of $3000 which, while it might be allocated to the moving expense, was still a part of the $6500 which was to be the maximum amount plaintiff agreed in the contract to pay.

Judgment affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

37 Cal.2d 531

BLACHE v. BLACHE et al.

S. F. 17997.

Supreme Court of California, in Bank.
July 6, 1951.

Rehearing Denied Aug. 2, 1951.

Action by Anna Blache for separate maintenance and determination of property rights against Maurice J. Blache, also known as Jean J. M. Blache and Jeanne C. Pedebidou, also known as Jeanne Blache, wherein the husband filed a cross-complaint for divorce and annulment. The Superior Court, San Francisco County, Edward Molkenbuhr, J., entered judgment ordering the husband to pay plaintiff separate maintenance and declaring that a half interest in described properties accumulated by the husband and his alleged wife by second marriage was community property of the husband and plaintiff. From the judgment entered all three parties appealed. The Supreme Court, Schauer, J., held that transcript of wife's testimony at first trial which was read into record without showing that wife was not available to testify, was inadmissible.

Judgment reversed and cause remanded with directions.

Prior opinion, 222 P.2d 35.

1. Evidence 🔑581

In separate maintenance action by wife against husband and woman with whom husband had contracted second marriage, where wife did not testify, transcript of wife's testimony at first trial which was read into record without showing that wife was not available to testify, was inadmissible and admission of transcript constituted prejudicial error. Code Civ.Proc. § 1870.

2. Evidence 🔑581

In absence of agreement by attorneys, or by parties if not represented by counsel, evidence which was used at former trial may be introduced in a present action only if witness's testimony in court cannot be produced. Code Civ.Proc. § 1870.

3. Appeal and error 🔑1145

Where trial court did not adjudicate husband's ownership, purported affirmation by District Court of Appeal of portions of judgment adjudicating husband's ownership of one-half of real and personal property, and vacating and setting aside certain transfers of husband's interests in properties to alleged wife by second marriage, was ineffective.

4. Appeal and error 🔑1119

A judgment becomes final as against a non-appealing party even though judgment is reversed on appeal of other parties except where portions of judgment adverse to a non-appealing party are so interwoven with whole that appeal from part affects other parts in which situation appellate court can reverse entire judgment.

5. Appeal and error 🔑1119

In separate maintenance action by wife against husband and woman with whom husband had contracted second marriage, where issues raised under husband's cross-complaint for divorce and annulment were interwoven and in substantial part identical with issues raised under wife's complaint, even though husband did not appeal from judgment, reversal set at large issues raised by cross-complaint.

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David Livingston and Louis F. DiResta, San Francisco for plaintiff and appellant.

Ernest J. Torregano, San Francisco, for defendant and appellant Maurice J. Blache.

Edward J. Lynch, San Francisco, for defendant and appellant Jeanne C. Pedebidou.

SCHAUER, Justice.

Plaintiff Anna Blache brought this action for separate maintenance and determination of property rights against her husband Maurice and against Jeanne Blache, with whom Maurice had gone through a marriage ceremony and lived in the mistaken belief that he had divorced plaintiff. Each of the defendants appeals from a judgment which decrees, among other things, that Maurice pay Anna separate maintenance and that a half interest in described properties accumulated by Maurice and Jeanne is community property of Maurice and Anna. Anna appeals from the judgment insofar as it fails to grant her additional relief which she contends should have been awarded her. The trial which resulted in this judgment was the second trial of this case. Anna did not testify at such second trial; rather, over objection, she was allowed to rest her case principally upon a transcript of her testimony at the first trial. Such testimony on its face appears to be evasive and self-contradictory. Essential findings of the trial court favorable to Anna are based solely upon this transcribed testimony. For reasons hereinafter more particularly set forth, we have concluded that this procedure was prejudicially erroneous.

Anna and Maurice were married in 1912 and separated in 1914. In 1916 Maurice sued for divorce on the ground of desertion. Anna was personally served and, in letters to Maurice's counsel written both before and after the case came on for trial, she repeatedly expressed consent to the divorce and urged that it be speedily obtained. Her default was entered in July, 1916. The case came on for trial in January, 1917; evidence was taken and the trial court suggested additional corroboration; Maurice's attorney stated that he would obtain a corroborating deposition; the cause was continued to October 24, 1917; on that date there was no appearance and the cause went off calendar. The proposed deposition was taken (in the state of Michigan) and was filed on March 11, 1918, but it appears that the cause was never restored to the calendar, that the additional evidence did not come to the trial court's attention, and that no judgment was rendered. Maurice believed that the divorce had been granted. In 1939, after the present action was instituted, Maurice's divorce action was dismissed of the court's own motion.

In 1918 Maurice went through a marriage ceremony with Jeanne; he did not tell her of his prior marriage or his belief that he had been divorced. Maurice had no property at this time; Jeanne contributed about $10,000 of her own property to their mutual endeavors; and over a period of twenty years they accumulated property worth more than $150,000.

Between 1915 and 1932, neither Maurice nor Anna knew anything of the other's whereabouts or activities. In 1932 Anna learned that Maurice was in San Francisco. She wrote to him that she was attempting to obtain a passport for a proposed trip abroad and that for this reason she needed a certified copy of the divorce decree; she asked him to send her such copy or tell her where one could be obtained. When Maurice attempted to obtain a copy of the decree he learned and advised Anna that they were not divorced. Thereafter, until 1938, Maurice and Anna corresponded; Anna repeatedly wrote that she did not desire to obtain money from him or to cause him trouble; she suggested that he dissolve their marriage and validly remarry Jeanne. In 1938 Anna saw Maurice for the first time since their separation in 1914. Later in 1938 she demanded money and threatened legal action. In May, 1939, Maurice for the first time told Jeanne of his prior marriage to Anna. In June, 1939, Anna instituted the present action. As grounds for separate maintenance she alleged desertion, adultery and wilful neglect. Among the defenses raised by Jeanne and Maurice were the following: laches; estoppel; an agreement between Maurice and Anna, made when they separated, that they would live apart, that each would support himself, and that any property which either might accumulate would be separate property of that person; the provisions of section 124 of the Civil Code that "A divorce must be denied: One. When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party * * *. Three. In all other cases when there is an unreasonable lapse of time before the commencement of the action." Maurice also cross-complained for divorce and for annulment.

On the first trial of this action the trial court made no finding which would have supported an award of separate maintenance, and no award of such maintenance; it awarded Anna $7,989.13 and ordered on payment of the judgment Anna should have no further interest in "any community property." The judgment was not supported by the findings and was not authorized by sections 137 and 146 of the Civil Code, which govern the disposition of separate maintenance actions.[1] For these reasons it was reversed by the District Court of Appeal in Blache v. Blache (1945), 69 Cal.App.2d 616, 160 P.2d 136.

[1, 2] As previously stated, on the second trial of this action Anna, the plaintiff, did not testify. Instead, over objections of both defendants, a transcript of her testimony at the first trial was read into the record. This was done without any attempt to show that she was not available to testify. The trial court permitted this procedure because of a misinterpretation of the following statement in the opinion of the District Court of Appeal on the prior appeal (at page 631 of 69 Cal.App.2d, at page 136 of 160 P.2d): "Whether the factual questions on a new trial should be submitted on the same record, or whether new or additional evidence should be presented, is a question to be decided by the trial court and the respective attorneys." Plaintiff's attorney urges that this statement means that he could submit plaintiff's case upon the record of the previous trial without the consent and over the objection of the attorneys for the defendants. In this he is mistaken. Under his interpretation, the District Court of Appeal made a misstatement of law, whereas the natural and reasonable meaning of its statement, which is in accord with law, is that the factual questions could be submitted on the record of the prior trial if the attorneys for *all* the parties *and* the trial judge agreed. It is established by both statute and judicial decision that in the absence of agreement by the attorneys (or by the parties if not represented by counsel), such use of the evidence at a former trial may be permitted only if the witness' testimony in court cannot be produced. (Code Civ.Proc., § 1870, subd. 8; Kuck v. Raftery (1931), 117 Cal.App. 755, 761, 4 P.2d 552; Van Orden v. Anderson (1932), 122 Cal.App. 132, 144, 9 P.2d 572; Kuehn v. Carlos (1939), 32 Cal.App.2d 295, 297, 89 P.2d 672; Gordon v. Nichols (1948), 86 Cal.App.2d 571, 576, 195 P.2d 444; 5 Wigmore, Evidence (3d ed.), § 1415, p. 191.)

The seriousness of the trial court's error is apparent when we consider the reasons for the requirement that the witness, if available, take the stand. Not only can the credibility of the witness on the stand be tested by cross-examination; another purpose is served by the requirement of the witness' presence: the trier of fact can "obtain the elusive and incommunicable evidence of a *witness' deportment while testifying.*" (5 Wigmore, op. cit., pp. 125–126.) Wigmore states that "No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the present trial." (5 Wigmore, op. cit., p. 191.)

As was aptly stated by the District Court of Appeal after the first trial of this case, "On appeal we cannot evaluate the truth of the testimony from the manner and demeanor of the witnesses. There appear enough contradictory and inconsistent statements in the transcript of the testimony of each of the three principal parties to justify this court in sustaining a finding contrary to the testimony of any one of the parties." (Blache v. Blache (1945), supra, 69 Cal.App.2d 616, 624–625, 160 P.2d 136.)

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[1] Section 137 provides in material part that "When the husband * * * wilfully deserts [or wilfully fails to provide for] the wife * * *, or when the * * * wife has any cause of action for divorce * * *, she may, without applying for divorce, maintain * * * an action * * *, for permanent support and maintenance. * * * The court, in granting * * * permanent support and maintenance * * * shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved * * *" The code does not provide for a division of community property in such action in the absence of an award of separate maintenance.

Section 146 provides in material part that "If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties."

The judge who tried the case the second time was no better qualified than was the appellate court to evaluate the truth of vague, evasive and self-contradictory testimony of a witness whom he had not observed.[2]

On the question of probable prejudice from the error it is significant that the judge who tried the case on the second trial, and who did not see and hear Anna, took a favorable view of her claim, whereas the judge who tried the case on the first trial, and who observed her, took a substantially unfavorable view of such claim, as is manifest from the substantial difference between the two judgments. Maurice and Jeanne took the stand on the second trial. The fact that their testimonies at both trials, like that of Anna at the first trial, appear to be in some respects evasive and unsatisfactory, serves but to emphasize the need for the trier of fact to observe the demeanor of all and to avail himself of every legitimate aid in resolving the conflicting factual issues.

The trial court from time to time during the second trial expressed the mistaken view that the only questions before it were (1) the amount of maintenance to which Anna was entitled; (2) whether the property described in the judgment on the first trial was the sole property of Jeanne, or whether one-half belonged to Maurice and Anna as community property. And it incorrectly determined that "The issues presented by Maurice's cross-complaint for divorce and annulment were disposed of at the previous trial of this case, and the decision at said trial on said issues is embodied in * * * the Findings of Fact. * * Maurice did not appeal from the judgment entered pursuant to said findings, and said decision upon said issues became final." It should be noted that, although on the first trial the court made findings against Maurice on the issues raised under his cross-complaint, it did not expressly decree that he was not entitled to relief thereunder, nor that Anna was entitled to separate maintenance; indeed, there is nothing in the judgment to show that the status of Maurice and Anna as husband and wife, or Anna's right to separate maintenance, was ever in issue.

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[2] Illustrations of issues on which the trial court found for Anna, and on which her demeanor on the stand could have an important effect, include the following:

The court found that Maurice wilfully deserted Anna in 1914. Evidence which would have supported a contrary finding includes her default in 1916, after personal service, in Maurice's divorce action, wherein he alleged that Anna deserted him; letters written by Anna in 1917 which manifested consent to, and eagerness for, Maurice's obtaining the divorce; and, if believed, the testimony of Maurice. Anna's only explanation of her consent to a separation and her admission (by default) that she deserted Maurice is found in the transcription of her testimony read into evidence. She testified that she expressed consent because she was "upset," "didn't realize what I was doing" and "I knew that no matter what I wrote, that wouldn't make any difference."

The trial court found for Anna on the issue of wilful neglect. But "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement." (Civ.Code, § 175.) Anna's transcribed testimony concerned the questions of abandonment, Maurice's conduct, and the asserted 1914 agreement to live separate; all these questions are material to a determination whether Maurice's conduct constituted wilful neglect and whether any of the property acquired by Maurice and Jeanne can be held to have become impressed with a community interest in favor of Anna.

The court found, contrary to Maurice's testimony, that Anna and Maurice did not agree in 1914 that they would separate, that each would support himself, and that the earnings of each would be his separate property. The only evidence contradicting Maurice's testimony was the transcribed and self-conflicting testimony of Anna; her actual conduct from 1916 to 1938 would seem to corroborate him.

The court determined that Anna's conduct during the period between 1932, when she learned of the purported marriage of Jeanne, and 1938, did not preclude her from maintaining this action. This conduct included the writing of the reassuring letters to Maurice which contained statements that Anna would not seek money from him, urging him to divorce her and marry Jeanne, etc. Anna's transcribed testimony purporting to explain these letters contains contradictions, uncertainties, and admissions that statements therein were not true; appraisal of the weight and effect of this testimony could be greatly aided by the opportunity to observe her demeanor.

[3] The order of the District Court of Appeal purportedly affirmed "the portions of the judgment adjudicating Maurice's ownership of one-half of the real and personal property, and vacating and setting aside certain transfers of his interests in such properties to Jeanne"; "in other respects [except as to an award of attorney's fees which is not here material] the judgment is reversed" (at page 633 of 69 Cal. App.2d, at page 136 of 160 P.2d). The trial court did not expressly or at all adjudicate "Maurice's ownership of one-half of the real and personal property." The purported and inadvertent affirmance of a non-existent portion of the judgment had no effect. As is clearly apparent upon analysis of the judgment, and as is stated in the summary of the original District Court of Appeal decision by the reporter of decisions (at page 618 of 69 Cal.App.2d, at page 136 of 160 P.2d) and by the District Court of Appeal, itself, in a subsequent opinion on an appeal from an intermediate order (Blache v. Blache (1947), 78 Cal.App.2d 168, 170, 177 P.2d 345) the original judgment of the appellate court amounted to a straight reversal of the trial court's judgment except as to attorney's fees.

[4, 5] The reversal by the District Court of Appeal set at large, and our reversal here will set at large, every issue in the case, including the issues raised under the cross-complaint of Maurice. (See De Hart v. Allen (1945), 26 Cal.2d 829, 833, 161 P.2d 453.) It is true that there are cases which hold that a judgment becomes final as against a non-appealing party even though the judgment is reversed on the appeal of other parties. (G. Ganahl Lumber Co. v. Weinsveig (1914), 168 Cal. 664, 667, 143 P. 1025; Lake v. Superior Court (1921), 187 Cal. 116, 119, 200 P. 1041; Smith v. Anglo-California Trust Co. (1928), 205 Cal. 496, 505, 271 P. 898; Neill v. Five C. Refining Co. (1947), 79 Cal.App.2d 191, 194, 179 P.2d 818.) But this rule is not applied where portions of a judgment adverse to a non-appealing party are so interwoven with the whole that appeal from a part affects the other parts; in such a situation the appellate court can reverse the entire judgment if it is necessary to do justice. (In re Estate of Murphey (1936), 7 Cal.2d 712, 717, 62 P.2d 374; Whalen v. Smith (1912), 163 Cal. 360, 362, 125 P. 904. The issues raised under the cross-complaint are not merely interwoven with, but in substantial part are identical with, the issues raised under the complaint.

For the reasons above stated the judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J. and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

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37 Cal.2d 563

In re MESNER'S ESTATE.

CRADICK et al. v. SINGER.

L. A. 21959.

Supreme Court of California.

July 13, 1951.

Rehearing Denied Aug. 9, 1951.

Proceedings in the matter of the estate of Jennie Mesner, also known as Jennie Grawoig, deceased, in which petition of Charles W. Cradick asking court to vacate order confirming sale and to order resale was contested by petition of J. P. Singer which sought order vacating sale and declaring same to have been void. The Superior Court of Los Angeles County, William P. Haughton, J. pro tem., granted petition of Charles W. Cradick and denied petition of J. P. Singer, and J. P. Singer appealed. The Supreme Court, Traynor, J., held that in absence of any evidence showing that original bidder at probate sale had right to terminate sale contract by notice of rescission, successful bidder at probate hearing could not have sale to him declared void on ground that executor had failed to notify him and court of prior rescission by original bidder.

Orders affirmed.

Prior opinion, 227 P.2d 297.

1. Executors and administrators ⚿375

Service of notice of rescission by successful bidder in probate sale did not divest court of jurisdiction to proceed with hearing for confirmation and to accept and confirm bid made at such hearing.

2. Executors and administrators ⚿379

In probate proceeding in which purchaser by bid made at hearing sought to have order confirming sale vacated on ground that executor had failed to notify bidders and court that successful bidder at probate sale had rescinded sale prior to hearing, in absence of evidence that sale to original bidders was not valid and binding sale, there was no fraudulent representation by executor to bidder or to court that valid sale to original bidder had been made.

3. Executors and administrators ⚿379

In probate proceeding in which successful bidder at hearing sought to have confirmation of sale vacated as being void, evidence was insufficient to establish that bid had been induced by fraudulent misrepresentations by attorney for executor and manager of property as to income which such property would yield and as to offered rebate on purchase price.

4. Executors and administrators ⚿375

Order confirming sale in probate proceedings which recited that bid was made by individual but which confirmed sale to such individual and his wife in conformity with request by such individual that title be vested in himself and his wife as joint tenants, error, if any, in confirming sale to husband and wife, was at most clerical error apparent on face of order and did not affect validity.

5. Executors and administrators ⚿375

Under provision of Probate Code that affidavit or verified petition must be received as evidence when offered in any uncontested probate proceedings, verified petition of executor which contained all facts necessary to justify court in confirming sale made on bid submitted at hearing, in absence of contest of sale by purchaser, was sufficient to warrant confirmation of sale by court without necessity for examination of witnesses. Probate Code, §§ 785, 1233.

6. Executors and administrators ⚿379

In probate proceeding in which purchaser at probate hearing sought to vacate sale to him on ground that sale was fraudulent, it was not error to exclude from evidence certified copy of transcript of hearing at confirmation of sale in view of fact that witnesses testified to proceedings which had occurred at sale and in view of fact that purchaser failed to point out relevancy of transcript to issues before court. Code Civ.Proc. § 273.

7. Executors and administrators ⚿372

Where purchaser of property at probate hearing rescinded sale, in absence of showing that sale was void, executor was entitled to retain down payment as security for deficiency at resale, or, if no resale was had, for damage caused by breach of contract.

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Clarence Hansen and Vernon S. Gray, Los Angeles, for appellant.

Dailey S. Stafford, Los Angeles, for respondents.

TRAYNOR, Justice.

Respondent, executor of the estate of Jennie Mesner, made his return of sale of real property on a bid of $79,500. At the probate hearing appellant, Joseph P. Singer, made an oral bid of $83,975, which was accepted. Appellant's bid was reduced to writing and filed, and he deposited a down payment of $8,500 with respondent's attorney. He requested that the order of sale direct that the executor's deed convey title to him and his wife as joint tenants. Thereafter an escrow was opened and in due time the escrow holder informed appellant that it was ready to close the sale on the payment of the balance of the purchase price. Appellant, however, served a notice of rescission on respondent and thereafter petitioned the probate court to vacate the order confirming the sale and to direct respondent to return the down payment. Because of appellant's failure to complete the purchase, respondent petitioned the probate court to vacate the order of confirmation and order a resale pursuant to the provisions of Probate Code section 788. After a hearing the court granted the petition of respondent and denied that of appellant. Appellant has appealed from both orders. A motion to dismiss the appeals on the ground that the orders were not appealable was denied in Estate of Mesner, 99 Cal. App.2d 319, 221 P.2d 740.

One of the objectives of both petitions was to have the order confirming the sale to appellant vacated. Accordingly, appellant cannot object that that was done. He contends, however, that the court erred in granting that relief on the ground of his failure to complete the purchase rather than on the ground that the order of confirmation was void or that the sale to him was induced by the fraud of respondent. Had relief been granted to appellant on either of the latter grounds his right to the return of his down payment would have been established. It is necessary to determine, therefore, whether the court erred in finding that a valid sale to appellant had been made.

[1] Appellant contends that because the original bidders to whom respondent had sold the property had served a notice of rescission, the court was without jurisdiction to proceed with the hearing for confirmation that resulted in the sale to appellant. It is settled, however, that the service of a notice of rescission by the successful bidder in a probate sale does not divest the court of jurisdiction to proceed with the hearing for confirmation. Baldwin v. Stewart, 218 Cal. 364, 366–368, 23 P.2d 283.

[2] Appellant also contends, however, that the failure of respondent to inform him and the court of the notice of rescission amounted to a fraud on both of them. It may be assumed that it would constitute a fraud upon the probate court and bidders at a confirmation hearing for the executor to seek confirmation of a sale that had been rescinded by the purchaser without informing the court of the rescission. A bidder at the confirmation hearing must compute his bid on the basis of the amount for which the property has been sold. By seeking confirmation of the sale the executor represents at least by implication the minimum price for which the property may be had. In the present case, however, there is no evidence that the sale to the original bidders was not a valid and binding sale. They could not terminate their contract to purchase by a notice of rescission, unless they had the right to rescind. Civil Code §§ 1689, 1691; Baldwin v. Stewart, supra, 218 Cal. 364, 367, 23 P.2d 283. Since there is no evidence that they had that right, appellant has failed to prove that respondent fraudulently represented to him or the court that a valid sale to the original bidders had been made.

[3] Appellant testified that the attorney for the executor and the manager of the property induced him to buy the property by misrepresenting the income therefrom and by informing him that he would receive a rebate on the purchase price. He sought also to have the sale set aside because of these alleged fraudulent misrepresentations. Much of his testimony was contradicted, however, by testimony of the attorney. Accordingly, it cannot be said that the trial court erred in resolving the conflict in favor of respondent and finding that "no fraud was practiced or perpetrated upon the said Joseph P. Singer, or the Court, nor was there any misrepresentation, deceit or concealment of material facts, by said executor, his attorney, agent or representative." See, Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Blank v. Coffin, 20 Cal. 2d 457, 461–462, 126 P.2d 868.

[4] Appellant contends that the order confirming the sale is void on its face because it recites that the bid was made by him but confirms the sale to both him and his wife. It is apparent from reading the order that appellant requested that title be taken in himself and his wife as joint tenants. The error, if any, in confirming the sale to both of them was at most a clerical error apparent on the face of the order and had no effect on its validity.

[5] Appellant contends that the order confirming the sale should be set aside because the court failed to examine witnesses in relation to the sale as required by section 785 of the Probate Code. Section 1233 of the Probate Code provides, however, that "An affidavit or verified petition must be received as evidence when offered in any uncontested probate proceedings * * *." Since the verified petition of respondent contained all the facts necessary to justify the court in confirming the sale and since appellant did not contest the sale, the court did not err in failing to examine witnesses.

[6] Appellant contends that in the proceedings to vacate the sale to him the court erred in excluding from evidence a certified copy of the transcript of the hearing when the sale was confirmed to him. It is unnecessary to decide whether the transcript was properly excluded on the ground that it was hearsay. See, Code Civ.Proc. § 273. Witnesses testified to the proceedings that occurred at the hearing when the sale was confirmed to appellant, and he does not point out nor does an examination of the transcript indicate its relevance to any of the issues before the court.

[7] Had appellant established his right to have the sale to him vacated on the ground that it was void or induced by fraud, he would have been entitled to a return of the down payment. Since he did not establish that right, however, any order directing the disposition of the down payment would be premature. Under the provisions of section 788 of the Probate Code, if a resale is conducted, appellant will be liable to the estate for the deficiency. Respondent is entitled to retain the down payment as security for appellant's obligation until the extent thereof is determined. Accordingly, the probate court did not err in instructing respondent not to return the down payment at the time appellant requested that relief. When and if the property is resold the rights of the respective parties to the down payment will be determined.

If, on the other hand, respondent does not resell the property, appellant's right to the return of any part of the down payment will depend on his successfully asserting a claim based on proof that the amount of the down payment exceeded the damages caused by his breach of the contract. Freedman v. Rector, Wardens and Vestrymen of St. Mathias Parish, 37 Cal.2d 16, 230 P.2d 629. An action on such a claim should be brought in the superior court. Texas Co. v. Bank of America, 5 Cal.2d 35, 46, 53 P.2d 127; see also, Baldwin v. Stewart, 218 Cal. 364, 23 P.2d 283; McCarty v. Wilson, 184 Cal. 194, 193 P. 578.

The orders are affirmed without prejudice to appellant's right to seek restitution after the disposition of the property is settled.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 587

In re COLLIAS' ESTATE.

COLLIAS v. COLLIAS et al.

L. A. 21453.

Supreme Court of California, in Bank.

July 24, 1951.

Proceeding in the matter of the estate of Chris Collias, deceased, wherein Argirios T. Collias, also known as Argirios Collias filed petition for distribution, opposed by Efstathios Collias and others. The Superior Court, Los Angeles County, Joseph M. Maltby, J., rendered decree of distribution, and Efstathios Collias and others appealed. The Supreme Court, Edmonds, J., held that the unconditional bequest and devise to the nephew was not affected by the subsequent desire and wish expressed by the testator and the nephew took the estate absolutely.

Order affirmed.

Schauer, J., dissented.

Prior opinion 225 P.2d 550.

1. Wills 🔑601(1)

Where absolute estate has been conveyed by will, such estate will not be limited by subsequent words unless they indicate as clear intention therefor as was shown by words creating estate. Probate Code, § 104.

2. Wills 🔑601(1)

Subsequent words which merely raise doubt or suggest inference will not affect absolute estate first conveyed by will, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of estate first conveyed. Probate Code, § 104.

3. Wills 🔑467

Wish or request of testator for disposition of his estate directed to executor is command, but if addressed to legatee or devisee it will not be construed as limitation on estate given in absolute terms. Probate Code, § 104.

4. Wills 🔑467

Where person directed to carry out wishes of testator is both executor and legatee or devisee, courts in construing effect of language do not follow rule imposing mandatory duty on executor but treat words as being addressed to him in capacity as legatee or devisee.

5. Wills 🔑675

Where nephew, who was both executor and legatee under will, was first bequeathed entire estate absolutely, subsequently expressed desire and wish of testator that one-half of estate be given to relatives was directed to nephew as legatee and no trust or equitable charge was created which limited first conveyed absolute estate. Probate Code, § 104.

◆

Marshall & Farnham and O. E. Farnham, Long Beach, for appellants.

James C. Webb, Long Beach, for respondent.

EDMONDS, Justice.

Chris Collias died testate. His will named his nephew Argirios Collias as executor and included the following provision: "All the rest and residue of my estate, of every kind and description, and wherever situated, I give, devise and bequeath unto my nephew Argirios Collias a resident of Long Beach, California at the time this instrument is signed. It is my desire and wish that my nephew Argirios Collias will give half of my estate to my nearest relative heir in Greece instructing him or her to distribute said half of my estate in equal shares to all my close relatives in Greece. In the event that my said nephew Argirios Collias shall predecease me, then said estate shall go and it is hereby bequeathed to my nearest relative in Greece to be distributed as above among the other relatives."

The superior court distributed all of the estate, after the payment of debts and expenses, to Collias without qualification. Upon the appeal of Efstathios Collias, Eleni Paras, and Chrysso Athanasoulis, nephew and nieces of the decedent, from the decree of distribution, they contend that it erroneously vests absolute title in Collias. The proper construction of the will, they assert, is that one-half the estate is left to Collias in trust for the use and benefit of the nearest or close relatives of the decedent in Greece.

[1] To impose a trust upon property bequeathed and devised to Collias, it must appear that the testator intended to impose mandatory duties upon him. Estate of Kearns, 36 Cal.2d 531, 225 P.2d 218. Otherwise stated, where an absolute estate has been conveyed by a will, that estate will not be limited by subsequent words unless they indicate as clear an intention therefor as was shown by the words creating the estate. Estate of Marti, 132 Cal. 666, 672, 61 P. 964, 64 P. 1071. Thus it is provided in section 104 of the Probate Code that "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

It is clear that the sentence "All the rest and residue of my estate * * * I give, devise and bequeath unto my nephew * * *", standing alone, would bequeath the property to Argirios absolutely. The only question presented for decision is whether by the sentence following the words: "It is my desire and wish * * *" the testator intended to impose a legally enforceable duty or a mere moral obligation.

[2] "'*Prima facie* a mere request, or an expression of hope or confidence or expectation, does not import a command.' * * * According to the ordinary use of the English language, the word 'desire' does not import a trust or charge. * * *" Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 965, 64 P. 1071. Thus it was said, 132 Cal. at page 672, 61 P. at page 966, that "Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed." See also Estate of Kearns, 36 Cal.2d 531, 225 P.2d 218.

[3] As a guide to the determination of the intent of the testator, the courts have stated certain general principles. Thus in Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893, 896, it was said that "* * * when words of recommendation, request and the like are used in direct reference to the estate, they are *prima facie* testamentary and imperative and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor." And again in Estate of Miles, 72 Cal.App.2d 336, 343, 164 P.2d 546, 550, it was said: "A wish or request of the testator for the disposition of his estate directed to the executor is a command, but if addressed to the legatee it will not be construed as a limitation on the estate given in absolute terms. In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071. * * *" To the same effect is Estate of Tooley, 170 Cal. 164, 149 P. 574.

[4] The appellants point out that Argirios Collias was appointed executor of the estate, and therefore contend that the words "wish and desire" should be treated as mandatory rather than precatory. However, he is also the sole devisee, and the wish and desire is addressed to him as the testator's nephew. "Where the person directed to carry out the wishes of the testator is both executor and legatee, the courts in construing the effect of the language have refused to follow the strict rule which imposes a mandatory duty on the executor and have apparently treated the words as being addressed to him in his capacity as legatee." Estate of Kearns, 36 Cal.2d 534, 225 P.2d 218, 221.

[5] Applying these rules of construction, it is clear that no trust was created by the will. By the first sentence, the entire estate is bequeathed outright and unconditionally to the nephew. The desire and wish which follow are directed to the devisee and not to the executor. Estate of Kearns, supra. In the event Argirios Collias should have predeceased his uncle, by language used in direct reference to the estate, the testator made an alternative disposition of his property. It is apparent from these provisions that the testator's "desire and wish" concerning his relative in Greece is "not equally clear and distinct" as the provision preceding it. Accordingly, applying the rule stated in section 104 of the Probate Code, and resolving any doubt suggested by the subsequent words in favor of the estate first conveyed, Estate of Marti, supra, it cannot be said that a trust or equitable charge was created which limits the absolute bequest of the entire estate to Argirios Collias.

The order is affirmed.

SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. It is my view that under the circumstances shown here the directions to the decedent's nephew Collias should be regarded as mandatory. Collias is named in the will both as a devisee and as executor. I think the intent of the testator, fairly to be derived from the will, is that Collias is to act as executor of the will to handle all of the estate; that the devise to him is to facilitate his handling of the property and carrying out of the testator's plan; that such plan envisages ultimate vesting of only a one-half interest in his own right in the nephew and the distribution of the other half "in equal shares to all my close relatives in Greece."

The same method is used by the testator in respect to securing the desired handling and distribution of the property in Greece as in America. He directs, "It is my desire and wish that my nephew Argirios Collias will give half of my estate to my nearest relative heir in Greece instructing him or her to distribute said half of my estate in equal shares to all my close relatives in Greece." Clearly the testator in directing his executor to "give" the one-half interest to his "nearest relative heir in Greece" did not intend such heir to take the entire share in his own right; the "giving" was for the purpose of convenient handling and distribution. The same intent appears in the language "giving" the estate to Collias; it was bequeathed to him to facilitate his carrying out of the testator's plan and the discharge of his duties as executor.

For further discussion reference is made to the opinion of Justice McComb, and the concurring opinion of Presiding Justice Moore, for the District Court of Appeal, reported at 225 P.2d 550, 551, and for the reasons therein and hereinabove stated I would modify and affirm the decree as ordered by the District Court of Appeal.

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37 Cal.2d 552

PEOPLE v. CHAMBERS.

No. L. A. 21478.

Supreme Court of California, in Bank.

July 13, 1951.

Action by the People of the State of California against Lovell C. Chambers to quiet title. The Superior Court, San Diego County, C. M. Monroe, J., entered a judgment quieting title in the State conditioned on the reimbursement of defendant by plaintiff of amount paid by defendant to obtain a tax deed from plaintiff and both parties appealed. The Supreme Court, Carter, J., held that where the property was acquired by the State in trust by the Park Commission for the people of the state, subsequent attempt by state officer to dispose of state land devoted to a public use was void and that state was not required to reimburse defendant for amount paid by him in acquiring tax deed and paying subsequent property taxes.

Judgment affirmed in part and reversed in part.

Prior opinion 225 P.2d 983.

1. Taxation 🔑183

Property belonging to state is not subject to taxation, and taxation thereof and tax deeds resulting therefrom are void. Const. art. 13, § 1.

2. Taxation 🔑805(4)

Where action by state was filed in 1947 to remove a cloud on its title created by defendant's tax deed which was recorded on March 11, 1940, action was not barred by 10-year statute of limitations, although state acquired title by deed in 1933 and property was sold for taxes in 1934. Code Civ.Proc. § 315.

3. Adverse possession 🔑8(1)
States 🔑201

Neither statute providing that people of state will not sue any person for or in respect to any realty or issues or profits thereof by reason of right or title of people to same unless such right or title shall have accrued within 10 years before any action or other proceeding for same is commenced nor provisions relating to adverse possession in action for recovery of realty apply to property owned by state and devoted to a public use. Code Civ.Proc. §§ 315, 318 et seq.; Civ.Code, §§ 1006, 1007.

4. Limitation of actions 🔑11(1)

General statutes of limitation apply against various agencies of state or state when its sovereign rights are not involved. Code Civ.Proc. § 345.

5. Limitation of actions 🔑11(1)

Statutes of limitation do not apply against state unless expressly made applicable.

6. Taxation 🔑183

Generally tax statutes do not apply against state as to its property.

7. Taxation 🔑805(4)

Statute providing that proceeding based on alleged invalidity or irregularity of any deed to state for taxes or any proceedings leading up to deed can only be commenced within one year after date of recording of deed to state in county recorder's office or within one year after June, 1941, whichever is greater, and statute providing that a proceeding based on alleged invalidity or irregularity of any proceeding instituted can only be commenced within one year after date of execution of tax collector's deed, do not apply to property of state. Revenue and Taxation Code, §§ 3521, 3691 et seq., 3725.

8. Taxation 🔑805(4)

Inapplicability of limitation provision in tax statute was not wiped out by statute which included "state" in definition of a taxing agency. Revenue and Taxation Code, §§ 121, 3691, 3694; Pol.Code, § 3831.1.

9. Taxation 🔑679(3), 730

Statute providing that if governing body of any taxing agency does not, before date of sale, file with tax collector and board of supervisors certified copies of a resolution adopted by governing body objecting to sale, taxing agency has consented to sale, and if taxing agency consents to sale lien of its taxes or assessments and any rights which it may have to property as result of such taxes or assessments are canceled and it is entitled to its proper share of proceeds deposited in delinquent tax sale trust fund, refers only to tax or assessment liens of governmental units other than county and makes provision for safeguarding such interests when county sells property, and it is only those liens which are canceled if no objection to sale is made. Revenue and Taxation Code, §§ 3691, 3694; Pol.Code, § 3831.1.

10. Taxation 🔑183

Statute requiring State Controller to approve sale of property tax deeded to state cannot be construed to authorize him to covenant for state to conveyance of its property, title to which was obtained from a source other than a tax deed, and which is devoted to a public use. Revenue and Taxation Code, § 3694.

11. States 🔑89

Lands of state, at least those devoted to a public use, may be disposed of only in manner specified by statute, and an attempt by state officer not authorized to dispose of state land devoted to a public use is void.

12. Taxation 🔑679(3), 730

Where state acquired title to realty by purchase and recorded deeds and property was made a part of state park system, but at time of purchase there were unpaid property taxes on land, subsequent action of county in attempting to sell property to collect delinquent taxes was void, as was subsequent deed issued to purchaser at tax sale based on county's action.

13. Taxation 🔑795, 821(1)

A private owner of property may not have his title quieted against a tax deed unless he pays purchaser at tax sale and deed holder taxes paid by latter, but, in absence of statute, a purchaser from state or public agency at tax sale cannot recover from seller purchase price paid or taxes subsequently assessed even though taxes were illegally assessed or levied, as property was not subject to taxation and tax deed was void.

14. Taxation 🔑820

Where a statute provides for recovery by purchaser from state or public agency of amount paid at tax sale or for taxes subsequently assessed, that remedy is exclusive. Revenue and Taxation Code, § 3730.

15. Taxation 🔑821(1)

Under statute providing the purchaser of tax sold or tax deeded property is entitled to a refund of amount paid as purchase price whenever it is determined by board of supervisors that property belongs to United States, state, a city or other political subdivision of state and should not have been sold for taxes, county must make a refund of purchase price. Revenue and Taxation Code, § 3730.

16. Taxation 🔑183, 821(1)

Where realty was acquired by state and held in trust for people of state by Park Commission, realty was no longer taxable and purchaser of tax deed to realty from county was not entitled to reimbursement from state of amount paid by him in acquiring tax deed and in paying property taxes subsequently levied. Revenue and Taxation Code, §§ 3728, 3728.1, 3730.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Walter S. Rountree and Dan Kaufmann, Dep. Attys. Gen., for plaintiff and appellant.

Solon S. Kipp and W. E. Starke, San Diego, for defendant and appellant.

CARTER, Justice.

Both parties appeal from a decree quieting title in plaintiff to a section of land in San Diego County conditioned upon the reimbursement of defendant by plaintiff of the amount paid by defendant to obtain a tax deed from plaintiff.

In 1933, Mr. and Mrs. Busch were the owners of the property. In that year they conveyed the property to plaintiff-state. The latter through the State Park Commission accepted the conveyance and made the property a part of the state park system.

At the time of the conveyance to the state there were unpaid taxes levied by San Diego County on the property. In 1934 the county instigated delinquent tax proceedings by reason of those taxes and the property was "sold" to plaintiff thereunder. In 1939 the property was conveyed by tax deed to plaintiff for the delinquent 1933 taxes. On March 11, 1940, the property was conveyed by tax deed from plaintiff to defendant. Taxes have been levied on the property for the years since then and paid by defendant. It was to eliminate that tax deed, as a cloud on its title, which prompted plaintiff to commence the instant action on May 28, 1947.

[1] Plaintiff's theory (and that of the trial court) is that the tax lien on the property, when it received the conveyance from the Busches, merged in its title thus acquired, and all the delinquent tax proceedings, including the final deed, were void for it owned the property which made it exempt from taxation. Cal.Const., art. XIII, § 1. It is not questioned that property belonging to the state is not subject to taxation, and taxation thereof, and tax deeds resulting therefrom are void. See People v. Doe G. 1,034, 36 Cal. 220; Warren v. City and County of San Francisco, 150 Cal. 167, 88 P. 712; City of Los Angeles v. Board of Supervisors, 108 Cal.App. 655, 292 P. 539; State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560; Sutter-Yuba Inv. Co. v. Waste, 52 Cal.App.2d 785, 127 P.2d 25; Anderson-Cottonwood I. Dist. v. Klukkert, 13 Cal.2d 191, 88 P.2d 685; Smith v. City of Santa Monica, 162 Cal. 221, 121 P. 920; Webster v. Board of Regents, 163 Cal. 705, 126 P. 974.

The main controversy concerns the effect of statutes of limitation on plaintiff's action. In his amended answer defendant asserts that the action is barred by sections 315 and 345 of the Code of Civil Procedure and sections 175, 3521, 3725 and 3726 of the Revenue and Taxation Code.

The first provision invoked reads: "The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or some part thereof, within the space of ten years." Code Civ.Proc., § 315. That section cannot bar the action for two reasons: First, it will be remembered that defendant obtained his tax deed in 1940 and the action was commenced in 1947, less than the 10 year limitation. Defendant argues that the period commenced to run in 1933 when plaintiff acquired title from the Busches, because the statute says (subd. 1) that the time runs from the time of acquisition by the plaintiff-state. That contention was settled contrary to defendant's assertion in 1885 by People v. Center, 66 Cal. 551, 564, 5 P. 263, 6 P. 481, 488, where the court said the section must be construed "as declaring, in effect, that the people of the state will not sue 'for or in respect to real property' except where the *cause of action has accrued* within 10 years." (Italics added.) The Center case has been consistently followed. See People v. Banning Co., 167 Cal. 643, 140 P. 587; People v. Kings County Development Co., 177 Cal. 529, 534, 171 P. 102; Wilhoit v. Tubbs, 83 Cal. 279, 23 P. 386; Doyle v. San Diego Land & Town Co., C.C., 43 F. 349. The cause of action would not accrue until defendant received his tax deed on March 11, 1940.

[3] Second, neither section 315 of the Code of Civil Procedure nor the provisions on adverse possession (limitations on actions for the recovery of real property, Code Civ.Proc., § 318 et seq.) apply to property owned by the state and devoted to a public use. See Civ. Code, §§ 1006, 1007; People ex rel. State Board of Harbor Com'rs v. Kerber, 152 Cal. 731, 93 P. 878; Henry Cowell Lime & Cement Co. v. State, 18 Cal.2d 169, 114 P.2d 331; Richert v. City of San Diego, 109 Cal.App. 548, 293 P 673; People v. Banning Co., supra, 167 Cal. 643, 140 P. 587; Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; Board of Education v. Martin, 92 Cal. 209, 28 P. 799; City & County of San Francisco v. Straut, 84 Cal. 124, 24 P. 814; Orack v. Powelson, 3 Cal.App. 282, 85 P. 129; City & County of San Francisco v. Calderwood, 31 Cal. 585; Fresno Irr. Dist. v. Smith, 58 Cal.App.2d 48, 136 P.2d 382; County of Sacramento v. Lauszus, 70 Cal. App.2d 639, 161 P.2d 460; Hoadley v. City & County of San Francisco, 50 Cal. 265; People ex rel. Alvord v. Pope, 53 Cal. 437; County of Yolo v. Barney, 79 Cal. 375, 21 P. 833; City & County of San Francisco v. Bradbury, 92 Cal. 414, 28 P. 803; Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141; City of Los Angeles v. Forrester, 12 Cal.App.2d 146, 55 P.2d 277; City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475; Reclamation Dist. No. 833 v. American Farms Co., 209 Cal. 74, 285 P. 688; 1 Cal.Jur. 497–508. Here, in 1933, the property was deeded to the state by the Busches, accepted for the state by the State Park Commission for park purposes and was included in the state park system, and, the law provides that: "The State Park Commission shall administer, protect, and develop the State Park System for the use and enjoyment of the public. * * *" Pub. Resources Code, § 5003.

Defendant urges, however, that the plaintiff knew in 1933 that the property was sold for taxes by San Diego County to it for it is presumed to have been notified of it (Rev. & Tax.Code, § 3440; Code Civ.Proc. § 1963, subd. 15) and that its title was then in jeopardy and the limitation period started to run. It is difficult to see how it would know its title was in jeopardy when the sale was to it, but in any event that is merely another way of arguing that title was lost under section 315 or the provisions on adverse possession, for the relief would be against the *county* not defendant, and it would require "tacking" on limitation periods (adding together the time while it ran in favor of the county and defendant) which plainly is not applicable except in adverse possession which is unavailable to defendant.

Other limitation provisions asserted by defendant are as follows: (1) A deed issued to the state by reason of delinquent taxes is conclusively presumed valid unless held invalid in a proceeding to determine its validity commenced within a year after the execution of the deed or after the effective date of the statute (Stats.1945, ch. 1017, § 1) whichever is later (Rev. & Tax.Code, § 175); (2) "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later" (Rev. & Tax. Code, § 3521); and (3) "A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed." Rev. & Tax. Code, § 3725. The chapter deals with sales to private parties after deed to the state. Rev. & Tax.Code, § 3691 et. seq.

Plaintiff argues that those provisions are not controlling because they do not apply to the state and there was no authority whatsoever for any of the tax proceedings —they were a complete nullity.

[4] It has been held that general statutes of limitation apply against various agencies of the state or the state when its "sovereign" rights are not involved. City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370, against a city when suing a county; San Francisco v. Luning, 73 Cal. 610, 15 P. 311, against municipal corporations; People v. Melone, 73 Cal. 574, 15 P. 294, against state; State Bd. of Health v. Alameda County, 42 Cal.App. 166, 183 P. 455, and Tehama County v. Pacific Gas & Elec. Co., 33 Cal.App.2d 465, 91 P.2d 936, against county; City of Fullerton v. County of Orange, 140 Cal.App. 464, 35 P.2d 397, against city in action by it against county; People v. Osgood, 104 Cal.App. 133, 285 P. 753 against state; People v. Kings County Dev. Co., 48 Cal.App. 72, 191 P. 1004. That rule springs from the code provision reading: "The limitations prescribed in *this chapter* apply to actions brought in the name of the State or county or for the benefit of the State or county, in the same manner as to actions by private parties, * * *." (Italics added.) Code Civ. Proc. § 345.

The *chapter* referred to is *chapter 3* of part 2, title 2 of the Code which deals with limitations for actions *other* than for the recovery of real property. The latter type of actions including section 315, are in chapter 2. It has been recognized that as to limitations in that chapter (3) that the state has included itself. San Francisco v. Luning, supra, 73 Cal. 610, 15 P. 311; People v. Melone, supra, 73 Cal. 574, 15 P. 294; State Bd. of Health v. Alameda County, supra, 42 Cal.App. 166, 183 P. 455; Philbrick v. State Personnel Board, 53 Cal.App.2d 222, 127 P.2d 634. People v. Osgood, supra, 104 Cal.App. 133, 285 P. 753, and People v. Kings County Dev. Co., supra, 48 Cal.App. 72, 191 P. 1004, state that the general policy of the state is to be bound by statutes of limitation, but that is hardly in conformity with the restricted wording of section 345, supra.

[5] It has been, on the other hand, generally stated that statutes of limitation do not apply against the state unless expressly made applicable. See City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277; Z. Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043; People v. City of Los Angeles, 93 Cal.App. 532, 269 P. 934; Philbrick v. State Personnel Board, supra, 53 Cal.App.2d 222, 127 P.2d 634; People v. California Fish Co., 166 Cal. 576, 593, 138 P. 79.

In Z. Russ & Sons Co. v. Crichton, supra, 117 Cal. 695, 699, 49 P. 1043, 1044, the issue was whether a provision of the Political Code dealing with taxation, which provided that if a tax deed is not made to the purchaser within a year and three months after the act takes effect, the purchaser has no right thereunder, applied to the issuance of a tax deed to the state. It was held that it did not, and the court said: "In Tuttle v. Block, 104 Cal. 443, 38 P. 109, it was held that the said provision was 'clearly a prospective statute of limitation of the time within which the tax deed must have been made'; and the rule is settled beyond all controversy that statutes of limitation do not apply to or bind the state unless they are made to do so by express words or necessary implication.

[6] "The language of the provision, 'in all cases,' etc., is apparently broad enough to include the state; but a statute will not always be held to include every case to which it may appear on its face to be applicable." With respect to tax statutes, the above statement is in line with the general rule that tax statutes do not apply against the state as to its property. People v. Doe G. 1,034, supra, 36 Cal. 220; Webster v. Board of Regents, supra, 163 Cal. 705, 126 P. 974; Low v. Lewis, 46 Cal. 549; Smith v. City of Santa Monica, supra, 162 Cal. 221, 121 P. 920; Bolton v. Terra Bella Irr. Dist., 106 Cal.App. 313, 289 P. 678.

[7] In any event it seems that if the statutes on adverse possession do not run against property of the state which is dedicated to a public purpose (see authori-

ties cited supra) the opposite result should not be reached, depriving the state of its property, by application to it of the provisions, supra, of the Revenue and Taxation Code. We hold therefore that they do not apply to the state.

[8] Defendant claims that the authorities heretofore cited with reference to the inapplicability of the limitation provisions in tax statutes were wiped out by the provision enacted in 1939 (Stats.1939, ch. 529, Pol.Code, § 3831.1; Rev. & Tax.Code, § 121) which included the "state" in the definition of a "Taxing Agency." We do not think any such result was intended. There is nothing said about any taxing agencies in the sections of the Revenue and Taxation Code, supra, invoked by defendant, and hence the "definition" section would not seem to be applicable.

[9–12] In this same connection defendant urges, specifically, that under section 3695 of the Revenue and Taxation Code, the state consented to the tax sale. The Code authorizes the sale of property by the tax collector after deed to the state upon approval of the county board of supervisors and the state controller. Rev. & Tax.Code, §§ 3691, 3694. "If the governing body of any taxing agency does not, before the date of sale, file with the tax collector and the board of supervisors certified copies of a resolution adopted by the governing body objecting to the sale, the taxing agency has consented to the sale. If the taxing agency consents to the sale the lien of its taxes or assessments and any rights which it may have to the property *as a result of such taxes or assessments are canceled* by a sale under this chapter and it is entitled to its proper share of the proceeds deposited in the delinquent tax sale trust fund. * * *" Rev. & Tax. Code, § 3695. (Italics added.) Assuming that the phrase "taxing agency" as there used includes the state, it plainly refers only to tax or assessment liens of governmental units other than the county and makes provision for safeguarding *such* interests when the county sells the property, and it is only those liens which are cancelled if no objection to the sale is made. That is evident from the italicized portion of the section. Plaintiff-state here is not claiming title or interest by reason of any tax lien. Its title is founded upon the conveyance from the Busches in 1933. Nor can it be supposed that the state controller, by his consent to the sale, could authorize the divestiture of the state's title to property devoted to a public use. See Smith v. City of Santa Monica, 162 Cal. 221, 121 P. 920. Section 3694 of the Code requiring the controller to approve the sale of property tax deeded to the state, cannot be construed to authorize him to covenant for the state to the conveyance of its property, title to which was obtained from a source other than a tax deed, and which is devoted to a public use. Lands of the state, at least those devoted to a public use, may be disposed of only in the manner specified by statute. Buck v. Canty, 162 Cal. 226, 121 P. 924; Messenger v. Kingsbury, 158 Cal. 611, 112 P. 65, and an attempt by a state officer, not authorized to dispose of state land devoted to a public use, is void. People v. California Fish Co., 166 Cal. 576, 138 P. 79.

[13–15] As above noted the trial court made its decree conditional on plaintiff paying to defendant the amount he paid for the property at the tax sale to him and for taxes subsequently levied on the property by San Diego County. Plaintiff appeals from that portion of the judgment and defendant makes no contention that it is correct. He relies solely upon his asserted ownership of the property. Nevertheless it may be observed that it is the settled rule that a private owner of property may not have his title quieted against a tax deed unless he pays the purchaser at the tax sale and deed holder the taxes paid by the latter. But in the absence of statute, a purchaser from the state or public agency at a tax sale cannot recover from the seller the purchase price paid or the taxes subsequently assessed even though the taxes were illegally assessed or levied, the property was not subject to taxation or the tax deed was void. Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1, 149 A.L.R. 215;

Loomis v. County of Los Angeles, 59 Cal. 456; Brooks v. County of Tulare, 117 Cal. 465, 49 P. 469; Bell v. County of Los Angeles, 90 Cal.App. 602, 266 P. 291; Coleman v. County of Los Angeles, 180 Cal. 714, 182 P. 440; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L.R.A. 1915C, 492; 24 Cal.Jur. 391–2; 77 A.L.R. 824; 116 A.L.R. 1408. Where a statute provides for recovery, that remedy is exclusive. See Bell v. County of Los Angeles, supra, 90 Cal.App. 602, 266 P. 291; Southern Service Co., Ltd., v. Los Angeles, 15 Cal.2d 1, 11, 97 P.2d 963. There are statutory provisions with reference to reimbursement in this state. The basic rule applicable is: "The purchaser of tax sold or tax deeded property is entitled to a refund of the amount paid as purchase price whenever it is determined by the board of supervisors that the property belongs to the United States, this State, a city, or other political subdivision of this State and should not have been sold for taxes. The refund shall be made in the same manner as a refund of an overpayment of tax." Rev. & Tax. Code, § 3730. Thus it is seen that the county must make a refund of the purchase price.

[16] There are other provisions for refunds but they plainly deal with situations where the taxes are validly levied and payable but the deed is void. Then the refund to the purchaser should be made by the owner or taxpayer. Before holding void a tax deed given under certain provisions of the code the court shall determine the correct amount of taxes, penalties and costs that should be paid upon redemption to discharge the tax liens of all taxing agencies "had the purported tax sale not been held" and shall order the former owner to pay from such amount in six months to the purchaser the amount expended by him in pursuit of the "State's title to the property" and for improvements and to the county the balance. Rev. & Tax. Code, § 3728. If the amount is not paid within the time fixed a new deed shall be "issued." Id. § 3728.1. Those provisions are based on the assumption that there are some taxes payable. Here there can be none, for the property was not taxable, and they apply where the owner, when the property was taxed, was a private person rather than the state.

The portion of the judgment quieting plaintiff's title is affirmed. The portion imposing the reimbursement condition is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

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105 Cal.App.2d 525

ANDREWS et al. v. CUNNINGHAM et al.
CUNNINGHAM et al. v. ANDREWS et al.
Civ. 14576.

District Court of Appeal, First District,
Division 2, California.
July 18, 1951.

Vella M. Andrews, and others, brought an action against James F. Cunningham, and another, for alleged breach of contract whereunder defendants were to build a house and other improvements for the named plaintiff and defendants filed a cross-complaint, and James F. Cunningham, and another, brought an action against Vella M. Andrews, and others, for amount allegedly due on the contract and to have the contract declared to be a lien on the property. The actions were consolidated for trial. The Superior Court, County of Santa Cruz, H. S. Shaffer, J., rendered a judgment adverse to plaintiff, Vella M. Andrews, and such plaintiff appealed. The District Court of Appeal, Dooling, J., held that the judgment was required to be reversed since District Court of Appeal could not ascertain from fact findings of trial court what issues were decided in favor of either party.

Judgment reversed.

1. Appeal and error ⚷931(8)

Fact findings of trial judge in action for breach of contract would be liberally construed on appeal to support the judgment.

2. Appeal and error ⚷1071(6)

Findings are required on all material issues raised by pleadings and evidence, unless they are waived, and, if court renders judgment without making findings on all material issues, case must be reversed.

3. Trial ⚷395(2)

Findings of fact should be definite and certain and should be so framed that defeated party can specify intelligibly the particulars in which they are not supported by evidence, where such point is made on appeal.

4. Appeal and error ⚷1071(1)

Where there are contradictory findings about matters material to merit of case, and determination of them is essential to correctness of judgment, judgment cannot stand.

5. Appeal and error ⚷1071(1)

Where District Court of Appeal, on appeal from judgment adverse to plaintiff in action for breach of contract whereunder defendants were to build a house and other improvements for plaintiff, could not ascertain from fact findings of trial court what issues were decided in favor of either party, and determination of issues were essential to correctness of judgment, judgment would be reversed.

◆

James F. Boccardo, Jean M. Blum, San Jose, for appellant.

Wyckoff, Gardner, Parker & Boyle, Watsonville, for respondents.

DOOLING, Justice.

Vella M. Andrews was the owner of land in Santa Cruz County on which she desired to have a house and other improvements built. To this end she entered into an oral agreement with Cunningham and Welch, a copartnership, who were general contractors. The agreement was entered into the latter part of 1946. Work on the improvements was begun in September, 1946 and was completed in the early part of 1947. The agreement, and the work performed pursuant thereto, resulted in the following litigation:

Vella Andrews filed a complaint against Cunningham and Welch for damages for breach of contract. An answer and cross-complaint were filed by defendants, and at the conclusion of the trial an amended cross-complaint was filed. These pleadings comprise action No. 22,197. Cunningham and Welch filed a separate complaint for the balance claimed due them on the contract and to have the amount declared a lien on the property. Andrews answered and cross-complained. This was action No. 22,226.

The actions were consolidated for trial. Hereafter Vella Andrews will be referred to as the plaintiff, and Cunningham and Welch as defendants.

The trial of the action resulted in a judgment in favor of defendants for $5,080.81 from which the plaintiff appeals. The court found that under the oral contract the defendants were to be paid on a time and material basis plus 10%, that this amounted for the entire job to $16,080.81, that $8000 had been paid on account and that plaintiff was entitled to an offset of $3000 by reason of defendants' unskilled, unworkmanlike and careless construction.

The findings were made by reference to the pleadings and after an analysis of the pleadings and findings we are convinced that some of the material findings are not only not supported by any evidence but are expressly contrary to all of the evidence introduced on the subject by both parties, that by reason of this fact and the extremely general character of other findings the findings as a whole are so vague, ambiguous, uncertain and self-contradictory as to require a reversal of the judgment.

It is undisputed that the oral contract entered into by the parties was to build a home of hollow concrete tile in accordance with plans drawn by a firm of architects. It cannot be disputed that these plans expressly call for certain structural features alleged as a part of the contract in paragraph III of plaintiff's complaint in the following language: "that the defendants * * * agreed to construct the * * * house and garage with top course 8″ x 8″ concrete bond course with two (2) ⅝″ rods horizontally * * * to construct * * * house and garage with * * * outside walls with ⅜″ iron rods horizontally every third course * * * to construct * * * house and garage with concrete lintels over all openings * * * to reinforce and construct the concrete floor slabs * * * with wire mesh."

The court found that "(n) one of the allegations in the paragraphs numbered II and III is true except that the areas of the floor space of the house and garage * * * are 1060 square feet and 460 square feet, respectively, and except that plaintiff" owns the property. By reference to the allegations of paragraph III above quoted and the quoted finding in relation to it the court found, against all of the evidence introduced on that subject, that the parties did not agree to any of the four structural features therein alleged.

[1] Since a departure from two of these features was admitted, the substitution of angle irons and hollow tile over the openings for concrete lintels everywhere but in the garage and of hollow tile for a concrete bond top course, and since the evidence, to put it mildly, heavily preponderates to support a finding that no wire mesh was placed in the concrete floors, and since the mason who laid the walls as a subcontractor expressly testified "I wasn't asked to follow anything specified" and that rods were not placed horizontally in every third course (which testimony was supported by test holes made in several places in the walls), this express finding that none of these features was agreed to by the parties should itself result in a reversal, unless construing the findings liberally, as we are required to do on appeal, we can find that other findings so clearly correct this error of the court that it did not result in prejudice to the plaintiff.

It was defendants' theory on the trial that the substitution of other material for concrete lintels and top course was a deviation requested and orally agreed to by plaintiff. There was no claim and no attempt to prove that the deviations in the omission of mesh from the concrete floors (if proved) and of horizontal rods in every third course in the walls was consented to by plaintiff.

In paragraph IV of the complaint it is alleged that defendants failed to erect the house and garage with a concrete top bond course, with horizontal iron rods in every third course, with concrete lintels over openings and with wire mesh in the concrete floors.

The trial court found that "(n)one of the allegations in * * * paragraph * * * IV is true except that:

"1. Said defendants agreed to construct certain improvements * * * according to certain agreed plans from which during the course of construction, deviations and departures were made with the consent of said plaintiff;

"2. Said defendants commenced the construction * * * on or about September 3, 1946 and * * * ceased work * * * on February 19, 1947; and

"3. A portion of the work of construction thereof was done in an unskilled, unworkmanlike and careless manner."

The court further found:

"It will reasonably cost plaintiff * * * the sum of Three Thousand Dollars ($3000.00) to repair said house and garage and make it in the condition in which it would have been had defendants constructed the same in a skilled, workmanlike and careful manner."

These findings are so general that they are little better than the general verdict of a jury. Since the court found expressly that the contract did not call for any of the four structural features above discussed and which were embodied in the only plans before the court what plans did the court intend to find were the basis of the contract? If the court intended to find that the agreed plans were those which contained the four structural features which it had previously expressly found were not agreed upon what deviations did the court intend to find were agreed upon? And what deviations led the court to find that the defendants did the work in such an unskilled, unworkmanlike and careless manner that it would cost $3,000 to put it in a proper condition? If the court intended to find that none of the alleged deviations from the plans occurred the finding is not supported by the evidence. If the court intended to find that some of them occurred it is impossible to determine from the general finding of negligent and unworkmanlike construction which, if any, were in the mind of the judge.

[2-4] It is elementary law, recently reiterated in Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260, 267, that: "Ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed." It is the equally well settled rule that "findings of fact should be definite and certain. They should be so framed that the defeated party can specify intelligibly the particulars in which they are not supported by the evidence, where such point is made." 24 Cal.Jur. 963-964. So "(w)here there are contradictory findings about matters material to the merits of a case, and the determination of them * * * is essential to the correctness of the judgment, the judgment cannot stand." 24 Cal.Jur. 965-967. Finally "(t)he parties 'are entitled to special findings upon the issues as thus presented in order that they may point out the precise errors of the trial court upon motion for a new trial and upon appeal'. Klein v. Milne, 198 Cal. 71, 76, 243 P. 420." Clements v. Lanning, 89 Cal.App. 2d 817, 820, 202 P.2d 98, 100.

[5] We confess that we cannot ascertain from the hodge-podge of findings made just what issues were decided in favor of either party. On many of the issues the evidence heavily preponderates in favor of the plaintiff and on one, the failure of the contractor to place horizontal rods in every third course, it is undisputed that the contract was not followed and no deviation from the plans was agreed to. There was substantial evidence that this rendered the walls structurally unsound and that there was no way to remedy this short of tearing them down and rebuilding them. Did the court intend to find that the contract was not departed from in this particular? Such a finding would find no support in the evidence. Did the court intend to find that plaintiff agreed to this deviation? Again no support in the evidence. Did the court intend to find that this was unworkmanlike, unskilled and careless construction which could be remedied by expending $3,000 or some part of it? Still no support in the evidence. Did the court intend to find that the deviations were trivial or excusable and that the contract in this respect had been substantially performed? If so there is no such finding.

The discussion of this one issue demonstrates the hopelessly uncertain state of the findings. While the findings are to be liberally construed on appeal to support the judgment they must be sufficiently definite and intelligible to dispose of the material issues tendered without resort to pure speculation and conjecture. The findings in this case do not measure up to this minimum requirement and if justice is to be done between the litigants this bare minimum must be met.

Judgment reversed.

GOODELL, J., concurs.

105 Cal.App.2d 445

DAVISSON et al. v. FAUCHER et al.

Civ. 17682.

District Court of Appeal, Second District, Division 1, California.

July 16, 1951.

Action by Frank T. Davisson and another against H. M. Faucher and another to recover damages for breach of oral and written contracts and for false representations inducing such contracts. The Superior Court of Los Angeles County, Charles E. Haas, J., entered an order denying defendants' motion for judgment notwithstanding the verdict and rendered judgment for plaintiffs and named defendant appealed. The District Court of Appeal, Hanson, Justice pro tem., held that written contract by which parties to oral contract agreed that fulfillment of written contract should constitute an effective release of all obligations from one party to the other was a complete novation of all existing obligations of the parties to each other and that upon breach by defendant of contract of novation, plaintiffs were entitled to recover at most the damages for such breach and for any false representations inducing contract of novation but that they could not recover for damages sustained at and prior to execution of contract of novation by reason of breach of prior oral contract or for false representations inducing it.

Judgment and order reversed and new trial ordered.

1. Novation ⚿**4, 10**

Written contract by which parties to oral contract to sell two houses and move them to purchasers' lot, allegedly breached by vendor, agreed that fulfillment of written contract should constitute an effective release of all obligations from one party to the other, though executory, was a complete "novation" of all existing obligations of the parties to each other, canceling the oral contract and all obligations arising from it.

See publication Words and Phrases, for other judicial constructions and definitions of "Novation".

2. Novation ⚿**10**

Upon breach of contract of novation by one of the parties thereto, the other party was entitled either to sue for damages or to seek a rescission of the contract, but he could not do both.

3. Novation ⚿**10**

Upon breach by defendant of written contract of novation of all existing obligations of plaintiffs and defendant to each other, plaintiffs were entitled to recover at most damages for such breach and for any false representations inducing plaintiffs to enter into such contract, but they could not recover for damages sustained at and prior to execution of written contract by reason of defendant's alleged breach of prior oral contract or for false representations inducing prior contract.

◆

Charles Murstein, Los Angeles, for appellant.

J. Marion Wright and Owen E. Kupfer, Los Angeles, for respondents.

HANSON, Justice pro tem.

The basic question here presented is whether purchasers after having entered into a written executory contract with a seller absolving the latter from liability for alleged prior false representations and promises made to induce the purchase of two houses may after giving notice of rescission of that contract, sue and recover for all damages accruing to the purchasers both prior and subsequent to the written contract.

Originally the parties entered into an oral contract by the terms of which the defendant agreed not only to sell two houses she owned to the plaintiffs, but to move them to the latter's lot and there place them upon foundations to be prepared by plaintiffs—all for a consideration of $7,000. One of the terms of the oral contract required the defendant to procure from the city the requisite permits involved in moving, placing and maintaining the houses on the premises of the plaintiffs. The complaint, which sought actual damages in the sum of $12,661 and exemplary damages in the sum of $10,000 alleged that the defendant not only breached the *oral* contract, but also made various material false representations to induce the purchase. The complaint further averred that as a result of these claims by the plaintiffs, and a demand by them, the defendant entered into a *written* contract with the plaintiffs wherein the defendant agreed to rectify and settle the claims of respondents by undertaking to fulfill the obligations as set forth in the written contract. The complaint goes on to aver that the defendant breached the later written contract in certain particulars and as a consequence the plaintiffs served upon the defendant a notice of rescission of the written contract. The complaint, however, does not seek a judgment of rescission, but instead damages based on the various alleged acts of the defendant, such as the initial alleged false representations which induced the oral contract, breaches thereof and outlays made and which would have to be made by reason of the breach of the written contract. The evidence disclosed that the defendant-appellant expended $1,172 toward the fulfillment of her obligations as set forth in the written contract. There was no evidence as to the further cost that would be involved in fulfilling the remaining terms of the contract.

Over apt objections made during the trial to evidence and to the instructions given and refused the court submitted the cause to the jury under instructions which permitted it to allow damages on respondents' theory of damages.

The written contract recites the purchase on the part of the plaintiffs of the two houses here involved from the defendant Faucher and the payment of the consideration therefor by the plaintiffs; that in moving the houses to the lot of the plaintiffs it was necessary for Faucher to remove the roof and porch of one of the houses and part of the roof of the other, as well as certain plumbing fixtures in each of the houses. The contract by its language proceeds to obligate Faucher to install a new roof of new materials on the one house as per a blueprint attached, to repair the roof of the other house, and to do certain other acts which need not here be detailed. The contract likewise details some minor obligations to be performed by plaintiffs. The contract then goes on to recite: "Both parties agree that fulfillment of this agreement by each party hereto shall constitute an effective release of all obligations of every sort from one party in favor of the other * * *."

[1] It is evident from the foregoing recitals that the written contract was a complete novation of all obligations of the parties, one to the other, which existed prior to the execution of the written contract and in particular the obligations arising out of the oral contract. The fact that the written contract was executory is of no moment. Beckwith v. Sheldon, 165 Cal. 319, 131 P. 1049. By the novation the old oral contract, and all obligations arising out of it, were "canceled and obliterated as completely as though it had never had existence." Beckwith v. Sheldon, 165 Cal. 319, 131 P. 1049, 1050; to the same effect is Eckart v. Brown, 34 Cal.App.2d 182, 93 P.2d 212; see also 1 Black on Rescission and Cancellation, 2nd Ed., sec. 8.

[2] Upon a breach of the contract of novation by the defendant Faucher the plaintiffs were entitled either to sue for damages or to seek a rescission of it, but they could not do both. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039. Initially, the plaintiffs elected to rescind the contract by giving notice to that effect, but later on in instituting the present action they did not seek a judgment of rescission or, in the alternative, damages for breach of the contract. Instead, they sought damages arising out of the superseded contract and damages for the breach of the written contract of novation together with damages for false representations which induced them to enter into it.

We do not stop to consider whether the complaint failed to state a cause of action, as appellant contends, nor do we tarry to decide whether the plaintiffs by their notice of rescission made a binding election. Instead we proceed upon the assumption, as it is stated by the respondents, that they seek neither a rescission of the contract nor damages for its breach, but instead damages for fraud and deceit. Upon that premise what are the rights of action of respondents as contradistinguished from the would-be causes of action alleged? We think the answer is quite simple.

[3] At the outset we note that the action for damages, if maintainable, must be based on the assumption that the contract was not effectually rescinded, but instead was affirmed as being binding on the parties. 3 Black on Rescission and Cancellation, 2nd Ed., secs. 561–563. On the theory that the contract was affirmed by respondents the latter were entitled to recover damages for any breach of the terms of the written contract and perhaps damages, if any, resulting from false representations, if such there were, that caused the respondents to enter into that contract. Cf. Waldman Produce v. Frigidaire Corporation, 157 Misc. 438, 284 N.Y.S. 167. Assuming, for the sake of argument, that the jury on the facts was entitled to find there had been a breach of the contract by the appellant-defendant and that the latter had made false representations to the respondents which had caused the latter to enter into the contract, it is nevertheless obvious that such damages, and those alone, were at best recoverable. The case, however, as it was submitted to the jury, by the instructions given, permitted it to find not only such damages, but in addition any and all damages that the respondents sustained at and prior to the execution of the written contract of novation. That being true it follows that the case must be reversed, regardless of any and all other errors assigned. Among the errors assigned by appellant are (1) that the complaint failed to state a cause of action; (2) that the evidence failed to establish that the plaintiffs sustained any damage; (3) that the court erred in not granting a nonsuit and likewise in not directing a verdict; (4) that the court erred in the instructions it gave and refused; (5) that it erred in its rulings on evidence. These alleged errors, and others which we have not detailed, have been considered by us, but as we are of the view that so far as the errors assigned are well taken, they all merely add up to the fact that the case must be reversed and tried anew.

Accordingly, the judgment and the order denying the motion for judgment notwithstanding the verdict are reversed and a new trial ordered.

WHITE, P. J., and DRAPEAU, J., concur.

K. & M. Inc. et al. v. LE CUYER et al.
Civ. 17974.

District Court of Appeal, Second District,
Division 3, California.
July 9, 1951.

Rehearing Granted July 25, 1951.*

K. & M. Inc., a corporation, brought action to recover installments due under contract for sale of cocktail room and restaurant against George LeCuyer, and others. Defendants filed cross-complaint against plaintiff and Paul E. Tapley for rescission of contract on ground of fraud. The Superior Court of Los Angeles County, Walter R. Evans, Judge Assigned, rendered judgment in favor of plaintiff, and defendants appealed. The District Court of Appeal, Bartlett, Justice pro tem., held that where plaintiff, under lease, had executed and recorded chattel mortgage on business fixtures as security for rentals, and lease and mortgage disclosed terms of deposit, defendants could not rescind for alleged misrepresentation as to terms of mortgage.

Judgment affirmed.

1. Appeal and error 🔑931(1)

On appeal, all evidence which would support findings of trial court must be accepted as true, and all evidence in conflict therewith must be excluded, and every inference from evidence which is favorable to appellant must be taken.

2. Chattel mortgages 🔑150(1)

Where owner of cocktail room and restaurant executed and recorded chattel mortgage on furniture, fixtures and equipment as security for rentals, buyers of the business had constructive knowledge of terms of mortgage. Civ.Code, §§ 1213, 1215, 2963.

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* Subsequent opinion 238 P.2d 28.

3. Sales 🔑38(1)

Where owner of cocktail room and restaurant, under lease, withdrew $2,500 deposited as security for payment of rentals of $36,000 plus percentage of gross sales, and executed and recorded in its place a chattel mortgage on furniture, fixtures and equipment, and terms of security deposit were stated both in lease and mortgage, buyers of business could not rescind sale contract for alleged misrepresentation that the business was hypothecated for performance of lease in sum of $2,500. Civ. Code, §§ 1213, 1215, 2963.

4. Sales 🔑185, 347(1)

Where owner of cocktail room and restaurant, pursuant to provisions of recorded lease, executed chattel mortgage on furniture, fixtures and equipment as security for rentals, and entered into contract of sale providing for assignment of lease and also for transfer of stock in trade, good will and fixtures free of encumbrances and liens except those mentioned in contract, tender by buyers of balance due, after failure to make installment payments, on condition that property be transferred free of chattel mortgage was not made in good faith and was ineffective in view of fact that buyers had entered possession and became subject to lease, and unpaid installments could be recovered. Civ.Code, §§ 1493, 1494.

5. Chattel mortgages 🔑225(1)

Where owner of cocktail room and restaurant, under lease, executed and recorded chattel mortgage on furniture, fixtures and equipment as security for rentals, and buyers were assigned lease with notice of mortgage and with consent of lessor, and entered in possession, buyers stepped in shoes of owner, and were under duty to pay rent to lessor and were subject to obligations of chattel mortgage.

6. Landlord and tenant 🔑80½

An assignee of lease is presumed to take leasehold estate in the condition which characterized it at the time of the assignment.

7. Tender 🔑11, 14(1)

Tender of balance due under a contract must be made in good faith and in such manner as to most likely, under the circumstances, benefit the creditor, and must be free from any condition which creditor is not bound to perform. Civ. Code, §§ 1493, 1494.

8. Appeal and error 🔑1033(7)

Appellants could not complain of failure to make a finding which would necessarily have been adverse to them.

9. Appeal and error 🔑1071(6)

In cross-action to rescind a contract for sale of business for fraud, failure of trial court to find on allegations that representations allegedly fraudulently made were untrue and amount of damage suffered thereby, was not prejudicial error where court found that the representations were not made.

10. Trial 🔑404(1)

Findings of a court are to receive such construction as will uphold rather than defeat its judgment thereon, and are to be read and considered together and liberally construed in support of the judgment.

11. Evidence 🔑471(29)

In action to recover installments due on contract for sale of business, wherein cross-action for rescission was filed, question to agent of seller's lessor as to whether chattel mortgage executed by seller as security for rentals could be released by depositing $2,500 with lessor, was properly excluded as calling for a conclusion.

◆

Charles A. Thomasset and Lee D. Mathews, Los Angeles, for appellants.

Arthur V. Kaufman and George Appell, Los Angeles, for respondents.

BARTLETT, Justice pro tem.

Plaintiff alleged in its complaint filed March 14, 1949, that on or about May 24, 1948, the parties entered into a written agreement whereby plaintiff sold defendants a cocktail room and restaurant for $19,000, $9,750 of which was paid in an escrow between the parties and the balance was to be paid by defendants in installments of $700 per month, commencing August 1, 1948. Plaintiff further alleged that defendants had failed and refused to pay the installments due January 1, February 1 and March 1, 1949, and prayed judgment for the sum of $2,100.

Defendants denied all of the allegations of the complaint, except an allegation contained therein, that defendants had paid plaintiff the sum of $9,750, plus installments of $700 per month up to and including December of 1948. As an affirmative defense defendants, after setting forth their conception of the legal effect of the contract of sale, alleged that they tendered plaintiff, on March 10, 1949, the entire balance remaining due under the contract upon certain conditions set forth therein. They further alleged that plaintiff made no objection to the tender and refused to transfer to them those things to which they deemed themselves entitled. As a second affirmative defense defendants, after incorporating as a part thereof the allegations as to the tender set forth in their first affirmative defense, alleged that on March 19, 1949, they had rescinded the contract and offered to return to defendants everything of value received by them on condition that plaintiff likewise return to them everything of value received by it. Defendants also filed a cross-complaint for a rescission and a supplemental answer. The cross-complaint in substance alleged that at and prior to the execution of the contract, plaintiff represented that the restaurant and cocktail business was hypothecated for the faithful performance of the lease covering the premises in the sum of $2,500 and that upon receipt of payment in full plaintiff would transfer concurrently with said payment, all property, free and clear of encumbrances and liens; that defendants believed and relied upon said representations; that said representations were false in that said restaurant and cocktail business was hypothecated to secure the lease which provided for rentals in the total sum of $36,000 plus a percentage of the gross sales; that payment in full had been tendered by defendants to plaintiff on March 10, 1949, upon condition that plaintiff perform its part of the agreement, but that plaintiff had failed so to do; that had defendants known of the falsity of the representations they would not have executed the agreement nor paid the sum of $13,250 above mentioned; that upon discovery of the fraud, defendants had rescinded; and that by reason of the premises, defendants had been damaged in the sum of $10,000 and prayed for the return of its payment and for the said damages.

The supplemental answer set forth, in substance, that on September 31, 1949, defendants tendered to plaintiff the full amount due under the agreement upon condition that plaintiff perform its obligations thereunder and that plaintiff failed and refused so to do.

The court found that the allegations of the complaint were true and that the allegations of fraud contained in the cross-complaint were untrue and rendered judgment in favor of the plaintiff and against the defendants for the sum of $2,100.

Defendants contend that the judgment should be reversed for the reasons "that the judgment is not supported by the evidence and is contrary thereto", that certain specific findings made in regard to the allegations of the cross-complaint are not supported by the evidence, that the court failed to find on certain affirmative allegations of the answer and the cross-complaint and that the court erred in sustaining objections made by plaintiff to certain questions asked by defendants.

[1] Defendants nowhere contend that the findings did not support the judgment and we take it, therefore, it is their contention that the evidence was insufficient to justify the findings as a whole. In reviewing findings it is our duty to accept as true all the evidence which would support the findings, excluding all evidence in conflict therewith, and take every inference from the evidence which is favorable to the plaintiff. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. With those principles in mind, we will briefly summarize the evidence which was before the court. Prior to the dealings with defendants the plaintiff had entered into a lease with Louise I. Roessler for the premises in

question for a period of five years commencing on the 16th day of October, 1947, and ending on the 15th day of October, 1952. Paragraph 3 of this lease provided, in part, as follows:

"Lessee covenants and agrees to pay to Lessor as and for rent for said premises during the full term of this Lease, and in addition to all other payments and considerations herein provided for, each and all of the following respective sums of money at the time hereinafter specified:

"(a) A minimum rental of the sum of $36,000.00 payable as follows:

"$600.00 upon the making and execution of this agreement, receipt whereof is hereby acknowledged; and a like sum of $600.00 on the 16th day of each and every month thereafter until the full sum of $36,000.00 shall be paid.

"(b) In addition to the foregoing payments of minimum monthly rental, Lessee shall pay to Lessor as rent the following additional sums:

"Of any all gross sales of and income from, the business of Lessee in the demised premises, such sums as 7% (seven percent) of such gross sales and income exceeds in any month the sum of $600.00."

Another paragraph of the lease which is of importance in the case was paragraph 15 reading as follows: "Lessee has delivered to Lessor, as security for the faithful performance of Lessee hereunder, the sum of $2,500.00, receipt whereof is hereby acknowledged. It is agreed that at any time during the life of this Lease, said deposit of $2,500.00 may be withdrawn by Lessee upon substitution therefor, as such security, a good and sufficient chattel mortgage of the furniture, furnishings, fixtures and equipment, of the reasonable value of $5,000.00, contained within the demised premises."

Under the terms of this paragraph of the lease the plaintiff, after depositing the sum of $2,500 in cash, withdrew this sum and executed the chattel mortgage referred to therein. This fact was disclosed to the defendants. The chattel mortgage was recorded in the Office of the County Recorder of Los Angeles County on December 16, 1947.

The contract between the parties in this case was dated May 24, 1948. It provided that for the consideration therein stated plaintiff would assign the lease to which we have just referred to defendants and would also transfer to them the liquor license on the premises, the stock in trade, goodwill and fixtures "free of all encumbrances and liens of every kind and description except those mentioned herein." By the terms of the agreement Paul E. Tapley was chosen by the parties to act as an escrow agent.

The evidence showed that the defendants were in default in the installments which, under the terms of the contract of sale, were due January 1, February 1, and March 1 of 1949. It further showed that at the time of the meeting in the office of the escrow agent of the parties, the lease between plaintiff and the owner of the premises was examined by the defendants and clause 15 thereof containing the provisions regarding a chattel mortgage on the fixtures to secure rents was discussed and acquiesced in by defendants. The evidence further showed that thereafter the lease was assigned to the defendants, the lessor consented to the assignment, the defendants accepted the assignment and entered into the possession of the premises, operated it as a cocktail room and restaurant for months and never raised any question regarding the chattel mortgage until after they were in default in their payments due to plaintiff.

[2, 3] Defendants strenuously contend that the court's finding that there was no fraud or deception on the part of the plaintiff is not supported by the evidence. We have heretofore set forth the allegations of the cross-complaint regarding fraud. The defendants admit that it was disclosed to them that the plaintiff had withdrawn the sum of $2,500 mentioned in paragraph 15 of the lease and had executed the chattel mortgage provided for in that paragraph. There is much discussion in the brief regarding the question as to whether or not the chattel mortgage could be released by returning the $2,500 to the lessor but that is all beside the point as that matter is all governed by the terms of the written contracts, the lease and the chattel mortgage,

and the conclusions of either the plaintiff or the defendants and their lawyer who represented them in this proceeding, regarding that matter is immaterial. They had knowledge that the $2,500 referred to in paragraph 15 of the lease had been withdrawn, that the chattel mortgage provided for therein had been executed and, as it had been recorded, they had constructive notice of its terms. Civ.Code, secs. 2963, 1213, 1215. This documentary evidence negatives any idea that there could have been any fraud on the part of plaintiffs as these documents disclosed all of the matters as to which it is alleged representations were made. As the attempted rescission was on the ground of fraud and there was no fraud, defendants were in no position to rescind. There can be no question as to the correctness of the court's findings as to the amount unpaid on the contract or as to the other findings of fact made by the court.

[4–8] Appellant urged also that the court erred in failing to find on certain issues raised by the special answers and the cross-complaint. The first of these to which they refer is the allegation of tender which is set forth in their special defense. These tenders, as shown by the testimony, the tender made in court, and by defendants' briefs, were made upon the theory that inasmuch as the contract of sale provided among other things that the license, goodwill and fixtures were to be assigned to defendants free of all encumbrances and liens except those mentioned in the contract, that therefore upon defendants tendering the balance of the purchase price, the plaintiff became obligated to transfer the property free of the lien of the chattel mortgage given as security for the performance by the lessees of their obligations under the lease. The effect of this would be to require the plaintiff to pay the rental of the entire balance of the term of the lease to the lessor to satisfy the chattel mortgage which was on the fixtures to secure defendants' obligations to pay rent as it became due to the lessor. The tender, therefore, was accompanied by a condition which the defendants had no right to impose and was not made in good faith. It ignored the provision of the contract of sale that plaintiff should assign the lease to the defendants and the fact that the plaintiff had made this assignment, that the lessor had consented to it, and that the defendants had not only accepted the assignment with notice of the chattel mortgage, but had entered into and were still in actual possession of the premises in question. Under these conditions when the defendants accepted this assignment and entered into the possession of the premises they simply stepped in the shoes of the plaintiff, their assignor. Childs, etc., Co. v. Shelburne Realty Co., 23 Cal.2d 263, 267, 143 P.2d 697. Having done so, it became their duty to pay the rent to the lessor and the chattel mortgage remained on the fixtures to insure the performance by defendants of their own obligations to the lessor to comply with the terms and conditions of the lease. If defendants complied with the provisions of the lease and paid the rent to the lessor as they agreed to do, the chattel mortgage would be automatically discharged. The law governing the assignees of a lessee who are in possession of the premises, is stated in 15 California Jurisprudence 751 as follows: "Assignees of a lessee, who are in possession, stand in his shoes, and so long as they occupy that relation to the lessor and his property, are bound by the terms of the lease and the obligations implied therefrom by law. An assignee is presumed to take the leasehold estate in the condition which characterized it at the time of the assignment." All of this shows that the phrase in the contract of sale to the effect that the transfer should be made free of all liens except those referred to in it, is not susceptible to the interpretation placed on it by defendants. No liens are mentioned in the contract except that the sentence preceding the one just referred to did provide for the assignment of the lease and therefore the acceptance by defendants of all the burdens that went with it. It is required that tenders must be made in good faith and in such manner as to most likely, under the circumstances, benefit the creditor. Civ.Code, sec. 1493. Such a tender must also be free from any condition which the other party is not bound to perform and any tender which is not free from such conditions is ineffective. Kruger v. Vernon, 73 Cal.App. 476, 483, 238 P. 1062; Civ.Code, sec. 1494. Any finding which the court might have made on the issues of tender would, necessarily, have been adverse to the defendants. Under such circumstances they cannot complain of the failure to make such a finding. Chamberlain v. Abeles, 88 Cal.App.2d 291, 300, 198 P.2d 927.

[9, 10] Defendants also complain of the court's failure to find on the allegations of the cross-complaint that the representations alleged to have been fraudulently made by plaintiff were untrue and also to find on the amount of damage suffered by the defendants by reason of these representations. The court having found that the representations in question were not made, these other issues become immaterial, and there was no prejudicial error in failing to find on them. Petersen v. Murphy, 59 Cal.App.2d 528, 533, 139 P.2d 49. As was held in Chamberlain v. Abeles, supra, 88 Cal.App.2d 291, on pages 299 and 300, 198 P.2d 927, the findings of a court are to receive such a construction as will uphold rather than defeat its judgment thereon, and are to be read and considered together and liberally construed in support of the judgment.

[11] Defendants cite no authorities in behalf of their contentions that the court erred in sustaining certain objections made to questions asked the defendant Gould and the witness Catts. As the questions asked Gould clearly called for conclusions, and as the questions asked Catts, the agent of the lessor, as to whether or not the chattel mortgage could be released by depositing $2,500 with the lessor certainly asked for his conclusion, the sustaining of the objection to these questions was proper.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

K. & M. Inc., a corporation, Plaintiff, Cross-Defendant and Respondent, Paul E. Tapley, Cross-Defendant and Respondent, v. George LE CUYER et al., Defendants, Cross-Complainants and Appellants.

Civ. 17975.

District Court of Appeal, Second District, Division 3, California.

July 9, 1951.

Rehearing Granted July 25, 1951.*

Appeal from Superior Court, Los Angeles County; Walter R. Evans, Judge assigned.

Charles A. Thomasset and Lee D. Mathews, Los Angeles, for appellants.

Arthur V. Kaufman and George Appell, Los Angeles, for respondents.

BARTLETT, Justice pro tem.

This was an action brought to recover subsequent installments due April 1, May 1 and June 1 of 1949 under the provision of the same contract of sale which was the subject of Civil No. 17974, K. & M. Inc. v. LeCuyer, Cal.App., 233 P.2d 569. At the time of the trial of these actions, it was stipulated that in the event the court found for the plaintiff and cross-defendants in case Civil No. 17974, then the court should find for the plaintiff in this case, and that in the event the court should find for the defendants and cross-complainants in case Civil No. 17974, then the court should find for the defendants in this case. The court having rendered judgment for the plaintiffs in the preceding case, Civil No. 17974, rendered judgment in this action for the plaintiffs and against the defendants in the sum of $2,100. For the reasons expressed in the opinion in Civil No. 17974, K. & M. Inc. v. LeCuyer, Cal.App., 233 P.2d 569, the judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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* Subsequent opinion 238 P.2d 33.

105 Cal.App.2d 740

HARLAND et al. v. NOTO et al.

Civ. 18106.

District Court of Appeal, Second District,
Division 3, California.

July 30, 1951.

Action by Arthur M. Harland and another against James Noto and another to require the defendants to remove their encroachment on the property of plaintiffs. The Superior Court of Los Angeles County, James H. Pope, J., rendered a decree granting a mandatory injunction and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that the decree was not uncertain and the encroachments were not of a trifling nature so far as plaintiffs were concerned.

Affirmed.

1. Judgment ⚷21

In action to require defendants to remove their encroachment on property of plaintiffs, where legal description of property did not appear from complaint but decree referred to book and page where deed to plaintiffs was recorded, fact that findings and decree did not contain a legal description of property did not render decree uncertain.

2. Judgment ⚷21

In action to require defendants to remove their encroachment on property of plaintiffs, where findings of the trial court located the overhanging eaves and bay window of defendants' home which was located beyond boundary line of defendants' property, and findings and decree required defendants to disconnect their sewer line if it ran through plaintiffs' property, mere fact that sewer line was underground did not render decree uncertain.

3. Injunction ⚷204

A mandatory injunction requiring defendants to remove their encroachments on property of plaintiffs was not ambiguous by reason of lack of specification of the time for compliance, since changes should be done within a reasonable time.

4. Injunction ⚷206

In action to require the defendants to remove encroachment on plaintiffs' property, fact that decree required defendants to disconnect sewer running through plaintiffs' property and reconnect it with a direct line from defendants' property to main sewer in street did not require an illegal act.

5. Injunction ⚷23

In action to require defendants to remove their encroachments on property of plaintiffs, where cost of removing overhanging eaves and defendants' bay window was admittedly less than $200, and plaintiffs paid defendant $3,000 for extra four feet of property when they purchased from defendants, encroachments were not trivial so far as plaintiffs' rights were concerned.

6. Appeal and error ⚷169

Defendants' contention which was not made at trial would not be considered on appeal.

John F. Sheffield, Los Angeles, for appellants.

Geo. L. Hampton, Van Nuys, for respondents.

SHINN, Presiding Justice.

Appeal by defendants from a decree granting a mandatory injunction requiring defendants to remove their encroachments on the property of plaintiffs.

In 1948 defendants, who were owners of a lot on Franklin Avenue in Los Angeles with frontage of 100.6 feet, offered to sell 50 feet to plaintiffs, who had a small apartment building which they wished to move from land which had been sold to the State for freeway purposes. The offering price was $9,000. Plaintiffs refused, saying they needed at least 54 feet in width to comply with the municipal building code. Defendants then offered to sell the 54 feet frontage for $12,000. The sale was consummated and plaintiffs moved their building onto the lot. Defendants gave a grant deed without any reservations. On the portion retained by them defendants have a house which is only two inches from the boundary of the property sold to plaintiffs.

This action was brought to require defendants to remove encroachments on plaintiffs' land. These consisted of the eaves of defendants' house which overhung 2.3 feet on plaintiffs' property, a bay window which jutted out at head height 1.77 feet over plaintiffs' property, and defendants' sewer line which extends under plaintiffs' property in an unknown course and at an unknown depth. The trial court granted a mandatory injunction requiring that defendants remove the overhanging eaves, the protruding bay window and, in effect, connect their sewer directly to the main sewer line in front of their property.

In a querulous and fribbling brief, defendants do not question the right of an owner of real property to a mandatory injunction for the removal of encroaching structures on adjoining land, nor do they deny that parts of their building and their sewer line constitute encroachments. They make the following points: (1) The judgment is not supported by the findings of fact and conclusions of law; (2) the decree is uncertain; (3) disconnection of the sewer would be an unlawful act; (4) the encroachment, if it exists, is of a trifling nature and equity will not enjoin it if the injury to the encroaching party in being required to remove it would be greater than that to the party encroached upon; (5) the attempted sale to plaintiffs was void in that it violated a city zoning ordinance which it is claimed requires that at least 50 feet frontage should have been retained by defendants.

[1, 2] The first contention is without merit. It is true the findings and decree do not contain a legal description of the property but such does appear in the complaint and thus in the judgment roll, and the decree refers to the book and page where the deed to plaintiffs is recorded. The findings locate the eaves and bay window of defendants' house which is located two inches from the boundary line of defendants' property. The findings and decree are clear in requiring defendants to disconnect their sewer line if it now runs through plaintiffs' property. The fact that the line is underground does not render the decree uncertain.

[3] The decree is not ambiguous by reason of lack of specification of the time for compliance. The changes should be done within a reasonable time. The acts required to be performed are clearly set out and would be easily interpreted by a workman competent to make the alterations.

[4] The act defendants are required to perform, and which it is claimed would be illegal, is that of disconnecting the sewer which their lessees are now using. But the decree contemplates not a disconnection alone but also a reconnecting of a new line leading directly from defendants' property to the main sewer in the street. It is not shown by the record that this would be an illegal act.

[5] The encroachments are not trivial, so far as plaintiffs' rights are concerned. The cost to defendants of obeying the judgment would be nominal when compared with the price they received for the extra four feet of their land. The bay window is low enough to be a hazard to a tall man using plaintiffs' walk alongside their building. The eaves overhang half the distance between the buildings and there was evidence that they cut out much of the light. The sewer, which is out of sight, was installed many years ago. There is no estimate in the record of the cost of putting in a new sewer line but the cost of removing the other encroachments is admittedly under $200.

[6] The contention that plaintiffs' deed was void because the property was divided so as to leave defendants a parcel less than 50 feet in width was not raised at the trial and need not be considered. We may observe, however, that a sale of property in violation of the ordinance referred to is not void but only voidable at the instance of the buyer, Clemons v. City of Los Angeles, 36 Cal.2d 95, 222 P.2d 439, and that plaintiffs' parcel is of legal size. If it is unlawful to retain a parcel smaller than one that can be sold legally, which we do not suggest to be the case, the owner of the parcel retained would not for that reason have a right to encroach upon the land he had sold to his neighbor.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

104 Cal.App.2d 425

TAYLOR v. CONTINENTAL SOUTHERN CORP.

Civ. 17796.

District Court of Appeal, Second District, Division 3, California.

May 25, 1951.

Rehearing Denied June 12, 1951.

Hearing Denied July 19, 1951.

Action by Eva C. Taylor against Continental Southern Corporation to require defendant to account to plaintiff for her proportionate interest in the proceeds from the oil and gas produced under a purported lease from plaintiff to defendant. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., held that plaintiff was entitled to nothing, and she appealed. The District Court of Appeals, Second Appellate District, Wood, J., held that it was not proved that plaintiff had any title or right to the land in question, or any part thereof.

Judgment affirmed.

See, also, Cal.App., 233 P.2d 583; Cal.App., 233 P.2d 585.

1. Landlord and tenant ⚿61

When provisions of lease show that it was contemplated by parties that lessee could question title of lessor, the general rule that a tenant is not permitted to deny the title of his landlord, is not applicable.

2. Mines and minerals ⚿79(1)

Where description of what lessor leased was "any right, title or interest" which she had or might acquire in streets and alleys within property leased, it was a condition of the lease that she own a right or interest in the streets or alleys in order to be entitled to participate in royalties from oil and gas produced in area by lessee.

3. Mines and minerals ⚿79(1)

Under community lease wherein lessor covenanted that she owned land in area covered by the lease, and agreed that if her title should be contested, then at option of lessee her alleged share of royalties from oil and gas produced from area by lessee might remain in escrow until such title was cleared, lessee could question the title of lessor.

4. Landlord and tenant ⚿50

Omission from lease of provision that lessor warranted and agreed to defend title did not mean that lessor was not required to be owner of property within area leased.

5. Mines and minerals ⚿79(7)

In action by lessor against lessee to require lessee to account for lessor's proportionate interest in proceeds from oil and gas produced under purported lease, evidence was insufficient to establish that lessor had any title or right to streets or alleys, or any part thereof, covered by lease.

6. Dedication ⚿19(2)

Portions of lands designated on recorded map of area as streets and alleys are dedicated to public use.

7. Boundaries ⚿33

The statutory presumption is that owners of lots adjoining streets and alleys own the land to the center of the streets and alleys. Civ.Code, §§ 831, 1112.

8. Boundaries ⚿37(4)

In action by lessor against lessee to require lessee to account for lessor's proportionate interest in proceeds from oil and gas produced under purported lease, evidence was insufficient to establish that any of lessor's predecessors reserved any interest in the streets or alleys within the property, so the statutory presumption, that owners of lots adjoining streets and alleys own to the center of the streets and alleys, was not rebutted. Civ.Code, § 831.

9. Mines and minerals ⚿79(7)

In action by lessor against lessee to require lessee to account for lessor's proportionate interest in proceeds from oil and gas produced under purported lease, evidence was insufficient to establish that lessor had any right of possession of any part of leased land below the surface of the streets and alleys within the property, or that she delivered to lessee possession of such land.

10. Appeal and error ⚿1048(1)

Where lessor introduced in evidence deeds under which she claimed title, the sustaining of lessee's objection to question as to whether lessor owned streets and alleys within property leased, was not prejudicial error.

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William M. Taylor, Coachella, for appellant.

George H. Emerson, Los Angeles, for respondent.

WOOD, Justice.

Plaintiff alleged in her complaint that on December 18, 1944, she and the defendant entered into a written community oil and gas lease whereby she leased to defendant all the highways, streets, roads, and alleys within a certain "described area" in the downtown section of the city of Long Beach (The area is described in Schedule "A" of the lease. It may be stated generally that the area is bounded by Pine Avenue on the east, the Los Angeles County Flood Control Channel on the west, Fourth Street on the north and Seaside Boulevard on the south); defendant agreed to pay to plaintiff her pro rata share of 13.125 per cent of all the oil and gas produced from the lands in the lease, and that her pro rata share would be the proportion that the area leased by her bore to the total area of the lands leased by defendant as shown in said Schedule "A"; thereafter, defendant entered into possession of said premises and extracted oil and gas therefrom; defendant has failed to account to plaintiff for royalties due under the lease and has not paid any royalty to her. She asked that the defendant be required to account to plaintiff for her proportionate interest in the proceeds from oil and gas produced under the lease.

Defendant, in its answer, denied each allegation of the complaint, except (1) "that defendant admits that on or about August 18, 1945, the plaintiff and defendant executed a written instrument in which the plaintiff was named as lessor and defendant as the lessee, under the provision of which the plaintiff purported to lease to defendant any and all right, title and/or interest which she then might have or might thereafter acquire in or to any part of the lands described in" the complaint, and except (2) "that defendant admits that it has not accounted to or paid to plaintiff any royalty." In connection with such denials and admissions defendant alleged that since said August 18, 1945, plaintiff has not proved that she was or is the owner of any right, title or interest in any part of the property described; that at the time of the execution of said instrument the plaintiff did not have, and does not now have, any right, title or interest in any part of said property; that defendant was not obligated to account to plaintiff or to pay any royalty to her.

The court found that all the allegations of the complaint are untrue, except that it is true that a certain instrument in writing which was known as "Continental Southern Community Oil Lease," was executed by plaintiff and defendant; and that all the allegations of the answer are true. It was adjudged that plaintiff take nothing. She appeals from the judgment.

Appellant contends that the findings are not supported by the evidence. She introduced in evidence (as Exhibit 3) a document entitled "Community Oil and Gas Lease" which was executed by plaintiff as lessor and by defendant as lessee. The document was a counterpart of the community oil lease which covered approximately 750 parcels of land that were in said "described area" of approximately 185 acres. The said counterpart of the lease was made by using a printed form which consisted of three pages of small printing. With a few exceptions, it contains substantially all the provisions usually found in the form of oil and gas lease customarily used in this locality. One exception appears in paragraph 17, which paragraph (prior to deleting a portion thereof) was in part as follows: "17. Each Landowner individually hereby warrants and agrees to defend the title to his lands hereinafter described, and agrees that the Operator, at its option, may pay and discharge any taxes, mortgages * * *." Prior to executing the counterpart, the parties hereto struck from said paragraph the following words: "warrants and agrees to defend the title to his lands hereinafter described, and." The president and assistant secretary of the defendant corporation and the plaintiff placed their initials on the margin of the form opposite the warranty of title provision which had been stricken out. Another exception pertains to the "Description of Property" covered by said counterpart of the lease. Said description of the property is set forth in typewriting following the signatures of the parties and, insofar as it pertains to the property involved in this action (the highways, streets, roads, and alleys within the "described area"), the description is as follows: "As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described, towit: * * * [Lots C, D, and E of The Ocean Front, which are not involved in this action] and any and/or all highways, streets, ways, roads and/or alleys within the 'described area'"; and "As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described, towit: * * * [the Pacific Park which is not involved herein] and any and/or all highways, streets, ways, roads and/or alleys within the 'described area.'"

Appellant also introduced in evidence (as Exhibit 1) a grant deed made on March 5, 1946, by Mary Cabezud, a single woman, as grantor, which recited that she did thereby grant to Eva C. Taylor (plaintiff) "all the reversion and reversions and any and all other interests and rights in and to all the property described in the following deeds as recorded in the following books and pages of Deeds of the Records of the County of Los Angeles, State of California, the same being the reversion and reversions and rights and other interests created by said deeds in favor of the Long Beach Land and Water Company, a corporation organized under the laws of the State of California, (said rights and reversion and reversions having been heretofore transferred to this grantor), as follows: * * *." After said words "as follows" in the deed, there were references to 37 deeds of record in the office of the Recorder of Los Angeles County. After said references therein, the deed recited further: "Together with all other rights and reversion and reversions and land and interests therein, including the fee title to the streets and alleys, whether said interest be of record or not, which I acquired from the Long Beach Land and Water Company."

Appellant also introduced in evidence (plaintiff's Exhibit 8) a grant deed made on October 15, 1945, by "The Long Beach Land And Water Company By A. C. Helvey, President of its Trustees By A. J. Clark, Secretary of its Trustees," as grantor, which recited that The Long Beach Land and Water Company did thereby grant to Mary Cabezud certain parcels of land in the Rancho Los Cerritos in Los Angeles County as follows: "Lots C, D, E, F, G, and H of the Ocean Front Of Long Beach, as per Book * * * [which lots are not involved in this action], and All that property situate and being in the City of Long Beach, bounded * * * [here is a description of the Pacific Park which is not involved in this action], and All streets, hi-ways, roads and alleys shown on maps recorded on pages 89, 90, 91, 92, 93, 94, 95 and 96 of Book 19 of Miscellaneous Records of said County, and All streets, hi-ways, roads and alleys shown on maps recorded on pages 67 et seq., of Book 28 of Miscellaneous Records of said county."

Appellant also introduced in evidence a judgment of the Superior Court of Los Angeles County (Exhibit 9), entered August 5, 1947, entitled Eva C. Taylor, plaintiff, vs. A. J. Clark and others, as trustees of the Long Beach Land and Water Company, a dissolved corporation, "defendant." It was adjudged therein, among other things, that the title to all the streets and alleys dedicated by the Long Beach Land and Water Company, by map recorded in Book 19, pages 89 to 96 inclusive, of Miscellaneous Records, and by map recorded in "Book 28, pages 67 and seq." of Miscellaneous Records of Los Angeles County, California, be quieted in the plaintiff Eva C. Taylor and against A. J. Clark and others as trustees of the Long Beach Land and Water Company, a dissolved corporation; and that the "defendant" has no right, title, or interest in or to said property, reversions or rights, and that plaintiff Eva C. Taylor is the owner of said property, reversions and rights.

Appellant also introduced in evidence a judgment of the Superior Court of Los Angeles County (Exhibit 10), entered May 5, 1948, entitled "In the Matter of the Long Beach Land and Water Company, a dissolved corporation." It was adjudged therein, among other things, that the petition of the Long Beach Land and Water Company "by its duly authorized officers and authorized and appointed trustees" for an order confirming "certain sales and resolutions" be granted; that the sale by Beatrice Porter, the then sole trustee of said company, to Mary Cabezud of all the lands and rights of said company in the Rancho Los Cerritos is confirmed; that the resolution of the trustees of said company confirming and ratifying said sale is confirmed by the court; that the resolution of the trustees of said company electing a president and a secretary and authorizing them to execute deeds on behalf of the company is confirmed; and that the deed executed by them to Mary Cabezud of all the lands and interests of said company in Rancho Los Cerritos is confirmed.

Appellant also introduced in evidence a map of the "Town Site of Long Beach" which was recorded July 30, 1887, in Book 19, pages 91 to 96, showing the streets and alleys which were within the "described area" referred to in said counterpart of lease involved in this action. A statement on the map, which was signed by the county recorder, shows that the map was recorded at the request of A. E. Pomeroy. It appears from another statement thereon that A. E. Pomeroy was secretary of the Long Beach Land and Water Company. Another statement on the map was as follows: "We the undersigned hereby certify that this map is a true copy of the map by and according to which we have heretofore made conveyances of Lots and Blocks in the Town site of Long Beach and in the Town Site formerly known as Willmore City, said Willmore City now forming a part of and included within the boundaries of said town of Long Beach and known as Long Beach. Dated Los Angeles, Cal., July 30 1887. Jotham Bixby [Seal] Lewellyn Bixby [Seal] Thos Flint by his attorney in fact [Seal] Lewellyn Bixby [Seal]"

It was stipulated that the royalty rate from production under the lease to July 31, 1949, was $79.301615 per 1,000 square feet. Oil wells were located within the "described area," but they were upon properties removed "from the properties which are the subject of this litigation." The wells were whipstocked from the flood control channel (which was on the west side of the described area) to the area east of the channel.

Defendant (respondent) introduced in evidence a counterpart of said oil lease, which counterpart was executed by the city of Long Beach as lessor and defendant as lessee, covering certain parcels of land in the "described area," namely, the Library Block, Pacific Park, portions of 3 blocks (being 18 lots), and a strip of land about 10 feet wide and 100 feet long. It also introduced in evidence another counterpart of said lease, which was executed by the city of Long Beach as lessor and by defendant as lessee, covering parcels of land which are not in the "described area" involved herein. (Those parcels being Lots C, D and E of the Ocean Front hereinabove mentioned, and six other lots and a strip of land about 47 feet wide and 500 feet long.)

An assistant engineer of the city of Long Beach, called as a witness by defendant, testified in part that the city of Long Beach owned the parcels of land which were described as the leased property in said two counterparts of the lease that were executed by the city of Long Beach.

Appellant argues, in support of her contention that the findings are not supported by the evidence, that she proved all the allegations of her complaint, and that defendant failed to produce any evidence to the contrary. She also argues that defendant, being the lessee, could not dispute the plaintiff's title. Defendant argues to the effect that recordation of the map of Long Beach in 1887 (plaintiff's Exhibit 7), and the sale of lots by reference to the map, was to accomplish a dedication to public use of the streets delineated on the map;

that since there was such a dedication of the streets and since the lots were sold by such reference, each owner of a lot in the leased area, which lot adjoins a street or road, owns the land to the center of the street or road; and that plaintiff (who was not an owner of a lot therein) did not have any title to the streets or alleys.

Under the provisions of the lease upon which plaintiff based her action and under the allegations of the answer, title of the plaintiff to the streets and alleys was an issue in the action. According to the first paragraph of the lease, the respective lessors are referred to in the lease as the landowner and the lessee is referred to as the operator. Paragraph A provides in part that each landowner covenants for himself that "he is the owner" of the parcel of land which is particularly set forth following his signature on the lease. The description so set forth in the lease, with respect to the property involved here, is: "As to any and all right, title and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of * * * any and/or all highways, streets, ways, roads and/or alleys within the 'described area.'" Paragraph 20 provides in part: "Should title to any of the land of any Landowner * * * be declared to be defective or contested, then unless such defect or contest be waived in writing by the Operator, at Operator's sole discretion, the share of the Landowner thereof shall remain in escrow with such person * * * acting as the Collecting Agent for the Landowners, until such title is cleared." Paragraph 21 provides in part: "Each of the persons signing this instrument as Landowner, * * * agrees with each of the others and with the Operator that any person * * * may at any time become a lessor under this lease, provided that such person is, at the time, the owner of a * * * parcel of land * * * within the boundaries described in Schedule 'A' hereof. No such land owner may become a lessor without the consent of Operator. Upon becoming such lessor * * * each such land owner shall from the date of so becoming a lessor, participate in all of the benefits and be subject to all of the covenants, provisions, and conditions of this lease."

[1–4] It is the general rule that a tenant is not permitted to deny the title of his landlord, but there are exceptions thereto. When the provisions of the lease show that it was contemplated by the parties that the lessee may question the title of the lessor, the general rule is not applicable. It is to be noted that in describing the property leased the lessor did not state that she leased the streets and alleys. The description of that which she leased was any right, title or interest which she may now have or may hereafter acquire in the streets and alleys. Although said description of the property leased would be consistent with a theory that plaintiff was leasing the streets and alleys even though she might not own any part of them, it is not to be assumed that she intended to participate in the royalties from the community lease without contributing to the community interest something of value. In other words, it is not to be assumed that she entered into the lease for the purpose of obtaining something for nothing. The reasonable interpretation to be placed upon the provisions of the lease, in view of the particular provisions relating to plaintiff's ownership hereinabove referred to, is that it was a condition of the lease that plaintiff should own a right or interest in the streets or alleys in order to participate in the royalties. She had covenanted to the effect that she was an owner of land in the area covered by the lease. It was a community lease, and she agreed with the other persons who were lessors in the community lease and with the lessee that any person might become a lessor under the lease provided such person was an owner of land within the area covered by the lease. She agreed that if her title to the streets or alleys should be declared to be defective or contested, then at the sole option of the lessee her alleged share of the royalties might remain in escrow until such title is cleared. It therefore appears that it was contemplated, under the provisions of the lease, that the lessee could question the title of the plaintiff. If the defendant could not question the title of the plaintiff and should thereby be required to admit that plaintiff owned the property so indefinitely "described," the result would be a pointless admission to the effect that the plaintiff owned an interest in the streets and alleys if she in fact owned any interest therein. It is true that the provision in the printed form of the proposed lease to the effect that the lessor warrants and agrees to defend his title was excluded from the lease, but the omission of said provision does not mean that the lessor was not required to be an owner of property within the area. It might be that such provision was omitted in order that plaintiff might not be held liable in damages for a breach of warranty of title or for failure to defend her title. At the trial counsel for plaintiff apparently was of the opinion that the title of plaintiff to the streets and alleys was an issue. As above shown, plaintiff introduced in evidence two deeds, two judgments, and a map for the purpose of proving that plaintiff had title. Also, plaintiff offered to testify that she owned the streets and alleys. Counsel for plaintiff stated at the trial as follows: "I believe we have stipulated that * * * if the Court does rule in this action that the plaintiff is the *owner* and is entitled to the oil and gas royalty from the streets and alleys * * * then the defendant agrees to furnish the Court within sixty days its computations by its engineers showing the royalties * * *."

[5–9] It was not proved that plaintiff had any title or right to the streets or alleys or any part thereof. The portions of the lands designated on the map, recorded in 1887, as streets and alleys were dedicated to public use as streets and alleys. See San Leandro v. Le Breton, 72 Cal. 170, 174, 175, 13 P. 405; Archer v. Salinas City, 93 Cal. 43, 52, 28 P. 839, 16 L.R.A. 145; Allan v. City and County of San Francisco, 7 Cal.2d 642, 648, 61 P.2d 1175. It is presumed that the owners of the lots adjoining the streets and alleys own the land to the center of the streets and alleys. Section 831 of the Civil Code provides: "An owner of land bounded by a road or street is presumed to own to the center of the way; but the contrary may be shown." Section 1112 of the Civil Code provides: "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." There was a provision in the lease (paragraph 13) to the effect that the area owned by each landowner "shall be deemed to extend to the center" of streets and alleys abutting thereon, provided the reversionary rights to the center of the streets or alleys remain with such owners; but if the fee title to the streets or alleys is in others than the owners of the abutting property, the streets and alleys shall be considered as separate parcels under the lease. There was no proof that the Long Beach Land and Water Company reserved or had any reversionary interest in the streets or alleys. The alleged title of Mary Cabezud was based upon a grant deed made by persons purporting to be the president and secretary of the trustees of the Long Beach Land and Water Company. The alleged title of plaintiff was based upon a grant deed made by Mary Cabezud. The contrary of the presumption stated in section 831 of the Civil Code was not proved. It did not appear "from any grant" that any grantor did not intend to pass title "to the soil of the highway in front [of his land] to the center" of the highway. The plaintiff, of course, did not have possession of the surface of the streets or alleys. The oil wells were whipstocked, as above stated, from the flood control channel to the area east of the channel. The lease provided that the lessee would not occupy the surface of the area leased east of that channel, and that as to the area east of the channel the lessee's operations would be confined to the portion of the subsurface beneath a depth of 200 feet below the surface. It was not shown that plaintiff had any right of possession of any part of such land below the surface of the streets and alleys, or that she delivered to defendant possession of such land.

[10] Appellant also contends that the court erred in sustaining defendant's objection to a question asked plaintiff as to whether she owned the streets and alleys. The objection should not have been sustained. The court, however, did not err

prejudicially in sustaining the objection, for the reason that plaintiff thereafter introduced in evidence the deeds above mentioned under which she claimed title.

The judgment is affirmed.

VALLEE, J., concurs.

SHINN, Presiding Justice.

I concur. I think plaintiff's proof showed that she had no title to the property described in the lease. Anything paid to her as royalty on property she did not own would result in detriment to defendant in the same amount. Plaintiff having shown herself to be guilty of breach of warranty of title (since she owned no right, title or interest whatsoever), and the detriment appearing with certainty, it would be futile to allow the litigation to proceed further. In no aspect of the case can it be said that the judgment results in a miscarriage of justice.

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104 Cal.App.2d 435

TAYLOR v. CONTINENTAL SOUTHERN CORP.

Civ. 17797.

District Court of Appeal, Second District, Division 3, California.
May 25, 1951.

Rehearing Denied June 12, 1951.

Hearing Denied July 19, 1951.

Action by Eva C. Taylor against Continental Southern Corporation to require defendant to account to plaintiff for her proportionate interest in the proceeds from oil and gas produced under purported lease from plaintiff to defendant. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., gave judgment for defendant and plaintiff appealed. The District Court of Appeal, Wood, J., held that it was not prejudicial error to strike out the testimony of plaintiff as to ownership of the property in question.

Judgment affirmed.

1. Mines and minerals 🔑79(1)

Where description of what lessor leased was "any right, title or interest" which she had or might acquire in a described piece of property, it was a condition of the lease that she own a right or interest in the described property in order to be entitled to participate in royalties from oil and gas produced from area by lessee.

2. Mines and minerals 🔑79(7)

In action by lessor against lessee to require lessee to account for lessor's proportionate interest in proceeds from oil and gas produced under purported lease, evidence was insufficient to establish that lessor had any title or right to the leased property in question, or any part thereof.

3. Evidence 🔑158(27)

Where lessor based her testimony as to ownership upon deeds which were available and could have been produced, the deeds were the best evidence as to provisions therein, and it was not prejudicial error to strike such testimony.

◆

William M. Taylor, Coachella, for appellant.

George H. Emerson, Los Angeles, for respondent.

WOOD, Justice.

Plaintiff alleged in the complaint that on December 18, 1944, she and the defendant entered into a written community oil and gas lease whereby she leased to the defendant a certain parcel of land in the downtown section of the city of Long Beach, bounded on the north by Second Street, on the east by Pacific Avenue, on the south by Ocean Park Avenue and on the west by Cedar Avenue. (The parcel is known as Pacific Park.)

The pleadings, findings, and judgment in this action are the same as the pleadings, findings, and judgment in the case of Taylor v. Continental Southern Corporation, Cal.App., 233 P.2d 577, except as to the allegations in the complaints describing the property leased by plaintiff. Plaintiff appeals from the judgment.

Appellant contends that the findings are not supported by the evidence. She introduced in evidence (as Exhibit 3) the same document entitled "Community Oil and Gas Lease" which she introduced in the said preceding case as exhibit 3. The description of the property set forth in typewriting below the signatures of the parties included the following: "As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described, towit: All that certain lot, piece or parcel of land situate, lying and being in the City of Long Beach, in the County of Los Angeles, State of California, boun_ed and particularl__ described as follows, towi_; Bounded on the north by Second Street, on the east by Pacific Avenue, on the south by Ocean Park Avenue, and on the west by Cedar Avenue, as per map of the Town of Long Beach, as recorded in Book 19 of Miscellaneous Records, pages 91 to 96 inclusive, in the County Recorder's office of Los Angeles County."

Appellant also introduced in evidence the map of Long Beach, recorded in 1887, which was introduced in said preceding case as exhibit 7. It was stipulated that defendant had been producing oil from the wells located within the "described area" (being the wells referred to in said preceding case).

Appellant's counsel asked her, on direct examination, if she owned the land described in the complaint known as Pacific Park. Counsel for defendant objected to the question upon the ground that it called for a conclusion. The objection was overruled, and she answered that she owned the land. On cross-examination she was asked if the basis for her statement as to ownership was that someone had told her that she owned the land. She replied: "No, not from someone told me, from the basis of the deeds." Then she was asked: "What deed was that?" She replied: "Well, from the whole chain of title from the Long Beach Land & Water Company to Mary Cabezud, from Mary Cabezud to myself." She was asked: "Do you have those deeds with you?" She replied: "Well, they have all been introduced in evidence." Counsel for defendant then made a motion to strike out her answer as to ownership of the land, upon the ground that her testimony was a conclusion based upon documents which were not before the court, that the documents were the best evidence and they should be before the court. The judge stated that she had qualified her answer in such a way that the court was justified in striking out her answer. The motion was granted. Thereupon appellant rested her case. Then defendant rested.

[1-3] Appellant's argument, in support of her contention that the findings are not supported by the evidence, is the same as that stated in the preceding case referred to, namely, that she proved all the allegations of her complaint, that defendant failed to produce any evidence to the contrary, and that defendant being a lessee could not dispute appellant's title. Title of the plaintiff to Pacific Park was an issue in the action. In describing the property leased, the lessor did not state (in the lease) that she leased the Pacific Park. The description of that which she leased was any right, title or interest which she may now have or may hereafter acquire in the park. The reasonable interpretation to be placed upon the provisions of the lease is that it was a condition of the lease that plaintiff should own a right or interest in the park in order to participate in the royalties. She covenanted that she was an owner of land in the area covered by the lease. It was contemplated, under the provisions of the lease, that the lessee could question the title of the plaintiff. It was not proved that plaintiff had any title or right to the park or any part of it. It was not prejudicial error to strike out the testimony of plaintiff as to ownership. She stated that she based her testimony upon certain deeds which had "been introduced in evidence." Presumably she was referring to deeds introduced in the preceding case herein referred to. In any event, her testimony showed that the deeds were available and could have been produced in this case, and that she was relying upon the

deeds as the basis of her claim of ownership. The deeds were the best evidence as to the provisions therein. Forbes v. Forbes, 41 Cal.App. 365, 372, 182 P. 773. Appellant elected to avoid the production of the best evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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104 Cal.App.2d 438

TAYLOR v. CONTINENTAL NORTHERN CORP.

Civ. 17798.

District Court of Appeal, Second District, Division 3, California.

May 25, 1951.

Rehearing Denied June 12, 1951.

Hearing Denied July 19, 1951.

Action by Eva C. Taylor against Continental Northern Corporation to require defendant to account to plaintiff for her proportionate interest in the proceeds from the oil and gas produced under purported lease from plaintiff to defendant. The Superior Court of Los Angeles county, Caryl M. Sheldon, J., gave judgment for defendant and plaintiff appealed. The District Court of Appeal, Wood, J., held that there was no proof that plaintiff had any title or right to the streets or alleys in question, or any part thereof.

Judgment affirmed.

Boundaries 🔑37(4)

In action by lessor against lessee to require lessee to account for lessor's proportionate interest in proceeds for oil and gas produced under purported lease, evidence was insufficient to establish that lessor's predecessor in title had reserved any interest in the streets or alleys in question, or that lessor had any title or right to such streets or alleys, or any part thereof.

William M. Taylor, Coachella, for appellant.

George H. Emerson, Los Angeles, for respondent.

WOOD, Justice.

Plaintiff alleged in the complaint that on December 18, 1944, she and defendant entered into a written community oil and gas lease whereby she leased to defendant all the highways, streets, roads, and alleys within a certain "described area" in the downtown section of the city of Long Beach. (The area involved here is north of the area involved in Taylor v. Continental Southern Corporation, No. 17796, Cal.App., 233 P.2d 577. It may be stated generally that this area is bounded on the south by Fourth Street, on the west by the County Flood Control Channel, and on the north by Tenth Street from said channel to Daisy Avenue; and then the boundary extends southeasterly by various streets to Sixth and Pine Avenue, and then on Pine Avenue to Fourth Street and Pine Avenue.)

The pleadings, findings, and judgment in this action are the same as the pleadings, findings, and judgment in the said case of Taylor v. Continental Southern Corporation, supra, except as to the allegations in the complaints describing the property leased by plaintiff, and except the name of the defendant. Plaintiff appeals from the judgment.

Appellant contends that the findings are not supported by the evidence. She introduced in evidence a document entitled "Community Oil and Gas Lease" which was executed by plaintiff as lessor and by defendant as lessee. The document was the same as the counterpart of the community oil lease described in said preceding case except as to the description of the property and the name of the lessee. The lease covered approximately 650 parcels of land. The description of the property set forth in typewriting below the signatures of the parties was as follows: "As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described, towit: All of the streets, in the City of Long Beach recorded in the original maps of Long Beach Townsite, in Miscellaneous Records Book 19, at pages 91 to 96 inclusive, Records of Los Angeles County and The American Colony Tract, in Miscellaneous Records Book 19, at pages 89 to 90, Records of Los Angeles County; and any and/or all highways, streets, ways, roads and/or alleys within the 'described area.'" Appellant also introduced in evidence the map of Long Beach, recorded in 1887, which was introduced in said preceding case as exhibit 7. She also introduced in evidence a grant deed made on March 27, 1945, by Mary Cabezud, a single woman, as grantor, which recited that she did thereby grant to Eva C. Taylor "all the reversion and reversions and any and all other interests in and to all the property described in the following deeds * * * as recorded in the following books and pages of Deeds and Miscellaneous Records of the Records of the County of Los Angeles, State of California, the same being the reversion and reversions and fee and other interests created by said deeds * * * in favor of the Long Beach Land and Water Company, a corporation organized under the laws of the State of California, or its assignors, (said rights and reversion and reversions and interest having been heretofore transferred to this Grantor), as follows: * * *." After said words "as follows" in the deed, there were references to approximately 175 deeds of record in the office of the recorder of Los Angeles County. After said references therein, the deed recited further: "[T]ogether with all rights, remainders, reversions, easements, rights of way, restrictions, appurtances [sic], hereditaments."

Appellant also introduced in evidence the same grant deed made by Mary Cabezud, as grantor, to plaintiff, dated March 5, 1946, which was introduced in said preceding case. Appellant also introduced in evidence the same grant deed from the Long Beach Land and Water Company to Mary Cabezud, dated October 15, 1945, which was introduced in evidence in said other case. She also introduced in evidence the two judgments of the superior court which were introduced in evidence in that case.

Appellant's argument, in support of her contention that the findings are not supported by the evidence, is that she proved all the allegations of her complaint and that defendant failed to produce any evidence to the contrary. The statements of this court, which were made in the opinion in the preceding case of Taylor v. Continental Southern Corporation, supra, regarding such a contention, are applicable here. Title of the plaintiff to the streets and alleys was an issue in this action. The description of that which plaintiff leased was any right, title or interest which she may now have or may hereafter acquire in the streets and alleys. There was no proof that the Long Beach Land and Water Company reserved or had any reversionary interest in the streets or alleys. It was not proved that plaintiff had any title or right to the streets or alleys or any part thereof.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

105 Cal.App.2d 376

MASCIOTRA v. HARLOW et al.

Civ. 18358.

District Court of Appeal, Second District, Division 2, California.

July 12, 1951.

Anthony Masciotra sued Roy Harlow and others to recover damages for the alleged nonperformance by defendant-lessees of the covenants in a lease of the physical equipment, facilities, and contents of a cafe owned by plaintiff. The Superior Court, Los Angeles County, James Snell, J., rendered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that there was no express covenant in the lease upon the part of the defendant not to carry on their business at another location until after the termination of the lease and that there was no implied covenant that the lessees would, during the term of the lease, so conduct their business as to make it mutually profitable for the parties.

Affirmed.

1. Landlord and tenant ⚿44(1)

Where lease of facilities of café for purpose of operating a restaurant provided for monthly rental of seven per cent. of gross receipts with minimum of $250 and contained covenant on part of lessor not to compete but contained no corresponding agreement upon part of lessee other then provision that business created and carried on by lessee should belong and remain sole property of lessee "with full right to maintain and carry on its said business at any other place or places after the end or sooner termination of the within lease", language of proviso last recited was permissive and not prohibitory and but emphasized intention that business should remain sole property of lessee and could not be construed as express covenant upon part of lessee not to carry on his business at another location until after termination of lease.

2. Landlord and tenant ⚿45

Where lease of physical equipment, facilities and contents of café for purpose of operating a restaurant for term of five years provided for monthly rental of seven per cent of gross receipts with minimum of $250, it could only be concluded under circumstances that parties considered stipulated minimum rent to be in itself fair and adequate and that any additional sum was to be in nature of bonus which lessee was willing to pay if his business exceeded expectations, and therefore removal by lessee of business and good will prior to expiration of lease would not be violative of any implied covenant to so conduct his business on the premises as to make it mutually profitable to both parties.

3. Contracts ⚿168

Implied covenants can be justified only on ground of legal necessity arising from terms of contract or substance thereof, but one absolutely necessary to operation of contract and effectuation of its purposes is necessarily implied whether inferable from particular words or not.

4. Contracts ⚿168

The rules controlling exercise of judicial authority to insert implied covenants may be stated as follows: the implication must arise from language used or it must be indispensable to effectuate intention of parties; it must appear from language used that it was so clearly within the contemplation of parties that they deemed it unnecessary to express it; implied covenants can only be justified on grounds of legal necessity; a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; there can be no implied covenant where subject is completely covered by contract.

5. Landlord and tenant ⚿45

When rental to be received under lease is based upon percentage of gross receipts of business, with substantial, adequate minimum, there is no implied covenant that lessee will operate its business in the demised premises throughout term of lease.

6. Evidence ⚿441(4)

Where agreement between parties for lease of physical equipment, facilities and contents of café for purpose of operating restaurant had been reduced to writing, written document superseded all oral negotiations which took place prior to execution of lease, and in action brought by lessor to recover damages for alleged nonperformance by lessee of covenants in lease, there could be no evidence of terms of agreement other than contents of writing. Civ.Code, § 1625; Code Civ.Proc. § 1856.

◆

Warner, Peracca & Cowan, of Los Angeles, for appellant.

Clifford A. Rohe, of Sherman Oaks, Harry J. Gross, Van Nuys, for respondent.

WILSON, Justice.

Plaintiff-lessor brought this action to recover damages for alleged nonperformance by defendant-lessee of covenants in a lease.

This appeal is from a judgment in favor of defendants.

In January, 1945, plaintiff as lessor leased to defendants certain premises on Ventura Boulevard in Los Angeles County for the purpose of operating a restaurant. The lease, which was for a term of five years from March 15, 1945, provided for a monthly rental of seven per cent of the gross receipts with a minimum of $250.

Defendants went into possession under the lease and began operating the cafe. They changed the name of the establishment to the "Pump Room" and displayed a large sign with a pump painted thereon. A few months later defendant Loomis assigned his interest to defendant Harlow, who thereafter conducted the business alone. The venture was successful and for a period of three and a half years the average monthly rental payment to plaintiff was in excess of $1,000.

In November, 1948, Harlow opened a restaurant on property owned by him on Ventura Boulevard, about a mile and a half from that leased from plaintiff. He transferred from plaintiff's premises to the new location the name "Pump Room", together with the painted sign of the pump and about two thirds of the personnel of the original Pump Room restaurant. The cafe on plaintiff's premises was changed to a Chinese restaurant. It was not successful and receipts from the business dropped. Rentals fell to some $300 and then to the minimum of $250 a month. A few months later Harlow changed the cafe back to an American restaurant but the business still did not prosper and plaintiff's rentals remained at the minimum.

On April 5, 1949, plaintiff sent defendant a notice of breach of the lease agreement but did not declare a forfeiture nor re-enter the premises or take possession until the term of the lease expired. By this action plaintiff seeks to recover damages for loss of rentals allegedly occasioned by the removal of the Pump Room restaurant prior to the expiration of the lease.

Paragraph 12 of the lease provides as follows: "It is further expressly understood and agreed that it is in nowise the intention of the parties hereto to enter into or create a partnership or a joint venture in any shape, manner or form; that the care and/or restaurant business that shall be created and carried on by the Lessee, and the good will thereof, shall belong to and shall remain the sole property of the Lessee, with the full right to maintain and carry on its said business at any other place or places after the end or sooner termination of the within Lease; that the Lessor shall have no responsibility or liability by reason of the maintenance or conduct of the said business by the Lessee, who shall save the Lessor harmless from any and all claims and law-suits that shall be brought against the Lessor based on such claimed responsibility or liability."

Plaintiff contends the removal by defendant of the business and the good will prior to the expiration of the lease was a violation (1) of the express provisions of paragraph 12 of the lease and (2) of an implied covenant.

[1] Plaintiff asserts that the restraint imposed by paragraph 12 does not go so far as to prohibit defendant from carrying on a restaurant business in competition with that on plaintiff's premises at another place less than two miles distant during the term of the lease but that the "activity prohibited was the carrying on in another place of the Lessee's 'said business,' that is, 'the business that shall be created and carried on by the Lessee, and the good will thereof.'" It is expressly provided in that paragraph of the lease that the "business that shall be created and carried on by the Lessee, and the good will thereof, shall belong to and shall remain the sole property of the Lessee * * *." Collas v. Brown, 211 Ala. 443, 100 So. 769, cited by plaintiff, does not support his contention. In that case the court held that a covenant not to compete is a thing apart from the "good will" and such an implied covenant does not go with the sale of the good will nor can a written contract selling the good will only be enlarged by parol to include an express covenant not to engage in a competing business. The only language in paragraph 12 which lends any support to plaintiff's contention, and which might be construed as imposing a

restriction, is that contained in the words following those quoted above "* * * with full right to maintain and carry on its said business at any other place or places after the end or sooner termination of the within lease." Taking the instrument as a whole, however, this language cannot be construed as an express covenant upon the part of defendant not to carry on his business at another location until after the termination of the lease. In paragraph 17 of the lease plaintiff agrees that during the term thereof "he will not have any interest in or conduct or carry on, directly or indirectly, under the name Palomine Cafe, or otherwise, any cafe or restaurant business within a radius of two square miles of the present location of Lessee's business * * *." There is no corresponding agreement upon the part of defendant not to open other restaurants during the term of the lease, nor to operate a cafe elsewhere under the name "Pump Room," nor does defendant agree not to change the name or character of the restaurant to be operated on plaintiff's premises. Defendant did not purchase a going business but leased "the physical equipment, facilities and contents of the cafe." The parties had no means of knowing whether the venture would succeed or fail and by paragraph 12 it was expressly agreed that it was not their intention to engage in a partnership or joint venture and the business that was to be created would remain the sole property of defendant. The language following such express agreement, which is preceded by the word "with" is permissive and not prohibitory and but emphasizes such intention.

Plaintiff cites four cases in support of his contention that there is an implied covenant that lessee would, during the term of the lease, so conduct his business on plaintiff's premises as to make it mutually profitable to both parties: Selber Bros. v. Newstadt's Shoe Stores, 194 La. 654, 194 So. 579; Cissna Loan Co. v. Baron, 149 Wash. 386, 270 P. 1022; Mayfair Operating Corp. v. Bessemer Properties, 150 Fla. 132, 7 So. 2d 342; Garden Suburbs, etc., Club v. Pruitt, 156 Fla. 825, 24 So.2d 898, 170 A.L.R. 1107. These cases are all distinguishable from the instant case. In the Selber Bros. case the lease involved was a renewal of a lease twice previously renewed on the same terms. At the time the last renewal was made defendant was well established and the parties knew six per cent of the gross sales had averaged $400 a month, which was double the minimum rent. In the Cissna case the defendant purchased an established department store business from plaintiff and leased plaintiff's building, agreeing to pay rent based on a percentage of gross sales with a yearly minimum. The Mayfair case involved the lease of a theatre at a minimum monthly rental in addition to a percentage of gross revenue. The lessee expressly agreed to use its best efforts to obtain and maintain the highest volume of business on the premises. Defendant failed to operate the theatre for a period of four months resulting in a material reduction in the gross revenue. It was held that the lease required defendant to operate the premises continuously. The Garden Suburbs case involved a lease and a sublease and the facts and questions under consideration are not analagous to those herein. Each of the foregoing cases had to do with an established, going business.

[2] In the instant case the lease was not a renewal of a prior lease; there was no established business which the parties could take into consideration in determining the minimum rental. On the contrary it was a new venture and the parties had no way of estimating the probable revenue. Under such circumstances it can only be concluded that the parties considered the stipulated minimum rent to be in itself fair and adequate and any additional sum was in the nature of a bonus which the lessee was willing to pay if his business exceeded his expectations.

[3-5] The facts in Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878, are more comparable to the instant case. The lease was of a four story building occupied by defendant in carrying on a men's clothing and furnishing business and provided for a rental of five and a half per cent of the gross income with a $4,000 monthly minimum. Approximately two months prior to the expiration of the lease

defendant moved its business to another location. It paid the minimum rental for the full term of the lease and plaintiff thereafter brought an action to recover the percentage rental which it claimed it would have received had defendant remained in business on the premises until the expiration of the lease. The court, quoting from Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, which in turn quoted from Grass v. Big Creek Development Co., 75 W.Va. 719, 84 S.E. 750, L.R.A.1915E, 1057, stated as follows, 45 Cal.App.2d at page 147, 113 P.2d at page 881: " 'Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity'." The court summarized the rules when covenants may be implied as follows, 45 Cal.App.2d at page 149, 113 P.2d at page 882: "(1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract." The court held there was nothing in the transaction to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties; that when the rental to be received under the lease is based upon a percentage of the gross receipts of the business, with a substantial, adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease. These comments are applicable in the action at bar.

A case involving facts almost identical with those in the case under consideration is Palm v. Mortgage Inv. Co., Tex.Civ.App., 229 S.W.2d 869. In that case plaintiff operated a shoe store in premises leased from defendant. Prior to the termination of the lease plaintiff established a store in another location and removed the major portion of his business from the store building leased from defendant to the new location. Thereafter he materially and substantially curtailed his stock of merchandise and his manner of doing business in defendant's premises. He advertised the new location, transferred part of his employees and devoted most of his time to the new business. The result was a material reduction in gross sales. In denying recovery to defendant the court distinguished the case of Selber Bros. v. Newstadt, supra, and followed the decision of Cousins v. Hastings, supra, and Jenkins v. Rose's 5, 10 & 25¢ Stores, 213 N.C. 606, 197 S.E. 174 cited in the Cousins case.

[6] Much of the evidence introduced was of negotiations which took place prior to the execution of the lease. Since the agreement of the parties has been reduced to writing the written document supersedes all the oral negotiations and there can be no evidence of the terms of the agreement other than the contents of the writing. Civ. Code, § 1625; Code Civ.Proc. § 1856; Sorensen v. Commercial Credit Co., 16 Cal. App.2d 71, 74, 60 P.2d 169.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

105 Cal.App.2d 503

STING v. BECKHAM.

Civ. 4183.

District Court of Appeal, Fourth District, California.

July 17, 1951.

Rehearing Denied Aug. 2, 1951.

Hearing Denied Sept. 13, 1951.

Emily J. Sting, also known as Emily J. Kirk, and also known as Emily Kraemer Kirk, brought action against Mary Beckham for partition of certain land. The Superior Court of Riverside County, Russell S. Waite, J., entered order confirming sale of the land to plaintiff as highest bidder, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that sale as a whole of the unimproved land consisting of seven lots in a certain subdivision was proper, and was not in violation of statute requiring premises consisting of distinct farms or lots to be sold separately.

Order affirmed.

1. Continuance ⚿6

Where plaintiff, in partition action, filed petition to confirm sale ordered by court, and on June 29 served notice of hearing thereon to be held July 10, denial of defendant's motion for continuance of hearing to July 24, the date noticed by defendant for hearing of her opposition to confirmation, was not abuse of discretion in absence of showing of reasonable ground for, or facts which would indicate probability of any benefit or advantage to be accrued from, continuance. Code Civ.Proc. § 784.

2. Partition ⚿105

Where plaintiff, in partition action, filed petition to confirm sale ordered by court, and return and report of referee appointed by court showed bids made and contained request that court direct disposition of proceeds to be received from sale, court did not err in treating referee's report and return as a return of sale and acting upon it as such, in view of fact that defendant had participated in bidding and that all parties had notice and were present in court and understood the proceeding.

3. Partition ⚿102

In partition action, sale as a whole of unimproved land consisting of seven lots in a certain subdivision was proper where both parties entered in bidding on an entire basis which resulted in securing highest possible price for property, and where one lot was so linked with other property that it could not be separated therefrom without great detriment, and sale was not in violation of statute requiring that premises consisting of distinct farms or lots must be sold separately. Code Civ.Proc. § 782.

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George D. Blair, of Los Angeles, for appellant.

Best, Best & Krieger and Arthur L. Littleworth, of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order confirming the sale of real property. The property consists of 60 acres of unimproved land, being five 10-acre lots and two 5-acre lots in a certain subdivision. Each of the parties to the action owned a one-half interest in the property. In this action for a partition the court ordered the land sold and appointed a referee for that purpose. That order was affirmed on a previous appeal. Sting v. Beckham, 94 Cal.App.2d 823, 211 P.2d 586.

On June 28, 1950, the referee filed his return and report showing that the plaintiff had bid $15,000 for all of the property. It also set forth that the defendant had bid certain amounts for five of the parcels and that a third party had bid $5500 for two of the parcels, these separate bids totaling $14,400.00.

On June 29, 1950, the plaintiff, claiming to be the purchaser of the property, filed a petition to confirm the sale to her. On the same day, notice was duly given and served of a hearing on this petition for confirmation of sale to be held on July 10, 1950. On July 7, 1950, the defendant filed an objection to such confirmation, with a request that the court direct the referee to sell two of the parcels to the defendant for $8000.00, and that the court confirm said sale. On the same date, the defendant served and filed a notice that on July 24, 1950, she would move the court to refuse to confirm the report of the referee or to confirm any sales proposed by said report, or the petition of the plaintiff, "except the sale to defendants Beckham."

When the matter came on for hearing on July 10, 1950, the court overruled the objections filed by the defendant and denied her motion for a continuance. An argument between the parties then ensued as to whether the court should receive bids for the entire tract as a whole or for individual parcels. The court ruled that it would hear bids both ways and would sell the property to the person or persons bidding the highest amount for the entire tract, or for all of the parcels. The defendant then made various bids for separate parcels, the final bids on the separate parcels totaling $16,850.00. The plaintiff continued to bid more for the entire property than the aggregate of the defendant's bids for the separate parcels. The defendant finally bid $17,250 for the entire property and the plaintiff raised this to $17,500. The judge called for further bids without success, and then declared the property sold to the plaintiff for $17,500, as the highest bid either on an entire or a separate basis. An order confirming the sale to the plaintiff was then entered, from which the defendant has appealed upon the clerk's transcript and an agreed statement.

[1] It is first contended that the court abused its discretion in refusing to continue the hearing to July 24, the date noticed by the defendant for the hearing of her opposition to confirmation. The plaintiff had given the 10-day notice required by section 784 of the Code of Civil Procedure, and the defendant not only had ample notice but appeared at the time set. So far as the record discloses, no reasonable ground for a continuance was presented to the court, and no facts were brought out which would indicate the probability of any benefit or advantage to accrue from such a continuance. No abuse of discretion appears.

It is next contended that the court erred in considering the return and report of the referee. It is argued that no sale had been made by the referee, and that the court had nothing before it to confirm.

[2] The return and report of the referee sets forth that he had been appointed by the court to sell the property; that he had given notice of the time and place of sale in a manner which conforms to the statutory requirement; that he had received various bids as above described; and that these bids were the highest and best he had received. While he did not pray for a confirmation of any sale he asked the court to direct him "respecting the disposition of the proceeds to be received from the sale of said real property." The petition of the plaintiff for a confirmation of the sale referred to the referee's "report on said sale," and prayed for an order confirming said sale and directing the execution of the conveyance to the plaintiff as the purchaser. Any irregularities in the return of sale are more fanciful than real. All parties had notice, were present, and fully understood what was intended and what was being done, and the defendant participated in the bidding, both by parcels and for the entire tract, and no possible prejudice appears. Under the circumstances which appear, the court did not err in treating the referee's report and return as a return of sale and acting upon it as such.

Finally, the defendant contends that the court erred in not selling the parcels separately and in selling the property as a whole. It is argued that a sale by separate parcels was required by section 782 of the Code of Civil Procedure, which provides that "if the premises consist of distinct farms or lots, they must be sold separately."

[3] There is no evidence in the record which would establish that these premises consist of distinct farms or lots, within the meaning of section 782. As was pointed out on the former appeal, there was evidence indicating that one of the parcels "was so indivisibly linked with the balance of the property, both physically and with

respect to value, that it could not be separated therefrom without great detriment." [94 Cal.App.2d 823, 211 P.2d 587.] The defendant joined in the bidding on an entire basis, bidding $17,250 for the entire property, and the bidding resulted in securing the highest possible price for the property. Under the circumstances here appearing, the defendant is not entitled to rely on a strict interpretation of section 782.

The order appealed from is affirmed.

MUSSELL, J., concurs.

GUDEROV v. HADJIEFF.

Civ. 18086.

District Court of Appeal, Second District, Division 3, California.

July 12, 1951.

Hearing Granted Sept. 7, 1951.*

Boris Guderov brought an action against John D. Hadjieff for libel. The Superior Court of Los Angeles County, Arnold Praeger and W. Turney Fox, JJ., entered a default judgment and an order denying defendant's motion to set aside the default, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that prayed for relief did not justify granting plaintiff punitive damages against defendant.

Order in accordance with opinion.

1. Judgment 🔑252(2)

The statutory provision that relief granted a plaintiff cannot exceed relief demanded in complaint if there is no answer to complaint is mandatory. Code Civ. Proc. § 580.

2. Judgment 🔑252(2)

In determining whether plaintiff in libel action was entitled to recover punitive damages against defaulting defendant, prayer for relief would be looked to rather than allegations of complaint, and punitive damages could not be awarded against defaulting defendant where punitive damages were not sought in prayer for relief, although allegations of complaint were sufficient to sustain award of punitive damages had they been sought. Code Civ. Proc. § 580.

3. Judgment 🔑252(2)

In a default case a prayer for general relief will not support a damage award which is not contained in prayer. Code Civ.Proc. § 580.

4. Damages 🔑87(1)

Compensatory damages are given as compensation and punitive damages purely as punishment and by way of example. Civ.Code, § 3294.

5. Judgment 🔑252(1)

Prayer for judgment in libel action for $100,000, which prayer immediately followed allegations that composition, publication and circulation of allegedly libelous newspaper article damaged plaintiff in sum of $100,000, was a demand for compensatory relief only and did not justify granting plaintiff punitive damages against defaulting defendant. Code Civ.Proc. § 580; Civ. Code, § 3294.

6. Judgment 🔑162(4)

Showing made by defendant who sought to have default judgment entered against defendant in libel actions set aside on ground that defendant's failure to file answer was excusable in that at first defendant's attorney was ill and confined and later defendant was ill, was insufficient. Code Civ.Proc. § 473.

7. Judgment 🔑161

A verified answer tendered by defendant who sought to have default judgment entered against defendant in libel action set aside, was to be considered in determining whether there was a showing of meritorious defense to action. Code Civ.Proc. § 473.

8. Appeal and error 🔑982(1)
Judgment 🔑139

An application to vacate a default judgment made under provision of Code of Civil Procedure authorizing relief from a judgment taken by mistake, etc., is ad-

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* Subsequent opinion 240 P.2d 621.

dressed to sound discretion of court and will not be disturbed except in case of manifest abuse of discretion. Code Civ. Proc. § 473.

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Leon A. Plotnik and Fred J. Martino, Beverly Hills, for appellant.

Morris Lavine, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant John D. Hadjieff appeals from a default judgment, contending the judgment grants relief in excess of that demanded by the complaint, in violation of section 580, Code of Civil Procedure, and further that the court's refusal to vacate the default was error.

Plaintiff sued to recover damages resulting from a libelous letter written by defendant and published in Narodna Volya (People's Will), a Bulgarian-English language weekly newspaper distributed in Los Angeles County, the United States and the Balkan Peninsula of Europe. It is alleged that defendant caused the publication to be made "wickedly and maliciously and with intent to injure, disgrace and defame the plaintiff and to bring him into public disgrace and obloquy." The complaint sets out the defamatory letter in which defendant refers to plaintiff's alleged marital unfaithfulness in Bulgaria and his amorous adventures in the United States. The letter uses such descriptive language as "rotten element," "most degenerated type of person," "Daylight Thief" and "clever swindler." After this "biographical" material the letter attacks plaintiff's announced plan to act as teacher for the children of Bulgarian immigrants. Plaintiff further alleged: "That the entire said article concerning plaintiff was and is wilfully and maliciously false and defamatory and was known to be such by defendant, Hadjieff, when he composed it and caused it to be published and circulated."

"That plaintiff avers upon information and belief that by reason of the composition, publication and circulation of said article the plaintiff has been damaged by the said defendant in the sum of One Hundred Thousand ($100,000) Dollars.

"Wherefore, plaintiff prays judgment against the defendant, John D. Hadjieff, for the sum of One Hundred Thousand ($100,000) Dollars, for costs of this action and for such other and further relief as to this Court may seem proper."

The complaint was filed and summons was served on defendant October 25, 1949. An oral extension of ten days to appear was given by plaintiff's attorney to defendant's attorney on November 7th. No further contact was made between counsel until December 12th when plaintiff's attorney called and told defendant's attorney he would take a default the next day if no answer was filed. The default was taken shortly after noon on December 13th. No answer had been filed, and no attempt had been made to obtain a further extension of time from the court. On December 23rd, defendant moved to vacate the default and permit answer on the ground that his neglect in failing to file an answer was excusable in that at first his attorney was ill and confined, and later defendant was ill. Defendant further alleged that his attorney had contacted plaintiff's attorney on December 13th and had been granted an additional two days in which to answer and that he was prepared to do so within that time. Plaintiff's attorney denied this conversation by affidavit. The court refused to vacate the default and on January 24, 1950, following a hearing, entered judgment for $2,500 compensatory damages and $5,000 punitive damages. This appeal followed.

Defendant's first contention is that the award of $5,000 for *punitive* damages is void, since the only demand for relief in the complaint was for *compensatory* damages. Section 580, Code of Civil Procedure, reads: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint * * *."

Section 580 proceeds on the theory that a defaulting defendant must be given notice of the maximum relief sought in the action, since otherwise he would be deprived of his day in court. Plaintiff agrees with this but contends that for several reasons the complaint was sufficient to justify the relief that was granted.

[1] With regard to the mandatory nature of section 580, it was said in Burtnett v. King, 33 Cal.2d 805, 807, 205 P.2d 657, 658, 12 A.L.R.2d 333: "It is equally clear that by reason of the mandatory language of the statute (the court *cannot* give a default judgment in excess of the demand), the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.* It cannot act except in a particular manner, that is, by keeping the judgment within the bounds of the relief demanded."

In a default case we must look solely to the relief which plaintiff shall have demanded in his complaint. It differs from a contested case where the issues actually tried and determined may embrace those added by answer, or may be even broader than the pleadings. Cf. Vaughan v. Jonas, 31 Cal.2d 586, 605, 191 P.2d 432. The holdings in the contested cases relied upon by plaintiff are beside the point.

In his prayer for relief plaintiff asked for $100,000 damages, costs and such other relief as may seem proper. Plaintiff has several theories. He says the averments of the complaint were sufficient to apprise defendant that exemplary damages were sought; that the term "damages" embraces both compensatory and punitive damages, and, that the damages awarded were less than those sought. The award of punitive damages may not be sustained for any of these reasons.

[2, 3] Although the publication was alleged to have been made with malicious motives, and these allegations were sufficient to sustain an award of punitive damages had they been sought, we must look to the prayer for the relief that was demanded. It was contended in Brooks v. Forington, 117 Cal. 219, 48 P. 1073, that in a default case any relief could be awarded consistent with the averments of the complaint, and that as the right to counsel fees in a foreclosure action was properly alleged an award of fees was authorized although not demanded in the prayer. The court said, 117 Cal. at page 220, 48 P. at page 1073: "The position of respondent does not find support in the decisions of this court giving application to section 580. The relief 'demanded in his complaint' is held to refer to the relief asked in the *prayer,*—the feature of the pleading to which alone reference may be had in default cases, to ascertain what relief the plaintiff seeks; and the rule of the statute applies in its strictness to actions in foreclosure alike with those of any other character. [Citing cases.]" The scope of a prayer for specific relief may not be enlarged so as to include relief of a different nature by reference to allegations of the complaint which would have justified such additional relief had the same been demanded. In a default case a prayer for general relief will not support a damage award which is not contained in the prayer.

[4, 5] The basic differences between compensatory and punitive damages refute the contention that defendant was given notice that punitive damages were sought by the complaint. The two differ in nature and purpose. One is given as compensation; the other purely as punishment and by way of example. Civ.Code, sec. 3294. A demand or prayer for one is not a demand legally, or otherwise, for the other, or for both. The court is without authority to grant relief of a kind essentially different from that which a defaulting defendant would reasonably anticipate from a reading of the complaint. Plaintiff contends correctly that the term "damages" embraces both compensatory and punitive damages but this argument does not reach the problem. The allegation of the complaint which immediately precedes the prayer for relief states that plaintiff has been damaged in the sum of $100,000. This can mean only compensatory damages. We think a skilled or an unskilled reader would understand the prayer for compensation in this amount to be a demand for compensatory relief and nothing more.

The fact that the damages awarded were less than those claimed is not an answer to defendant's contention that plaintiff sought only compensatory damages and was awarded in addition to that relief damages by way of punishment. The judgment being void in part, the award of punitive damages may not stand.

[6] An insufficient showing was made of a reason for relief from the default. The affidavits of defendant and his attorney were vague and evasive. While each claimed to have been ill, the duration of the claimed illness was not stated in either affidavit. Defendant's attorney did not deny that he had been granted an extension from November 7th to November 17th, nor did he allege any facts which tended to show inability to file an answer within that time, nor any excuse for not filing it later, prior to the entry of the default. It was alleged in the affidavit of defendant that he was endeavoring to make a settlement with plaintiff, and offered plaintiff $350 in settlement, and it was shown by several affidavits filed on behalf of plaintiff that defendant endeavored to induce mutual friends to bring about a settlement. Defendant alleged that he had on two occasions been "incarcerated" in a sanitarium, suffering from kidney trouble, but the dates when he was so confined were not stated. There were also affidavits to the effect that defendant, during the time in question, was seen in attendance at several social functions. He admitted having attended a dance but alleged he did not dance. There was no showing whatever that defendant was deceived or misled in any manner other than the claim that on December 13th defendant was granted a two day extension, which claim was denied by affidavit. No other valid excuse was offered for the obvious negligence of the defendant and his attorney.

[7] There was no sufficient affidavit of merits accompanying the motion. A verified answer was tendered and was to be considered in determining whether there was a showing of a meritorious defense. Beard v. Beard, 16 Cal.2d 645, 649, 107 P.2d 385. The proposed answer did not deny the fact or the contents of the publication, nor did it allege the truth of the publication. It denied that the publication was made with "intent to injure, disgrace *and* defame plaintiff or to bring him to public disgrace or obliquy." It was also denied that plaintiff had suffered any damage by reason of any act or acts of the defendant. The publication was manifestly libelous on its face. The only issues raised by the proposed answer would have been whether plaintiff should be awarded compensatory damages, and if so, the amount thereof. It is unnecessary to decide whether the answer set up a good and meritorious defense. Its insufficiency to set up a complete defense was to be taken into consideration by the court in ruling upon the motion. The court naturally would be less inclined to open a default for the filing of an answer which admitted liability but denied damage, than in a case where the proposed verified answer alleged a complete defense on the merits.

[8] It is a rule as familiar as any to be found in the books that an application to vacate a default under section 473, Code of Civil Procedure, is addressed to the sound discretion of the court and will not be disturbed except in a case of manifest abuse of discretion. Such long established rules should be consistently and impartially respected. Here the denial of the motion to vacate the default was not only a proper one, but in our opinion it would have been an abuse of discretion to grant it upon the showing made.

The order denying the motion to vacate the default being reviewable on the appeal from the judgment, Code Civ.Proc. secs. 956, 963, the attempted appeal from the order is dismissed. The judgment is modified by striking therefrom the provision for punitive damages and is affirmed as to the award of $2,500 compensatory damages and costs.

WOOD and VALLÉE, JJ., concur.

105 Cal.App.2d 463

PEOPLE v. LINDSEY et al.

Cr. 4639.

District Court of Appeal, Second District,
Division 1, California.
July 16, 1951.

Delwin E. Lindsey and James Evan Lindsey were convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of keeping and occupying a residence with books, papers and paraphernalia for the purpose of recording and registering bets upon the result of horse racing, and from an order denying a motion for a new trial, defendant Lindsey appealed. The District Court of Appeal, Durand, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal law ⚿1158(1)

Order denying new trial after entry of verdict of guilty in criminal prosecution may be reversed on appeal only when there is lack of substantial evidence to support conclusion reached by trial court.

2. Gaming ⚿98(5)

Evidence sustained conviction for keeping and occupying a residence with books, papers and paraphernalia for purpose of recording and registering bets upon the result of horse racing. Pen.Code, § 337a, subd. 2.

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Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Two defendants were charged with the violation of section 337a, subdivision 2 of the Penal Code in that they kept and occupied a residence with books, papers and paraphernalia for the purpose of recording and registering bets upon the result of horse racing. A jury was duly waived and the issue submitted by stipulation upon the transcript of the preliminary hearing. Defendants were found guilty as charged. Proceedings were suspended and defendants granted probation with the condition that appellant serve 90 days in the county jail. Defendant Lindsey appeals from the judgment and order denying a motion for a new trial.

Inasmuch as no judgment was pronounced, the appeal from the judgment is dismissed.

It is contended on appeal that the evidence is insufficient to sustain the conviction and that the motion for a new trial should have been granted.

The record reveals that two officers entered a private residence containing five rooms. The house was unfurnished. The officers went into one of the rooms and, "observed the appellant and his co-defendant just getting up from chairs in front of two tables, on each of which was located a telephone, betting markers and scratch sheets. The rear door was opened to permit an investigator to come in. They searched the appellant and his co-defendant and found on the co-defendant a key to the door into the kitchen from the back porch. Another key was taken from the person of the appellant, which was a key to the same door. The officers also found a National scratch sheet for October 21, 1950 on the table to the right, lying beside a telephone on that table and in front of the co-defendant. Also on this table they found a pad with printed lines on it, on which was written in pencil various numbers, symbols and names. On the table in front of the appellant was found another National scratch sheet for Saturday, October 21, 1950, and on this table was also found various pieces of paper and part of a pad of paper with printed lines on them and appearing thereon in pencil various numbers, symbols and names, together with a rubber stamp date on different pieces of paper."

One of the officers qualified as an expert and testified that "in his opinion the pads and papers were betting markers and the notations on the betting markers represented bets made on horses running that day". The defendants did not testify.

[1, 2] In the circumstances the order may be reversed on appeal only when there is a lack of substantial evidence to support the conclusion reached by the trial court. The record reveals no such situation in the within action. There are no prejudicial errors in the record.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

105 Cal.App.2d 418

Ex parte KOSH.

Cr. 2273.

District Court of Appeal,
Third District, California.
July 13, 1951.

Proceeding in the matter of application of Jacqueline Mildred Kosh, on behalf of Kathleen Kosh, a minor, for a writ of habeas corpus. The District Court of Appeal, Van Dyke, J., held that rendition of decree in Illinois awarding custody of child to father after petitioner had left state with child did not preclude filing of a petition for letters of guardianship in the Superior Court and such petition having been filed Superior Court acquired exclusive jurisdiction to determine matter of custody of minor and the County Court of another county was without jurisdiction to determine those issues in a habeas corpus proceeding commenced by the child's father.

Custody of a minor Kathleen Kosh, ordered delivered to Jacqueline Kosh, her mother.

1. Courts 🔑475(6)

Where petitioner and her minor daughter left State of Illinois prior to commencement of proceeding by father in that state for divorce in which he obtained custody of child and on her arrival in California petitioner filed her petition for letters of guardianship in the Superior Court to determine matter of custody of child and jurisdiction of Superior Court having been invoked that jurisdiction to proceed was complete and County Court had no jurisdiction to determine custody of minor in habeas corpus proceeding brought by father. Probate Code, § 1440.

2. Judgment 🔑815

The existence in full force and effect of a decree of a court in another state does not oust jurisdiction of appropriate California courts to entertain proceedings touching the custody of minors within the borders of the state. Probate Code, § 1440.

◆

Palmer & York, Calistoga, for appellant.

Paul Golis, Santa Rosa, for respondent.

VAN DYKE, Justice.

This proceeding involves the custody of Kathleen Kosh, a girl child of the age of two years. Her father, Russell Kosh, and her mother, Jacqueline, are husband and wife, and at the time of initiation of the proceedings with which we are concerned resided in Chicago. They separated on July 16, 1950, and have since lived separate and apart. On July 19th of that year Jacqueline commenced an action in the Superior Court of Cook County, Illinois, against Russell, wherein she sought a decree of separate maintenance. The child was then in her care and she asked that a reasonable amount be awarded to her for its support and maintenance. On August 9th Russell entered his appearance in said action, but at that time filed no pleading therein, the document he filed reciting that he did thereby enter his appearance through his counsel. On August 14th Jacqueline, accompanied by Kathleen, departed from Illinois. On August 16th she arrived in California and she and the minor have been in this State ever since. On August 17th, acting through her counsel, she served in her maintenance action notice of motion to dismiss the same, noticing the motion for a future date. On the following day, and before the hearing of that motion, Russell filed in said action pleadings denominated a "Counter-Complaint for Divorce". Upon the hearing of the motion to dismiss, the court granted the same, but continued the case upon the counter-claim for divorce, ordering that Jacqueline answer the same within thirty days, though the record does not show that she was ever served with that counter-claim. She did not answer the same and on December 14th the Cook County court made an order awarding the custody of Kathleen to Russell.

On arriving in California, Jacqueline, accompanied by Kathleen, went directly to Calistoga in Napa County, where they were when the said order was made. On December 22d Jacqueline filed in the Superior Court for Napa County her petition for letters of guardianship upon the person of Kathleen. This petition alleged that Kathleen was a resident of Napa County; that petitioner was her mother; that the minor was at present with her and under her care and that the father, Russell, resided at a given address in Chicago; that the child had no guardian legally appointed by will or otherwise, and that she required the care and attention by some fit and proper person, which petitioner Jacqueline alleged herself to be. She prayed that she be appointed guardian of the person of the minor. Upon the filing of the petition for guardianship, the Napa County court ordered that notice of the hearing of the petition be posted at least ten days before the date set for hearing and that further notice thereof be given Russell by mailing a copy of the notice of hearing, and copy of petition, to him at his Chicago address as given in the petition. The court set the hearing on the petition for January 19, 1951, and further ordered that pending the hearing the care, custody and control of the minor be awarded to Jacqueline. After obtaining the Cook County decree, Russell came to California. On December 26th, after the initiation by Jacqueline of the guardianship proceedings in Napa County, he began proceedings in the Superior Court for Sonoma County to obtain possession of the minor. In that court he filed a petition for warrant in lieu of habeas corpus under Section 1497 of the Penal Code. Therein he alleged that Jacqueline had removed the minor from the jurisdiction of the Cook County court "in defiance of said Court" and that she had secreted the minor in the County of Sonoma; that he was entitled to the care, custody and control of the minor by virtue of the Cook County decree; that Jacqueline and Jean Johnson, the mother of Jacqueline and the grandmother of Kathleen, had threatened to remove the minor from the jurisdiction of any court which might attempt to adjudicate her status; that Jacqueline had further threatened to carry the minor out of the County of Sonoma and out of the State of California and that he feared the minor would be so carried out of the State. Responsive to this application for warrant, the Sonoma County court issued its warrant as prayed for. The warrant was executed by the Sheriff of Sonoma County who took the minor from the grandmother. It appears that, while Jacqueline has throughout claimed to reside, since coming to California, in Calistoga and in Napa County, the home of her mother, Jean Johnson, lies just over the line dividing the two counties and is in Sonoma County. It is Jacqueline's contention that the minor was in her care and custody in Napa County and was merely being cared for by the grandmother over the line in Sonoma County when the warrant in lieu of habeas corpus was granted and executed by taking the minor into the custody of the Sonoma County court. After the execution of the warrant, the grandmother filed her return in the Sonoma County court, therein alleging that on December 27th, at the time the service of the warrant was made upon her, she had Kathleen in her possession and under her control by authority received from Jacqueline; that Jacqueline had custody and control of the minor pursuant to the order of the Napa County court made on December 22d in the guardianship proceedings. She denied that Jacqueline had removed Kathleen from Cook County in defiance of the court therein and alleged that Jacqueline and Kathleen left Illinois on August 14th and ever since the 16th of August had been residents of the State of California. She challenged the jurisdiction of the Cook County court to make its decree under the circumstances and denied any threat to remove Kathleen from the jurisdiction of any court, denying also any threat to carry her out of the County of Sonoma, denying the existence of any conspiracy for such purposes. She alleged the commencement of the guardianship proceedings in Napa County. She challenged the jurisdiction of the Sonoma County court in that the child was in no danger as to its safety, morals or reasonable comfort, and alleged that it would not be removed from the jurisdiction of California's courts unless it be delivered into possession of Russell and he should take it away.

The record before us does not indicate that any traverse was filed to this return, but it does appear that the Sonoma County court proceeded to hear the matter as a proceeding in habeas corpus. However, Jacqueline did not appear in that proceeding as a party thereto, was not served with any process therein, nor was any effort made to bring her in as an interested party. The hearing, therefore, proceeded as between Russell, the minor's father, and Jean Johnson, the minor's grandmother. The mother did appear as a witness, but that does not make her a party to the proceedings, nor bind her so far as her interests are concerned by any order therein made. At the close of the hearing, the Sonoma County court declared itself bound by the Cook County decree and ordered that the infant be delivered into the custody of its father. It also declared that the proceedings in Napa County "appear as being wholly lacking in jurisdiction." This order was made on January 8th current, and the court granted a stay in the execution of its order. Thereupon Jacqueline filed in this court her petition for writ of habeas corpus, which writ was granted and the matter was heard here and submitted for decision after arguments and briefs.

[1] We think the essential question to be answered here is this: Did the filing of the petition of Jacqueline for letters of guardianship in the Superior Court for Napa County vest exclusive jurisdiction in that court, so far as the courts of California be concerned, to determine the matter of custody of the minor? The answer must be in the affirmative.

[2] It has often been held by our appellate courts that the existence in full force and effect of the decree of a court of another state does not oust the jurisdiction of appropriate California courts to entertain proceedings touching the custody of minors within the borders of this State. Sampsell v. Superior Court, 32 Cal.2d 763, 780, 197 P.2d 739; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206, 209. In the last cited case it was said: "* * * It must be conceded that, although the Arizona divorce and custody decrees were in all respects valid, the courts of the state of California would nevertheless have jurisdiction upon the children thereafter becoming residents or inhabitants of this state to determine their custody in accordance with their best welfare. * * * It is of the inherent nature of custody decrees, whether entered in divorce proceedings or independently thereof, that they are not final and conclusive, but subject to modification in the state where rendered as circumstances change. Where children whose custody has been the subject of judicial inquiry in another state subsequently become residents or inhabitants of this state, they are subject to the supervisory jurisdiction and guardianship of this state, to be exercised for their protection. The paramount concern in awarding custody as between parents is the welfare of the child, who is not the property of his parents. If it appears that the circumstances upon which the prior order of another state is based have not changed, our courts, on principles of comity, may refuse to decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child."

In Sampsell v. Superior Court, supra, it was said, 32 Cal.2d at page 778, 197 P.2d at page 749:

"There is authority for the proposition that courts of two or more states may have concurrent jurisdiction over the custody of a child. * * * In the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction. As stated by Justice Cardozo in Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625, 40 A.L.R. 937, 'The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. * * * For this, the residence of the child suffices, though the domicile be elsewhere. * * * But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status. * * *'

"* * * if the jurisdiction of one state has been exercised over the child, there is no reason why, if the welfare of the particular child is a matter of real concern to the courts of another state, those courts may not also have jurisdiction, which might be exercised in the interest of the child 'with respectful consideration to the prior determination of other courts similarly situated.' * * * In any event, there is no reason why courts of one state should not be able to 'assume with confidence that the courts of the other jurisdiction will act with wisdom and sincerity in all matters pertaining to the welfare of this child.'"

The application of the foregoing rules to the decree of the Cook County court which is before us is apparent upon a consideration of its contents. Thus that court recited that Jacqueline had failed to file her answer to the counter-complaint of Russell, that she was in default and had "fled from the State of Illinois" and had taken and wilfully concealed the infant child of the parties, with intent to deprive Russell of "his right to visit said child and support said child" and with the further intent of depriving the Cook County court "of the supervision and welfare of said child." Concluding that, therefore, Jacqueline stood in defiance of the Cook County court, it was ordered that the counter-complaint of Russell be taken as confessed against her and that he be awarded the care and custody of the child and retain the same until the further order of the court. It is not disputed, and indeed could not be disputed in view of the record here, that when Jacqueline came to California with the infant child she was under no restraint from the Cook County court and we know of no law that forbade her from departing from the state of her domicile if she desired to do so. We further know of no law that forbade her from taking the infant child with her in the absence of any judicial restraint against her doing so. The order of the Cook County court does not purport to be one which passes upon the ultimate question of which of the two parents should, for the best welfare of the child, have its care, custody and control.

The petition for guardianship filed by Jacqueline in Napa County properly invoked the exercise of that court's jurisdiction. It contained all of the allegations required by our statute (Sec. 1440, Probate Code), including the allegation that the minor and petitioner resided in Napa County and that the minor required the care and attention of a fit and proper person. Its jurisdiction having been so invoked, the Napa County court proceeded in the exercise thereof by ordering appropriate notice to be given and setting a date for the hearing of Jacqueline's petition for letters. Its jurisdiction to proceed was complete and this jurisdiction included the power of determining the truth of each and all of the allegations of the petition, such as those of the residence of the mother and her minor daughter. Guardianship of Danneker, 67 Cal. 643, 645, 8 P. 514, 516. Therein it was declared that the court first acquiring jurisdiction through the filing of an appropriate petition "had jurisdiction to hear and determine whether the minor was a resident of that city and county, and required a guardian and whether the said Teresa was a proper person to be appointed." Continuing, the court said: "The question, then, is presented, could Michelson (instead of presenting the issue of residence and the other subjects involved to the superior court of the city and county of San Francisco) step over to Alameda county, obtain letters there, and thus oust the former court of jurisdiction to proceed? We think not." See, also, Milani v. Superior Court, 61 Cal.App.2d 463, 467, 143 P.2d 402, 404, 935, wherein the court said: "where several courts have concurrent jurisdiction over a certain type of proceeding, the first one to assume and exercise such jurisdiction in a particular case acquires an exclusive jurisdiction. Thereafter another court, though it might originally have taken jurisdiction, is wholly without power to interfere". This court in In re Green, 67 Cal.App. 504, 505, 226 P. 76, said: "The question of whether petitioner is a fit and proper person to have the care and custody of the minor is in issue in the guardianship proceeding in the superior court of Sonoma county. Pending the determination of such issue by that court, this court will not interfere, by a writ of habeas corpus, with the custody of the minor." In Greene v. Superior Court, 37 Cal.2d 307, 231 P.2d 821, 822, it was declared that:

> "Ordinarily the superior court of the county of a minor's residence or temporary domicile has jurisdiction to appoint a guardian. Probate Code, § 1440. * * *
>
> "The rule making exclusive the jurisdiction first acquired is particularly apposite to prevent unseemly conflict between courts that might arise if they were free to make contradictory custody awards at the same time." See, also, Matter of Maginnis, 162 Cal. 200, 206, 121 P. 723.

When Jacqueline filed her petition in the Napa County court there was vested in that court full and exclusive jurisdiction to proceed to determine, so far as courts of California be concerned, whether or not the jurisdictional facts asserted in the petition did, in fact, exist, and if it found that they did then to proceed further to declare what the courts of this State ought to decree as to the custody of the minor, its welfare considered. While it was proceeding in the regular exercise of its authority no other court in this State could interfere therewith.

We conclude that, in so far as matters of the custody of this minor were of concern to the courts of this State, the Superior Court for Napa County had exclusive jurisdiction and the Sonoma County court was without jurisdiction to determine those issues. This is not to say that the Sonoma County court, presented with an application for a warrant in lieu of habeas corpus which alleged that the minor was within the confines of the County of Sonoma and was in a situation of danger, did not have jurisdiction to order the minor brought before it for its protection, but it is to say that beyond that point it could not go in view of the existing exclusive jurisdiction of the Napa County court to determine what should thereafter be done in the matter of custody.

It is not necessary for us here to determine the claims and counter-claims made by the parties as to the validity of the Cook County decree or as to the effect which it should be given by the Napa County court. What we have said is based on an assumption, arguendo, of the validity of that decree. If the Napa County court decides that under the facts it has jurisdiction to proceed in the matter of the guardianship it will then proceed to determine what is for the best interest and welfare of the minor involved and its decree will speak as of the time it is rendered and declare what that court holds ought to be done relative to the minor's custody, considering all things presented to it, including the decree of the court of Cook County, if it be introduced.

What we have said indicates the proper disposition of this proceeding. We hold that the writ of this court was properly issued. We hold further that questions touching what should be done by the courts of this State concerning the care and custody of this minor ought to be determined in the Superior Court of Napa County, which first acquired jurisdiction. That court is vested with authority to make all necessary orders for the temporary custody of the minor until the hearing can be had upon the petition before it. It is not disputed here, and could not be, that when the mother filed her petition for letters of guardianship in the Napa County court she had the actual care and custody of her daughter. That custody should be restored to her pending the guardianship proceedings, subject to such orders as the court therein may make.

It is ordered that the minor Kathleen Kosh be delivered into the custody of Jacqueline Kosh, her mother. (In re Green, supra.)

ADAMS, P. J., and PEEK, J., concur.

105 Cal.App.2d 520

WEBSTER v. SCHEIDT et al.

Civ. 4326.

District Court of Appeal, Fourth District, California.

July 17, 1951.

Action by William Webster against Conrad Scheidt, M. Friis-Hansen & Co., a copartnership consisting of M. Friis-Hansen, and others to recover the value of certain personalty, either as the purchase price or on the theory of a conversion. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered judgment for plaintiff against defendant Hansen and that defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that defendant Hansen unlawfully took possession of and retained stock of goods which plaintiff, as sublessee had placed in service station building placed on certain lots by defendant Hansen during course of its lease and that evidence sustained finding of a conversion of plaintiff's stock of goods by the defendant.

Judgment affirmed.

1. Landlord and tenant 🔑161(3)

Where plaintiff, as sublessee, placed a stock of automotive goods in service station building owned by defendant lessee, and until goods were taken by defendant after expiration of its lease they were in exclusive possession of plaintiff, such possession was sufficient to maintain his action for conversion.

2. Landlord and tenant 🔑161(1, 3)

Where plaintiff, as sublessee, placed a stock of automotive goods in service station building owned by defendant lessee and after expiration of defendant's lease without notice to plaintiff, who was in peaceful possession with the acquiescence of owner of lots and new lessee, defendant wrongfully and illegally entered building and forceably removed and took possession of plaintiff's property, there was a conversion of the property by defendant, and a subsequent offer to return the property was ineffectual as a defense.

◆

Irvine P. Aten, Fresno, Aynesworth & Hayhurst, Fresno, for appellants.

Frank C. Lerrigo, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the value of certain personal property, either as the purchase price or on the theory of a conversion.

M. Friis-Hansen & Co., which will be referred to as Hansen, was the lessee of certain lots upon which it had erected a service station building with the normal equipment of storage tanks, pumps, etc. The terms of the lease required that these improvements remain as security until its expiration, and by implication gave Hansen the right to then remove them. Hansen later subleased the station to Eagle Oil & Refining Co., Inc., and still later Eagle subleased to the plaintiff Webster. In addition to selling gasoline Webster had installed in the building a stock of tires and accessories, which will be referred to as the "stock".

Hansen's lease expired on May 31, 1947. Prior to that date the owners of the lots leased the land to the defendant Scheidt for a term beginning June 1, 1947. This lease required Scheidt to assume the entire responsibility for any negotiations with Hansen "for the acquisition of any property owned by him." While notices of termination had been duly served by Hansen and by Eagle, Webster was allowed to continue to operate the service station after May 31, 1947, and until September 6, 1947. In the meantime, Scheidt was negotiating with Hansen for the purchase of the building and equipment owned by it. On August 1, 1947, Scheidt purported to take theoretical possession of the station and made a temporary arrangement with Webster by which Webster was to continue to operate the station, pending Scheidt's negotiations with Hansen, and was to pay Scheidt two cents per gallon on all gasoline sold. About the same time, Scheidt entered into negotiations with Webster for the purchase of the stock, which the court found were never completed.

Scheidt and Hansen were unable to agree on a price for the property owned by Hansen and on the afternoon of September 6, 1947, Scheidt notified Hansen that he would not permit the removal of the building and equipment from the premises. At 5:00 o'clock on Sunday morning September 7, Hansen's crew of twelve men entered the premises and removed the building and equipment. They first removed the stock from the building and by 6:00 a. m. had it loaded in a van. The stock was then taken to Hansen's premises, where it still remains. Scheidt and Webster appeared about 7:00 a. m., while the equipment was being removed. Being unsuccessful in their efforts to prevent its removal, they went to Hansen's premises and were told by Mr. Hansen that he would not deliver the stock to them until after he had talked to his attorney. At a later date Hansen offered to deliver the stock to Webster if he would secure Scheidt's signature on a written consent which was prepared by Hansen's attorney. Scheidt refused to sign such a consent.

Webster brought this action against Scheidt and Hansen. In the first cause of action he alleged that Scheidt had orally agreed to purchase the stock at an agreed price, and had later refused to pay the sum agreed upon. In a second cause of action it was alleged that Hansen had unlawfully seized and converted this stock of goods to his own use. Judgment was prayed for as against Scheidt for the purchase price with damages, and as against Hansen in the sum of $3,032.28 for the conversion of plaintiff's property, together with certain costs of pursuit, and for damages. Among other things, the court found that Scheidt had not agreed to purchase the stock from Webster; that Webster was in possession thereof as the owner at the time the property was seized and converted by Hansen; that on September 7, 1947, Hansen unlawfully seized and converted the stock to its own use; that the fair market value of the property thus seized and converted was $2,616, and that the plaintiff had further suffered damages in connection with the pursuit of the property in the sum of $150. Judgment was entered in favor of the plaintiff as against Hansen for $2,766, with interest and costs. From this judgment Hansen has appealed.

[1] It is first contended that the plaintiff is estopped by his pleadings, his conduct and his testimony from recovering on the ground of conversion. It is argued that he pleaded and testified that he had sold the property to Scheidt; that he allowed Hansen to believe that Scheidt was the owner of the property; and that he at no time claimed to be the owner. On the first cause of action the court found, on conflicting evidence, that Scheidt had not agreed to purchase the property in question and that Webster remained the owner thereof. The second cause of action alleged that at the time the property was taken by Hansen it was "owned by and in the possession of the plaintiff." Until it was taken by Hansen the property was in the exclusive possession of Webster, and such possession is sufficient to maintain an action for conversion. Fletcher Aviation Corp. v. Landis Mfg. Co., 95 Cal.App.2d 905, 214 P.2d 400. As the court found, Webster was also the owner, and we find no conduct on his part which was sufficient to constitute an estoppel in this action. While he thought he had sold the stock to Scheidt, he did nothing to cause Hansen to take or hold the property. He was not present when the property was originally taken. Later that morning, when he and Scheidt were together, Hansen refused to release the property until he had consulted his attorney. Hansen could have returned the

stock to the one from whom it was taken, and it was not until much later that Hansen claimed to have any doubt about the matter.

[2] It is next contended that Hansen never asserted any interest in the stock, and that his conduct with reference thereto was not sufficient to constitute a conversion. It is argued that this property was in a building which Hansen had a right to remove; that Hansen merely stored it in order to protect it from the elements and from third parties; and that he was willing at all times to deliver it to the rightful owner when he had satisfied himself in that regard. Assuming that Hansen had a right to remove the building within a reasonable time after the expiration of his lease, he had no right to take possession of Webster's property under the circumstances which here appear. Knowing that Webster had rightfully been in possession under a sublease from Eagle, Hansen permitted him to remain in possession and operation of the station for some three months, while Hansen was trying to sell the building to Scheidt. Without notice to Webster, who was in peaceful possession with the acquiescence of all parties, Hansen wrongfully and illegally entered the building early on a Sunday morning and forcibly removed and took possession of Webster's property. Apparently, it was necessary to break into the building in order to do this. There is no direct testimony on this point but Webster testified that he had the only keys to the building. It is incredible that such a building, with this stock in it, would have been left open and unattended at night. The only inference reasonably to be drawn from the evidence as a whole is that the removal of the stock was accomplished by breaking into the building. Beyond question, this was a conversion of the property. California Products, Inc. v. Mitchell, 52 Cal.App. 312, 198 P. 646; Hull v. Laugharn, 3 Cal.App. 2d 310, 39 P.2d 478. Any subsequent offer to return the property would be ineffectual as a defense. Hull v. Laugharn, 3 Cal. App.2d 310, 39 P.2d 478. Moreover, any subsequent offers to return the property were qualified. Hansen's later expressed desire to be sure of the rightful owner before releasing the property might have been an important element if it had come into possession of the property rightfully, but it is not a conclusive defense under the facts and findings which here appear.

Appellants finally contend that if it be assumed that Webster was the owner of the stock of goods, and in possession of the premises, "his status was illegal and precluded recovery." It is argued that Webster knew that Hansen owned the building; that Scheidt's new lease from the owners of the land contained a provision against subleasing without the consent of the lessors; that the owners of the land had not given their written consent to a sublease from Scheidt to Webster; that Webster knew this; that Scheidt's possession of the premises was taken without purchasing Hansen's building and equipment; and that Webster is not entitled to recover because he thus participated "in an illegal act to deprive Hansen of their property and their possessory right under the contract." This contention is without merit. The owners of the land were accepting the rent from Scheidt and had not complained; Webster was in possession of the premises with the implied, if not the actual, consent of Hansen; and there is no evidence of any illegal act on the part of Webster for the purpose of depriving Hansen of its property, or which in any way tended to contribute to that end.

Without taking the legal steps which were available, Hansen took the law into its own hand and unlawfully took possession of and retained the goods in question. The evidence amply supports the court's finding of a conversion. Judgment affirmed.

MUSSELL, J., concurs.

105 Cal.App.2d 411

FONG et al. v. MILLER.

Civ. 7898.

District Court of Appeal, Third District, California.

July 13, 1951.

Horace Fong and Lily Fong sued Ruby Miller to recover for damage sustained as the result of defendant's violation of a contract. The Superior Court, Amador County, Ralph McGee, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that the trial court had correctly held that that the defendants were in pari delicto and that the contract was unlawful and that the court should therefore leave the parties where it found them.

Affirmed.

1. Contracts ⟹138(1), 139

As a general rule a party to an illegal contract can neither recover damages for its breach nor by rescinding recover performance that he has rendered or its value, but under certain conditions, notwithstanding that one is party to an illegal bargain, relief may be accorded if such party be not in pari delicto.

2. Contracts ⟹138(1)

Where, under contract with owner, operators of restaurant were to receive as their compensation not only profits from restaurant but in addition thereto share of profits from bar and from gambling devices, operators were in pari delicto and contract was unlawful and could not be enforced by operators, even if operators confined their claim to demand for cost of additions to restaurant made by them pursuant to contract and waived their claim for future profits, and notwithstanding the fact that to deny operators relief for breach of contract would leave restaurant owner unjustly enriched. Civ. Code, § 1608.

3. Contracts ⟹138(1)

The rule that courts will not compel parties to perform contracts which have for their object performance of acts against sound public policy is not generally applied to secure justice between parties who have made such illegal contract but from regard for higher interest, that of public, whose welfare demands that certain transactions be discouraged, and therefore in action involving such contract a plea of unjust enrichment will be unavailing. Civ.Code, § 1608.

Harold L. Strom, Oakland, for appellants.

Nat Brown, Sr. and Nat Brown, Jr., Stockton, Herbert Chamberlin, San Francisco, for respondent.

VAN DYKE, Justice.

On January 1, 1946, Horace Fong and Fulton Fong, predecessor in interest of Lily Fong, entered into a contract with Ruby Miller. The contract recited that Miller was the owner of a cafe known as the Gate Inn, situated at Jackson, California, consisting of a bar for the sale of liquor, and a restaurant; that Miller desired to obtain the services of the Fongs to manage and operate the restaurant and that the Fongs were willing to undertake such services upon the following terms: That any additional equipment or construction added to the restaurant would be paid for by the Fongs, which additions would remain their property, except where the removal of them would damage the building in which they were located; that all licenses for the conduct of Miller's business should be taken out and maintained in her name, but that the Fongs would pay to her as rental for the restaurant premises a sum equal to one-half of the total of all license fees required for the operation of all businesses conducted upon the premises; that the Fongs would pay all expenses due to operation of the restaurant; that they should receive as compensation for their services all proceeds from the restaurant, and in addition thereto one-fourth "of the net revenue derived from the operation of the bar and amusement machines." The Fongs improved the restaurant by spending over $4,000 in additional equipment and over

$1,000 in constructing living quarters to be used by their help. They then began the operation of the restaurant as agreed upon. Differences arose between the parties and about two months after the Fongs moved in Miller locked them out. Treating this as an eviction from leased premises, the Fongs brought this action to recover the amounts so expended in connection with the restaurant and $15,000 additional, demanded as compensation for loss of prospective profits. At the trial of the action the Fongs waived their claim for damages for prospective profits. The parties stipulated that the "amusement machines" referred to in the contract which were being operated by Miller were in fact slot machines, punchboards, a roulette table and a blackjack table and that the term used in the contract was so understood. The trial court, deeming the contract to be tainted with illegality, denied relief to plaintiffs upon that ground. From the judgment entered that they take nothing plaintiffs present this appeal.

[1, 2] We think the trial court was correct in its analysis of the contract and in its conclusions that no relief could be granted appellants, notwithstanding the respondent alleged wrongful acts. As a general rule, to which there are exceptions, a party to an illegal contract can neither recover damages for breach nor by rescinding recover the performance that he has rendered or its value. Restatement of the Law of Contracts, Sec. 598; Owens v. Haslett, 98 Cal.App.2d 829, 833, 221 P.2d 252. Under certain conditions, notwithstanding that one is a party to an illegal bargain, relief may be accorded if such party be not in pari delicto, but we are unable to conceive how appellants here could claim that they occupied that innocent position. Under the contract they were to operate the restaurant and to receive as their compensation therefor not only the profits from the restaurant, but in addition thereto a share of the profits from the bar and from the gambling devices. What they did in operating the restaurant may have been honest enough, but when they agreed that they were to be given for their services 25% of the profits derived from gambling they tainted their contract with illegality. This made it to their interest that the gambling should flourish in order that their profits therefrom might be enhanced. To say that such a consideration could be valid and that a contract requiring its payments would not be unlawful would be to say that a laborer might, because his labor was honest, lawfully agree that he should be paid from the profits of a crime which the parties contemplated his employer would engage in. The trial court correctly held that the appellants were in pari delicto and that the contract was unlawful and that the court should leave the parties where it found them.

Appellants argue that this contract possessed a dual nature and that one part of it, which they call a lease, could be completely separated from the unlawful agreement to receive a share in the profits of crime. But we think that the contract cannot receive such construction. Notwithstanding the agreement was to last for five years, with option for renewal for a second five years, and assuming that the appellants might lawfully receive the proceeds from the operation of the restaurant, it is yet quite clear from the terms of the contract itself that such profits were not the sole consideration moving to the appellants under the agreement. In addition to the profits from the restaurant, they were to receive a share in the profits of contemplated illegal action. That provision rendered the contract void. The contract made it clear that the consideration moving to respondent was the operation by appellants of the restaurant in connection with her liquor-selling and gambling business. "If any part * * * of several considerations for a single object, is unlawful, the entire contract is void." Civ.Code, § 1608.

[3] Appellants urge that by waiving their claim for future profits and confining their demands to the cost of their added equipment and reconstruction they freed their contract of the taint of illegality. But these things did not change

the nature of the contract nor relieve the appellants from the rule invoked against them by the trial court. Appellants bitterly complain that the court's action leaves the respondent unjustly enriched. The complaint is a familiar one and is generally made by those who, deeming themselves wronged by their companions in illegal ventures, find themselves denied any right to enforce their unlawful agreements. Their pleas have always been unavailing. "This rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged." Takeuchi v. Schmuck, 206 Cal. 782, 786, 276 P. 345, 346; see, also, Lee On v. Long, — Cal.2d —, 223 P.2d 894.

The judgment appealed from is affirmed. The purported appeal from the order denying motion for new trial is dismissed.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 518

CHANITZ et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY.

Civ. 4265.

District Court of Appeal
Fourth District, California.
July 17, 1951.

Joseph Chanitz, and another, filed petition for writ of prohibition commanding the Superior Court of the State of California, in and for the County of San Diego, and Dean Sherry, Judge thereof, to desist from further proceedings in divorce case wherein divorced wife had filed affidavit against divorced husband, who was business partner of petitioners, to recover amounts due under divorce decree, whereupon court had appointed receiver to operate partners' business and had ordered petitioners to show cause why receiver should not sell business. The District Court of Appeal, Barnard, P. J., held that it could not be assumed that court would order sale of entire business if showing that petitioners owned some interest was made, that court would attempt to try issues raised by a separate action brought by petitioners for dissolution of partnership, or that court would place burden of proving exact extent of their interests in business upon petitioners, and therefore, prohibition would not issue.

Petition denied.

Prohibition ⚷27

Where trial court, in divorce action wherein divorced wife sought to recover amounts due under divorce decree, appointed receiver to operate business owned by divorced husband and partners who had started separate action for dissolution of partnership, and ordered partners to show cause why receiver should not sell business, it could not be assumed that court would order sale of entire business if showing that partners owned some interest was made, that court would try issues raised by dissolution action, or that court would place burden on partners to prove exact extent of their interests in the business, and therefore, writ of prohibition commanding court to desist from further proceedings would not issue.

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Ray Miller, Augustine, Bryans & Champion, San Diego, for petitioners.

BARNARD, Presiding Justice.

This is a petition for a writ of prohibition commanding the respondent court to desist from any further proceedings, as against the petitioners, in a divorce case pending in that court.

In the case of June Nelson v. Norman B. Nelson a final decree of divorce was entered on May 13, 1948. On May 22, 1951, June Nelson filed an affidavit stating that certain amounts were due her under the decree; that Norman B. Nelson owns an interest in a cocktail bar known as the "Blue Pacific"; and that these petitioners also claim an interest in that business, claiming a partnership with Nelson. The affidavit prayed for a judgment against

Nelson; and that a receiver be appointed to take possession of Nelson's property and dispose of sufficient to meet her claim, or that the court charge the interest of Nelson in this partnership, if any, with said amount.

On July 2, an action was filed in the same court for a dissolution of the partnership consisting of these petitioners and Norman B. Nelson, who are operating the business known as the "Blue Pacific". On July 6, June Nelson filed a supplemental affidavit in the divorce action stating that the only property of Nelson in this state is his interest in the "Blue Pacific"; that unless a receiver is appointed "in accordance with the prayer" contained in her former affidavit the interest of Nelson will be placed beyond the reach of her judgment; and that an action has been filed to dissolve the partnership and distribute the assets, to her prejudice. On July 9, the court entered an order appointing a receiver, with bond fixed at $1000, and directing him to take full charge of and to operate the business known as the "Blue Pacific". It was further ordered that these petitioners, "claiming to be partners" in this business, show cause on July 26 why the receiver should not sell this business "and all of its assets" and apply the proceeds on the claim of June Nelson; and that all proceedings in the action for dissolution of the partnership be suspended pending the hearing on this order to show cause. This application for writ of prohibition followed.

While the order directing the receiver to take possession of and operate the entire business in question exceeded any relief supported by or prayed for in the affidavit, prohibition is here sought only with respect to future proceedings. The petitioners are now ordered to show cause why the entire business should not be sold in the divorce proceedings. It cannot be assumed that the court will order a sale of this business, in its entirety, if any reasonable showing is made that the petitioners own some interest in it. And it cannot be assumed that the court would attempt, in the divorce proceeding, to try the issues raised by the dissolution of partnership action, or attempt to place on these petitioners the burden of proving the exact extent of their interests in the business. If, upon the hearing of the order to show cause, an improper order should be entered another application for a writ may be made.

The petition is denied.

MUSSELL, J., concurs.

105 Cal.App.2d 566

SINGH v. COOK.

Civ. 7935.

District Court of Appeal, Third District, California.

July 18, 1951.

Karm Singh commenced an unlawful detainer action against Carroll A. Cook, who filed a cross complaint for reformation of a lease to certain premises. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem, held that evidence was sufficient to sustain finding that clause of lease requiring lessee to personally occupy premises was left in the printed portion of the lease through inadvertence and mutual mistake.

Judgment affirmed.

1. Judgment 🔑138(1)

In unlawful detainer action, where tenant filed cross-complaint for reformation of lease, and landlord failed to file affidavit in support of motion to set aside default as to cross-complaint, and no showing of mistake, inadvertence, surprise or excusable neglect was made, trial court's refusal to set aside default was not an abuse of discretion. Code Civ.Proc. § 473.

2. Reformation of Instruments 🔑45(9)

In unlawful detainer action, where tenant filed cross-complaint for reformation of lease, evidence was sufficient to sustain finding that clause of lease requiring tenant to personally occupy premises was left in printed portion of lease through inadvertence and mutual mistake.

3. Appeal and error 🔑110

An order denying motion for a new trial is a nonappealable order.

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Frank L. Murphy, Sacramento, for appellant.

Elliott, Atkinson & Sitton, Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff Karm Singh commenced an action in unlawful detainer against defendant Carroll A. Cook and certain fictitious defendants. No fictitious defendants were served or appeared in the action, so Cook is the sole defendant. In his complaint plaintiff alleged he is the owner of a lot located at 211 N Street, Sacramento, and that on November 5, 1945, he entered into a written lease of the said property with defendant Cook. The complaint then went on to allege that said Cook had violated the terms of said lease in a number of particulars, among them, the provision that "the Lessee shall personally occupy said demised premises and shall keep same in good repair." The complaint alleged further that plaintiff had been damaged in the sum of $2500.00; that three days notice for demand of surrender of possession had been given; that the lease provided that in an action to dispossess the lessee, said lessee shall pay attorney's fees and costs. The prayer of the complaint was for possession of the premises, the amount of rent due and unpaid, trebled, the damages found by the court, and $500.00 attorney's fees and also for costs.

The answer of defendant alleged that no purpose as to the use of the premises was designated in the lease; that it was agreed by the parties at the time that it was to be used as a rooming house. The violations alleged in the complaint were denied and it was alleged that everything done with respect to the premises was done with the knowledge and consent of the plaintiff. By way of a second separate defense it was alleged that prior to the date of the lease plaintiff solicited defendant to improve the premises in question as a rooming house, the understanding being that plaintiff would select the room in which he wanted to live; that following the execution of the lease, defendant spent $19,606.86 in reconstruction of the premises and $1,773.25 for furnishings; that when the reconstruction was completed, plaintiff selected a room and has since resided on the premises; that defendant has been in possession of the premises through his agent and employee, who has actively managed the rooming house; that plaintiff has never offered to repay defendant the cost of reconstruction; that it was never agreed by the parties that defendant should personally live on the premises; that to permit plaintiff to forfeit defendant's rights as lessee would be unjust, unconscionable, and inequitable. By way of a third separate defense defendant realleged by reference the allegations of the second separate defense and set forth that plaintiff's alleged cause of action was barred by laches.

By way of cross-complaint defendant incorporated by reference all of the allegations of the second defense, and alleged further that in the preparation of the lease a printed form was used which contained the phrase "The Lessee shall personally occupy said demised premises"; that neither of the parties read or checked the printed terms prior to signing the lease; that it was never understood or contemplated that defendant would personally live on said premises and that said clause was inadvertently by mutual mistake permitted to remain in said lease, and he asked that the lease be reformed.

Following a trial before the court without a jury, and after findings had been waived, judgment was entered to the effect that all of the denials and allegations of defendant's answer and cross-complaint are true and that plaintiff take nothing, and further that the lease be reformed by striking out the clause that the lessee "shall personally occupy said demised premises." A motion for a new trial was denied and this appeal is from the judgment and from the order denying the motion for a new trial.

[1] Appellant first contends that the trial court erred in denying his motion to set aside the default to the cross-complaint. The record shows that the complaint was filed on July 8, 1949 and that the answer and cross-complaint was filed on September 10, 1949. On February 14, 1950, the case first came on for trial but was continued to March 8, 1950, because of the illness of appellant's counsel. On the same day respondent had the Clerk enter appellant's default for failure to answer the cross-complaint. On March 18, 1950, the cause came on for trial, and after the issues had been stated by respective counsel, the counsel for defendant (appellant is represented by different counsel upon this appeal) made an oral motion to set aside the default entered as to the cross-complaint, tendering an answer at the same time. No affidavit was filed in support of the motion and no showing of mistake, inadvertence, surprise or excusable neglect, as required by section 473 of the Code of Civil Procedure was made. Counsel for defendant merely stated to the court that by stipulation he had been given until November 11, in which to answer the cross-complaint, and that nothing further had been done by him about filing an answer but that he relied upon his general understanding that Mr. Sitton, counsel for plaintiff, would never take a default against an attorney, although he had been given no such assurance in this case. The trial court in denying the motion, stated: "Well, he hasn't made any showing at all, in respect to it, so I don't know that I can set it aside, but I expect to go into that question just as fully as though the answer was filed. So, you can do whatever you want. You haven't made any showing, Mr. Mitchell (counsel for defendant), you haven't made any showing which permits the Court to just say, 'We will set aside the default as to the cross-complaint,' but as far as that is concerned unless they prove it, of course, the Court will not give him that relief anyway. Proceed. Motion to set aside the crosscomplaint is denied with the understanding the Court has stated."

While courts should be liberal in setting aside defaults in order that litigation may be disposed of upon its merits, it requires no citation of authority to support a holding that in the instant case the trial court did not abuse its discretion in refusing to set aside the default. Furthermore it is apparent from the record that the court went into the matter fully and that no possible prejudice could have resulted to appellant from the denial of the motion.

[2] Appellant next contends that the judgment is not supported by the evidence. We have read the record carefully and are convinced that the allegations of respondent's defenses and cross-complaint were amply proved. Appellant does not dispute this except to contend that it is clear that the provisions as to the lessee's personally occupying the premises was breached. It was, of course, conceded and stipulated that respondent never personally occupied the premises, but the Court determined upon sufficient evidence that that particular clause was left in the printed portion of the lease through inadvertence and mutual mistake. To have determined otherwise the court would have had to believe that respondent, who, with his family, was living, and had lived for forty years, in an exclusive residential district in East Sacramento, had agreed to change his dwelling place to a rooming house in a business and industrial section near the Sacramento River.

The following summary, made by the learned trial judge at the conclusion of the trial is amply sustained by the record:

"As I would gather the background of this case, here was an old building that had stood there for years after a fire had gutted it. In the condition which it was in it brought in no revenue. It stood in a part of the town that we know as a matter of fact is rather difficult to rent or to lease. There is not much doubt in the Court's mind but what it would be rather difficult to get anybody to finance this sort of a lease.

"The evidence here shows that at the time the lease was made it was perfectly satisfactory apparently to all parties, and while the lease does provide for the deposit of $3000.00, it does not provide any limitation as to the amount that should be expended. In paragraph 13 the lessees agree to make all improvements to the present building. After the term of the lease, of course, unless it were renewed from month to month which would be the case in case either party did not desire to extend this lease, the property and the full possession and control would be with Mr. Singh, the lessor.

"Now, if we look at the picture from the standpoint that Mr. Singh would undoubtedly not have been able to finance the reconstruction of that building in any shape, form or manner, the evidence shows he owed a lumber bill to one of the lumber companies for many years, and that bill, possibly not too large, Mr. Singh had not been able to pay. So, in the course of events it was settled and that particular part is not of great importance except to show the situation that existed. It would look to the Court as though Mr. Singh was trying to get something where he could have a living and an income. This lease provided for his occupying a room and $30.00 a month. It would be very unfair and inequitable after a lessee had put in the property more than $20,000.00 to have the lessee come in, or the lessor come in and try to void that lease unless he had very good grounds.

"The fact of the matter is that while it does contain this provision about personal occupancy, everybody knew from the beginning that it was never intended that Mr. Cook was going to occupy this personally. He is occupying the premises by an employee there and that apparently has been satisfactory and been going on ever since the lease was executed. Mr. Singh has lived there, knew all about it, never made any protest, and as a matter of fact since the notice was given to institute this proceeding, which was filed on July 8, 1949, Mr. Singh has been taking the rent ever since that time, been taking the rents ever since the lease was executed. You cannot blow hot and cold at the same time. If he desired to try to void the lease, he should have done things consistent with that. You cannot void a lease by continuing to take the rent after you have given notice that the lease has been violated, and particularly is that true in a case such as this where he claims that probably the most important part was that the lessee was not occupying the premises, and yet under those conditions he goes right along and accepts the rent and justifies the lease.

* * * * * *

"So, when you look at the whole record, there is nothing here that would justify the Court in holding that any of the provisions material have been violated.

"Now, there isn't any question, as I have just stated, but what they all knew that this was going to be a rooming house, that it was going to be run by Mr. Cook and that he was not going to live in it. As he has explained, this particular provision, it was never intended by either party to have him come down there and run a rooming house."

[3] In view of the foregoing, we believe that the judgment should be, and the same is hereby affirmed. The order denying appellant's motion for a new trial, being nonappealable, the appeal therefrom is dismissed.

ADAMS, P. J., and VAN DYKE, J., concur.

105 Cal.App.2d 495

CONWAY v. GLOBIN.

Civ. 7877.

District Court of Appeal, Third District,
California.

July 17, 1951.

Action by Russell J. Conway against Frank Globin for damages for assault. The Superior Court, El Dorado County, George H. Thompson, J., rendered judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that an employee could maintain action against employer for compensatory and punitive damages for alleged willful assault, as against contention that the matter was exclusively within jurisdiction of Industrial Accident Commission.

Judgment reversed.

1. Workmen's compensation ⚷681

Compensation will be granted for injuries due to assaults by fellow employees where same are fairly traceable to an incident of employment, but compensation will be denied where injuries are the result of personal grievances unconnected with employment. Labor Code, §§ 3600, 3601.

2. Workmen's compensation ⚷609

Under statute providing that liability for compensation shall, without regard to negligence, exist against an employer for any injury sustained by his employees "arising out of employment", quoted phrase means that the injury must occur by reason of risk or condition incident to employment. Labor Code, §§ 3600, 3601.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out of Employment".

3. Workmen's compensation ⚷519

Employer's intentional assault on employee is not a risk or condition incident to the employment and hence the assaulted employee's injury does not arise out of employment and is not compensable. Labor Code, §§ 3600, 3601.

4. Workmen's compensation ⚷2093

An employee could maintain action against employer for compensatory and punitive damages for alleged willful assault, as against contention that the matter was exclusively within jurisdiction of Industrial Accident Commission. Labor Code, §§ 3600, 3601.

◆

Maul, Hughes & Maul, Placerville, for appellant.

Russell A. Harris, Sacramento, for respondent.

PEEK, Justice.

Plaintiff appeals from a judgment entered in favor of defendant by reason of plaintiff's failure to amend his complaint following the sustaining of defendant's demurrer thereto.

The complaint alleges that defendant is the owner of Globin's Resort at Lake Tahoe; that plaintiff was employed by defendant as manager thereof; that while plaintiff was engaged in the performance of his duties, defendant, without provocation, wilfully attacked him, tearing his clothes and striking him in the face and body; that as a result two of his lower front teeth were broken, necessitating the expenditure of money for dental services, and that it will cost an additional sum to replace the broken teeth. The prayer is for both compensatory and punative damages. Defendant demurred to the complaint on the ground that it failed to state a cause of action in that the superior court had no jurisdiction of the cause of action, the matter being exclusively within the jurisdiction of the Industrial Accident Commission. The demurrer was sustained with leave to amend, and upon plaintiff's failure so to do, judgment was entered in favor of defendant.

The single issue presented is whether the allegations of the complaint established the conditions of compensation as provided in the Workmen's Compensation Law. If they do, it is admittedly apparent on the face of the complaint that appellant has no cause of action against respondent.

It is appellant's contention, however, that the injuries herein alleged resulted from a wilful assault and battery committed by the defendant employer, and hence are not injuries "arising out of and in the course of" plaintiff's employment as provided in Section 3600 of the Labor Code.

Respondent's contention in support of the court's order is that since plaintiff alleges that his injuries were incurred while he was engaged in the performance of his duties as an employee of defendant, the situation so pleaded comes within the provisions of Section 3600 of the Labor Code, and since plaintiff has pleaded no peculiar factual circumstances taking the cause out of the jurisdiction of the Industrial Accident Commission, that therefore the Commission, under the provisions of Section 3601 of the Labor Code, has exclusive jurisdiction of the cause.

The conditions essential to compensation are set forth in Section 3600 of the Labor Code, which reads as follows:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees *arising out of and in the course of the employment* and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation occur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment, either with or without negligence.

"(d) Where the injury is not caused by the intoxication of the injured employee.

"(e) Where the injury is not intentionally self-inflicted." (Emphasis added.)

Section 3601 of the Labor Code reads as follows: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death."

The situation so presented herein has been dealt with specifically in the Compensation Laws of various states by provisions that in the event of death or injury resulting from the deliberate intention of the employer to produce such death or injury, the employee or his survivor may, in addition to his remedy under the Workmen's Compensation Law, maintain an action at law against the employer for damages over the amount payable under the compensation system. See Schneider's Workmen's Compensation Statutes, Vol. 4, p. 3210, Oregon, Section 49–1828. In line with such statutory enactments the weight of authority is that "where an employer inflicts the intentional injury upon his employee, the injured person may sue at common law for damages or accept the benefits under Workmen's Compensation Law. DeCoigne v. Ludlum Steel Co., 251 App.Div. 662, 297 N.Y.S. 636; Le Pochat v. Pendleton, 187 Misc. 296, 63 N.Y.S.2d 313; Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233, 72 A.L.R. 108; Castleberry v. Frost-Johnson Lumber Co., Tex.Com.App., 283 S.W. 141; Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35; Rumbolo v. Erb, 20 A.2d 54, 19 N.J. Misc. 311." Mazarredo v. Levine, 190 Misc. 953, 76 N.Y.S.2d 324, 325.

[1–3] The question so posed in this proceeding is one of first impression in this state. However, the rule is well established that compensation will be granted for injuries due to assaults by fellow-employees where the same are fairly traceable to an incident of the employment but compensation will be denied where they are the result of personal grievances unconnected with the employment. Globe Indemnity Co. v. Industrial Accident Comm., 2 Cal.2d 8, 37 P.2d 1039. Furthermore it has been held that the phrase arising "out of the employment" means at least that the injury "occur by reason of a risk or condition incident to the employment." Pacific Employers Ins. Co. v. Industrial Accident Comm., 19 Cal.2d 622, 628, 122 P.2d 570, 573, 141 A.L.R. 798. But that is not to say that an intentional assault by the employer is a risk or condition incident to the employment. To so hold would be not only to sanction indirectly conduct of the employer which is both tortious and criminal, but also would be to permit the employer to use the Workmen's Compensation Act to shield him from his larger civil liability, which liability would exist independent of the common law defenses to personal injury actions by employees which prevailed prior to the advent of the Workmen's Compensation Act.

[4] For the reasons herein stated we conclude that the allegations in the complaint that an employment relationship existed is immaterial, since the further allegations that the plaintiff's injuries resulted from defendant employer's wilful attack upon plaintiff, allege an injury which is not a risk or condition of the employment, and

hence one not arising out of the employment. It therefore follows that since the injury alleged was not compensable under the Workmen's Compensation Act, the demurrer based upon the purported exclusive jurisdiction of the Industrial Accident Commission should have been overruled.

The judgment is reversed.

ADAMS, P. J., and VAN DYKE, J., concur.

105 Cal.App.2d 373

SIPE v. McKENNA et al.

Civ. 18336.

District Court of Appeal, Second District, Division 2, California.

July 12, 1951.

Hearing Denied Sept. 7, 1951.

Action by Frank R. Sipe against Catherine A. McKenna and others to set aside a decree quieting title to real property. The Superior Court, Los Angeles County, A. W. Ashburn, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Wilson, J., held that the appeal was frivolous and taken solely to harass plaintiff and subjected defendants to penalty for bringing frivolous appeal.

Judgment affirmed.

1. Appeal and error ⚷1097(1)

Where previous appeal from judgment dismissing case resulted in complaint being held sufficient and judgment of dismissal being reversed, such decision constituted law of case and appeal from judgment on ground that complaint did not state cause of action was without merit.

2. Costs ⚷260(4)

Where question argued on appeal had been definitely answered on former appeal and no new point was advanced on later appeal, such appeal was unjustified, vexatious and frivolous. Code Civ.Proc. § 957.

3. Costs ⚷263

Penalty of $300 was imposed against defendants for having taken and prosecuted frivolous appeal. Code Civ.Proc. § 957.

Catherine A. McKenna, of Los Angeles, in pro. per.

J. Irving McKenna, of Los Angeles, for appellants Herman A. Paulk and Mary Agnes Paulk.

Robt. E. Rosskopf, of Beverly Hills, for respondent.

WILSON, Justice.

Defendants have appealed from a judgment cancelling, vacating and holding null and void a decree quieting title to real property in Los Angeles County rendered in an action entitled Catherine A. McKenna, plaintiff, versus The Escrow Corporation, Herman A. Paulk, Mary Agnes Paulk and others, defendants.

The court found that on or about June 21, 1930, for a valuable consideration, defendants Herman A. Paulk and Mary Agnes Paulk made, executed and delivered to Alma Stiebitz their promissory note secured by a deed of trust executed by them, and recorded in the office of the county recorder, upon the property described in the aforesaid action and in the complaint in the case at bar to The Escrow Corporation for the benefit of Alma Stiebitz; that thereafter the promissory note and deed of trust were transferred to Olga Schrago, who thereafter transferred them to plaintiff in the instant action; that the promissory note has not been paid except a small sum on account of interest; that the decree in the aforesaid action purporting to quiet title in the plaintiff therein, Catherine A. McKenna, was rendered pursuant to a fraudulent scheme and conspiracy on the part of Catherine A. McKenna, Herman A. Paulk and Mary Agnes Paulk and by the practice of fraud upon the court; that at the time of the filing of the aforesaid action Catherine A. McKenna was not the true owner of the real property described in the complaint but that defendants Herman A. Paulk and Mary Agnes Paulk were, and had been since June 21, 1930, the true owners thereof; that for the purpose of making it appear that Catherine A. McKenna was the owner of the property defendants caused to be recorded a deed from the Paulks to Sarah O'Neill, a relative of Mary Agnes Paulk, and thereafter a deed from Sarah O'Neill to Catherine A. McKenna, both of which purported transfers were without consideration and were made for the sole benefit of defendants and in furtherance of the aforesaid fraudulent scheme and conspiracy; that affidavits of service were filed in the aforesaid action executed by J. M. McKenna, the son of Catherine A. McKenna, and sworn to before J. Irving McKenna, a notary public, the husband of Catherine A. McKenna, alleging the service of complaint and summons in the aforesaid action; that said affidavits of service were false and fraudulent in that summons and complaint in said action were not served upon any of the defendants therein except defendants Paulk; that after the entry of the decree in said action defendants Catherine A. McKenna, Herman A. Paulk and Mary Agnes Paulk caused to be recorded a deed purporting to convey one of the lots in question to defendants Paulk.

Based upon the foregoing facts the court adjudged that plaintiff is the owner and holder of the promissory note and of the beneficial interest in the deed of trust above mentioned; that such deed of trust is a valid and subsisting instrument affecting the title to the real property described therein; that the decree quieting title rendered in the aforesaid action entitled Catherine A. McKenna versus The Escrow Corporation is null and void and is cancelled and vacated as to defendants therein Alma Stiebitz and The Escrow Corporation.

The result of defendants' machination and circumlocution, if not frustrated, was that Catherine A. McKenna became the owner of one lot and the Paulks of the other, free and clear of the latters' indebtedness under the deed of trust which they had executed.

[1] Defendants do not contend that the evidence does not support the findings and judgment. The entire brief consists of argument that the complaint does not state sufficient facts to constitute a cause of action. Upon a previous appeal from a judgment dismissing the case the complaint was held to be sufficient and the judgment of dismissal was reversed. Sipe v. McKenna, 88 Cal.App.2d 1001, 200 P.2d 61. Since that decision constitutes the law of the case defendants' argument is futile and their appeal is without merit.

[2] Several pages of defendants' brief in the instant case are copied verbatim from their brief in the former appeal relating to the insufficiency of the complaint. Since the question defendants have argued on this appeal was definitely decided against them on the former appeal and no new point is here advanced by them, it is obvious that the present appeal is unjustified, vexatious and frivolous and was taken solely for the purpose of delaying and harassing plaintiff. This appeal has not only caused plaintiff an unnecessary expense but has consumed the time of this court which might have been spent in determining meritorious cases. Such appeals apparently can be discouraged only by the imposition of a penalty on the offender as authorized by section 957 of the Code of Civil Procedure. Seidell v. Tuxedo Land Co., 216 Cal. 165, 171, 13 P.2d 686; Barry v. All Persons, etc., 158 Cal. 435, 436, 111 P. 249; Tetenman v. Melekov, 90 Cal. App. 625, 629, 266 P. 367.

[3] The judgment is affirmed and damages are imposed upon defendants-appellants in the sum of $300 for having taken and prosecuted a frivolous appeal, and the trial court is instructed to enter judgment in favor of plaintiff and against defendants for said sum in addition to the costs of appeal.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

SEVEN UP BOTTLING CO. OF LOS ANGELES, Inc. v. GROCERY DRIVERS UNION LOCAL 848, etc., et al.

Civ. 17610.

District Court of Appeal, Second District, Division 1, California.

July 5, 1951.

Rehearing Denied July 23, 1951.

Hearing Granted Aug. 30, 1951.*

Seven Up Bottling Company of Los Angeles Incorporated brought action against Grocery Drivers Union Local 848, etc., and others, for damages and injunctive relief alleging violation of jurisdictional strike act. The Superior Court of Los Angeles County, Archie D. Mitchell, J., entered judgment dismissing action on ground that complaint did not state cause of action, and plaintiff appealed. The District Court of Appeals, Drapeau, J., held that act was exercise of power of state to define an unlawful purpose limitation of peaceful picketing, and was constitutional and enforceable, and therefore, action was maintainable.

Reversed.

1. Constitutional law 🔑90

Right of free speech is not without limitations, but is always to be exercised with due regard for the rights of others.

2. Constitutional law 🔑90
Labor relations 🔑295

Right to picket as an incident to right of free speech is limited when conduct of those engaged therein goes beyond peaceful picketing.

3. Labor relations 🔑285

Jurisdictional strike act prohibiting concerted refusal to perform work or any other concerted interference with employer's operation or business, arising out of controversy between labor organizations as to which of them should have exclusive right to bargain collectively with employer, or as to which of them should have its members perform work for employer, was an exercise of state power to define an unlawful purpose limitation of peaceful picketing and was part of general legislative scheme to protect people as a whole, and therefore was constitutional and enforceable. Labor Code, §§ 923, 1115 et seq.

4. Constitutional law 🔑82
Labor relations 🔑303

Employers have constitutional right, just as sacred and binding as right of free speech, to be protected from assaults upon their property in industrial disputes to which they are not parties.

5. Labor relations 🔑352

Statute prohibiting concerted refusal to perform work or any other concerted interference with an employer's operation or business, arising out of controversy between two or more labor organizations as to which of them should have exclusive right to bargain collectively with employer, or out of controversy as to which should have its members perform work for employer, had effect of prohibiting jurisdictional strikes. Labor Code, § 1115 et seq.

6. Constitutional law 🔑48

Jurisdictional strike act would be presumed constitutional. Labor Code, § 1115 et seq.

7. Labor relations 🔑933

Employer's complaint against labor union alleging facts showing violation of jurisdictional strike act and praying for damages and injunctive relief was sufficient to state cause of action. Labor Code, § 1115 et seq.

8. Labor relations 🔑814

An injunction will lie against lawful acts of a labor union which indirectly cause a breach of contract.

9. Labor relations 🔑251

Under Labor Code, an employer cannot sign a closed shop or union shop contract if none of its employees are members of the contracting union. Labor Code, §§ 920–923.

10. Labor relations 🔑352, 913

Statute prohibiting jurisdictional strikes was a determination by the legislature that such a strike would constitute a clear and present danger to paramount public interests, and action for injunction against violation of the statute could not be defeated on ground that record did not show clear and present danger. Labor Code, § 1115 et seq.

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* Subsequent opinion 254 P.2d 544.

11. Constitutional law ⚷90
Labor relations ⚷286

Protection afforded by free speech guarantee of right to publicize a labor dispute is not necessarily controlled by the clear and present danger test.

Thomas P. Menzies, Harold L. Watt, Los Angeles, Carl M. Gould, Los Angeles, of counsel, for appellant.

Stevenson & Richman, Los Angeles, Todd & Todd, San Francisco, for respondents.

DRAPEAU, Justice.

Plaintiff's complaint alleges facts sufficient to charge defendants with violation of the jurisdictional strike act of California, to be awarded damages, and to be granted injunctive relief—all under the terms of the statute. California Labor Code, Sec. 1115 et seq., Stats. 1947, ch. 1388.

Defendants' answer puts in issue the material allegations of the complaint, and asserts a constitutional right to do the acts complained of.

At the commencement of the trial defendants objected to the introduction of evidence, on the ground that the complaint did not state a cause of action. The trial court agreed with this contention, and ordered entry of judgment dismissing the action. From this judgment plaintiff appeals. See Seven Up etc. Co. v. Grocery etc. Union, 97 Cal.App.2d 623, 218 P.2d 41.

The principal question for decision is whether the statute under attack is constitutional or unconstitutional. Respondent suggests other questions, which will be considered at the close of this opinion.

In re Blaney, 30 Cal.2d 643, 184 P.2d 892, gives names, citations, and brief statements of the facts, in cases in the Supreme Court of California and in the Supreme Court of the United States which define the rights of the people and of employers and employees in the developing law of labor relations. There will be found a comprehensive exposition of labor's right to publicize disputes with employers, by picketing, boycotting, and otherwise, in the exercise of civil liberties guaranteed by federal and state constitutions. And there also will be found cases which up to that time defined certain limitations of that right. No need therefore appears to repeat fundamental rules now settled in cases of this kind; except, of course, those believed to directly apply to the questions here involved.

In re Blaney declared unconstitutional the so-called hot cargo or secondary boycott act, because it was too sweeping, vague and uncertain, and violated the right of free speech, press and assembly guaranteed by the Constitution of the United States.

The statute now under consideration defines a jurisdictional strike as: "a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have * * * its members perform work for an employer." Sec. 1118, Labor Code.

So here we have a law which is neither sweeping, vague nor uncertain, as was the one under consideration in the Blaney case. The opinion of the Supreme Court in that case points out that the hot cargo act prohibited a group of employees or a union from giving publicity to their contentions in a dispute between employers and employees even by means of radio or newspaper.

In this case the law prohibits concerted action against employers by persons who have no dispute with employers over wages, or hours, or any condition of employment, except only what labor organizations shall represent employees and bargain with employers, or which of two or more contending labor organizations shall represent employees.

At the same time employers are prohibited by California law from coercing or compelling any person to join or not to join any labor organization. And this prohibition is implemented by penal sanctions. Sec. 922, Labor Code.

The Blaney case comments upon the familiar rule that rights of employers and employees in labor cases are to be determined by the law of the state, as construed by the courts of the state, and by the Supreme Court of the United States; and that, of course, the pronouncement of the latter high tribunal is the last word upon the subject, to the extent that rights under the federal constitutional are involved.

[1] The right of free speech is not without limitations. It is always to be exercised with due regard for the rights of others. No authorities need be cited to sustain this elementary proposition.

[2] In the law of labor as it develops in the United States the right to picket as an incident to the right of free speech likewise has its limits. An example of such limitation is when the conduct of those engaged goes beyond peaceful picketing and involves violence, continuous, uninterrupted, and enmeshed in the picketing. Steiner v. Long Beach Local, 19 Cal.2d 676, 123 P.2d 20; In re Bell, 19 Cal.2d 488, 122 P.2d 22.

This inquiry, then, narrows to whether the statute under consideration constitutes a valid limitation upon the right to strike as an incident to the right of free speech.

Four cases in the Supreme Court of the United States, decided in 1949 and 1950, bring light to the problem. These cases are Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985; International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995; and Building Service Employees International Union v. Gazzam, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045.

These cases turn upon what has been called the unlawful purpose limitation of peaceful picketing, and hold that picketing to coerce employers to violate state law may be prohibited by the state.

In Giboney v. Empire Storage & Ice Co., supra, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, it was held that the state had the power to regulate peaceful picketing when its objective was to require an employer to violate the law of the State of Missouri dealing with restraints of trade. In that case the state law provided criminal penalties for its violation.

Hughes v. Superior Court, supra, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, is a California case. Negroes in the City of Richmond, California, were enjoined by the Superior Court from picketing a grocery store. The objective of the picketing was to require the grocer to employ Negroes as clerks in proportion to the Negro patronage of the store.

Picketing was continued, despite the injunction; the pickets were adjudged guilty of contempt and ordered to jail. The District Court of Appeal of California reversed the judgment. Hughes v. Superior Court, 186 P.2d 756. California's Supreme Court reversed the District Court of Appeal. 32 Cal.2d 850, 198 P.2d 885. And the United States Supreme Court upheld the conviction. 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985.

The judgment was affirmed by the Supreme Court of California and by the Supreme Court of the United States for the reason that the picketing was for an unlawful purpose. In the decision of the United States Supreme Court, 339 U.S. 460, 70 S.Ct. 718, 721, 94 L.Ed. 985, 992, it is said: "Picketing is not beyond the control of a State if the manner in which picketing is conducted *or the purpose which it seeks to effectuate* gives ground for disallowance." (Emphasis added.)

In International Brotherhood v. Hanke, supra, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995, the question involved the right to picket peacefully a business conducted without employees, the object being to enforce closing hours on business days, and closing on Sundays and holidays, to conform with practices agreed upon between the union and a few employers in the same business.

Picketing for this purpose was enjoined. The judgment was affirmed by the Supreme Court of Washington and by the Supreme Court of the United States.

In its opinion the Supreme Court makes the following comments, 339 U.S. 470, 70 S.Ct. 773, 775, 94 L.Ed. at page 1001:

"The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' (Citing cases.) A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect. * * * [339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. at page 1003.]

"Because there is lack of agreement as to the relevant factors and divergent interpretations of their meaning, as well as differences in assessing what is the short and what is the long view, the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to the Congress as well as to the forty-eight States."

A situation similar to that here presented appears in Building Service Employees Union v. Gazzam, supra, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045. In that case the State of Washington enacted legislation that workers may join or not join a union, free from coercion, interference, or restraint of employers in the designation of their representatives for collective bargaining.

The union was enjoined from picketing a hotel. The picketing was because the owner refused to sign a contract agreeing to require his employees to join the picketing union. The injunction was affirmed by the Supreme Court of Washington; Gazzam v. Building Service E. I. Union, 29 Wash.2d 488, 188 P.2d 97, 11 A.L.R. 2d 1330, and by the Supreme Court of the United States. The decisions were based upon the fact that the picketing constituted a coercive attempt to force an employer to violate state law.

No particular restatement need be made of the principle under discussion as it has been stated and applied in our California decisions. Views of the courts of this state, as picketing has changed from unlawful to lawful, as it has been extended to accomplish various things, and then, perforce, as it has been limited to lawful objectives, may be found in: Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Lisse v. Local Union No. 31, 2 Cal. 2d 312, 41 P.2d 314; Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109, 222 P. 812; McKay v. Retail Automobile Salesman's Local Union, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403; Magill Bros. v. Building Service Employees' Union, 20 Cal.2d 506, 127 P.2d 542; James v. Marinship Corporation, 25 Cal. 2d 721, 155 P.2d 329, 160 A.L.R. 900; Park & Tilford Import Corporation v. International Brotherhood of Teamsters, 27 Cal. 2d 599, 165 P.2d 891, 162 A.L.R. 1426; In re Blaney, supra, 30 Cal.2d 643, 184 P.2d 892; Northwestern Pac. R. R. Co. v. Lumber & Sawmill Workers Union, 31 Cal.2d 441, 189 P.2d 277; Riviello v. Journeymen Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400; and City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36, 210 P.2d 305.

Reference should also be made to several helpful and instructive discussions in text and law reviews: Wolferman, Inc., v. Root, 356 Mo. 976, 204 S.W.2d 733, 174 A.L.R. 593; Gazzam v. Building Employees, etc., Union, 29 Wash.2d 488, 188 P.2d 97, 11 A.L. R.2d 1338; 22 Southern California Law Review 442; 37 Cal. Law Review 296; 24 Southern California Law Review 145; 3 Stanford Law Review 413, and Cf. "The Organizational Picket Line" by Lauritzen and by Tobriner; and 28 North Carolina Law Review 291.

[3] It therefore appears that the California jurisdictional strike law, enacted in 1947, is constitutional and enforceable. It is an exercise of the power of the State

of California, using democratic methods through its legislative department, to define an unlawful purpose limitation of peaceful picketing. Moreover, it is part of a general legislative scheme developing in our Labor Code, for the protection not only of labor and of management but of the people as a whole.

Section 923 of the Labor Code provides:

"*Public policy as to labor organizations.* In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

To tell the employer that he is not to interfere in the designation by his employees of their bargaining organization, and then to permit picketing of the employer's business to force him to do the very thing which the law enjoins him not to do is socially illogical.

[4] Nor does it help to argue that picketing may be directed against employees only, to persuade them to join the picketing union. In such circumstances it is the employer's business which inevitably suffers, and which may indeed be destroyed if it is a small one. Employers too have a constitutional right, just as sacred and binding as the right of free speech, to be protected from assaults upon their property in industrial disputes to which they are not parties. Coppage v. State of Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441; Dorchy v. State of Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248.

Other questions raised by respondents are:

1. Whether the decision of the court is supported by the record.

2. That there does not appear in the record any clear and present danger to paramount public interests justifying the injunction.

3. That the jurisdictional strike law does not prohibit jurisdictional strikes.

4. That the law prohibits acts long recognized as protected by the bill of rights.

5. That the law has no presumption of constitutionality.

6. That the complaint alleges no facts to show that plaintiff is engaged in interstate commerce.

7. That the allegations of the complaint are insufficient to constitute a cause of action, or permit injunctive relief.

8. An injunction will not lie against lawful acts of a labor union which indirectly cause a breach of contract.

9. The fourth cause of action fails to show a proper ground for equitable relief.

10. That an employer may sign a closed shop or union shop contract even if none of its employees are members of the contracting union, without violating Sections 920–923 of the Labor Code.

[5–9] Examination of the record and of the law has convinced this court that these contentions, and all of them are untenable.

Only one of them needs any particular comment—that there does not appear in the record any clear and present danger to paramount public interests justifying the injunction.

[10] The short answer is that it was the province of the legislature when the law was put upon the statute books of the state to determine the clear and present danger

requiring its enactment; and that unless the courts may say that there was and that there is no such clear and present danger the law is not to be struck down.

In the opinion of the United States Supreme Court in the Hughes case, 339 U.S. 46, 70 S.Ct. 718, 723, 94 L.Ed. 985, 994, it is said: "The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the form of legislation, e. g., restraint of trade statutes, or be left to the ad hoc judicial process, e. g., common law mode of dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice."

[11] In California it has been held that the protection afforded by the free speech guarantee of the right to publicize a labor dispute is not necessarily controlled by the clear and present danger test. In re Blaney, supra, 30 Cal.2d 643, 184 P.2d 892; City of Los Angeles v. Los Angeles etc. Council, supra, 94 Cal.App.2d 36, 210 P.2d 305.

The judgment is reversed.

DORAN, J., concurs.

WHITE, Presiding Justice.

I concur.

The main and vital question here presented is whether the statute under consideration in so far as it defines a jurisdictional strike, declares it to be against the public policy of the State of California, and providing injunctive relief and damages for violation of the act is an unwarranted encroachment upon constitutional guarantees.

In Thornhill v. State of Alabama, 310 U.S. 88, at page 103, 60 S.Ct. 736, at page 745, 84 L.Ed. 1093, it is stated: "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants". This is but another way of saying what was declared in James v. Marinship Corp., 25 Cal.2d 721, 730, 155 P.2d 329, 334, 160 A.L.R. 900, as follows: "Thus a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy, though any such limitations are subject to review by the United States Supreme Court, and will be annulled if they unreasonably interfere with labor's right to publicize the facts of a labor dispute".

It is now firmly established that states have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law. But, under this constitutional doctrine the due process clause is not to be so broadly construed that the state legislature is without power to suppress business and industrial conditions which it regards as offensive to the public welfare. Thus, in Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 726, 62 S.Ct. 807, 809, 86 L.Ed. 1143, it was held that a state may validly declare that its welfare will not be served if "in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder."

There can be no doubt that the constitutional guarantee would be infringed should the state attempt to limit peaceful picketing for, as was said in American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 570, 85 L.Ed. 855, 857, "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

And, as was said by our Supreme Court In re Blaney, 30 Cal.2d 643, 648, 184 P.2d 892, 896, quoting from Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20: "It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby *has a reasonable relation to the betterment of labor conditions,* and they act peaceably and honestly, (Citations.) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) (*and it is not*) *dependent upon the existence of a labor controversy between the employer and his employee."* (Emphasis added.)

However, the act with which we are here concerned is not directed at any concerted action against employers over wages, hours or conditions of employment. It prohibits concerted action only in cases where two or more labor organizations are contending as to which of them should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer. Section 922 of the Labor Code prohibits employers from coercing or compelling any person not to affiliate with a labor organization. Violation of this section is punishable as a crime. The act here in question is not aimed at disputes or controversies to which the employer is a party. It has to do only with quarrels between rival labor organizations as to which of them should have the rights and privileges above referred to. I fail to see how such a dispute can be classed as having "a reasonable relation to the betterment of labor conditions". The employer is an innocent victim of such a controversy. As, in the instant case, he has according to the complaint on file herein a contract with a labor organization. The object of the economic pressure against the employer is to compel him to require his employees to join a union other than the one of their choice. Can it be said that the due process clause deprives the state of the right to prohibit concerted action to force an employer to deal with the picketing union in defiance of his existing agreement with another union, or notwithstanding the provisions of section 922 of the Labor Code?

To judge of the wisdom of the declared policy of the state is not for the courts. Their duty is to determine whether a restraint of picketing in reliance on the policy of the state as declared by its legislative branch is an unwarranted encroachment upon rights protected from abridgement. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, it cannot be held that peaceful picketing must be wholly immune from regulation in order to protect the general interest, nor that the state must be held powerless to confine the use of this industrial weapon within reasonable bounds. For the reasons herein stated, it is my conclusion that the labor code act under discussion presents no constitutional infirmity.

This cause is before us on a judgment predicated upon the sustaining of an objection to the introduction of any evidence on the ground that the complaint did not state a cause of action. Assuming, as we must, the truth of the allegations of the complaint, I am persuaded that it states a cause of action under the California Labor Code, section 1115 et seq.; Stats. 1947, chap. 1388, and that the legislation in question is constitutional.

VOELTZ v. BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION NO. 37, etc. et al.

Civ. 18110.

District Court of Appeal, Second District, Division 1, California.

July 5, 1951.

Rehearing Denied July 23, 1951.

Hearing Granted Aug. 30, 1951.*

Virgil V. Voeltz, etc., employer, brought action against Bakery and Confectionery Workers International Union of America, Local Union No. 37, etc., and others, to enjoin picketing. The Superior Court of Los Angeles County, W. Turney Fox, J., ordered preliminary injunction commanding defendants to refrain from picketing, from representing that plaintiff's employees were unorganized, and from representing that plaintiff's products were made by unorganized labor, and defendants appealed. The District Court of Appeal, Drapeau, J., held that legislature had power to prohibit picketing or other persuasion which would injure employer's business and which was directed against employer to compel him to influence determination of employees to secure recognition of union as their representative, and to require employees to join union.

Orders affirmed.

White, P. J., dissented.

1. Labor relations ⚷352

Under jurisdictional strike act, a valid dispute between employer and employee is an indispensable prerequisite to picketing. Labor Code, § 1115 et seq.

2. Labor relations ⚷326, 327

There can be no valid dispute between employer and any labor organization when that organization attempts to compel employer to determine what labor organization, if any, shall be formed in his shop, or what organization shall be bargaining agent for his employees, or to which of two or more contending labor organizations his employees shall belong. Labor Code, § 1115 et seq.

3. Labor relations ⚷283

Legislature had power to prohibit, as conduct for unlawful purpose, picketing or other means of persuasion which would injure employer's business and which was directed against employer to compel him to influence determination of employees to secure recognition of union as their representative, and to require employees to join union, where employer, under statute, is prohibited from exerting such influence. Labor Code, § 1115 et seq.

4. Labor relations ⚷332

Where one purpose of picketing was lawful as protesting unlawful discriminatory discharge of a union member and supporter, but other purpose was unlawful as attempting to secure recognition of the union as bargaining representative of employees, picketing was not lawful so long as union insisted on the unlawful object. Labor Code, § 1115 et seq.

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Gilbert, Nissen & Irvin, Los Angeles, Clarence E. Todd, San Francisco, for appellants.

Hyman Smith, Los Angeles, Howard R. Harris, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

This case has been held for decision until completion of the opinion in Seven Up Bottling Company of Los Angeles Incorporated v. Grocery Drivers Union, Local 848, et al., Cal.App., 233 P.2d 617.

The law to be applied is the same as in the Seven Up case.

The complaint in this case also alleges facts sufficient to charge defendants with violation of the jurisdictional strike act, Labor Code, § 1115 et seq., of California. Defendant's answer also puts in issue the material allegations of the complaint, and asserts a constitutional right to do the acts complained of.

The complaint in this case alleges, in addition, that defendants conspired and agreed among themselves to destroy plaintiff's business, in retaliation for his refusal to require his employees to join defendant unions, and that the picketing and other acts described in the complaint were for that added purpose.

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* Subsequent opinion 254 P.2d 553.

The course of the litigation here was different from that in the Seven Up case.

In this case the trial court ordered a preliminary injunction, commanding defendants to refrain from picketing plaintiff's premises, from representing that plaintiff's employees were unorganized, and from representing that plaintiff's products were made by unorganized labor. Thereafter the trial court denied a motion to vacate the preliminary injunction. From these orders certain defendants appeal.

In view of the able briefing and argument by counsel in this case, this Court would not have them think that their presentation of the important matters here involved has been cursorily disposed of entirely in the light of the Seven Up case.

It is, of course, unnecessary to repeat in this opinion, the cases, or all of the reasoning, which brought this Court to the judgment therein expressed, and which affects the decision in this case.

It is difficult, if not impossible, to capture in any formula all of the elements in grave constitutional questions, as presented in these two cases.

In the light of the earnest and able presentation of the contentions of defendants, may this at least be said:

[1, 2] Viewing the jurisdictional strike act as an expression of the policy of the State of California by a coordinate branch of that government under its Constitution, this Court is of the opinion that a valid dispute between employer and employee is an indispensable prerequisite to picketing; and that when the law of California forbids an employer to have anything to do with what labor organization, if any, shall be formed in his shop, or what labor organizations shall be the bargaining agent for his employees, or to which of two or more contending labor organizations his employees shall belong, then there can be no valid dispute between any employer and any labor organization when that organization attempts to compel the employer to do any of these forbidden things.

Such matters, under the expressed public policy of the State of California, are not for the interference, restraint, or coercion of the employer. He is prohibited from having anything to do with them.

[3] Such being the policy of the state, no picketing, or other method of persuasion used in labor disputes, which will injure an employer's business may be directed against him to compel him to influence the determination of his employees in these matters. The cases in the Supreme Court of the United States and in the Supreme Court of the State of California support the conclusion that it is within the power and the province of the Legislature to declare such conduct to be for an unlawful purpose, and as such to prohibit it.

Defendants argue that one of the purposes of the acts complained of was "to protest and redress the unlawful discriminatory discharge of a union member and supporter." This was, of course, in addition to the attempt, as pleaded in the complaint, to secure recognition of defendants as the bargaining representative of plaintiff's employees.

[4] The rule is that "when workers engage in concerted action against an employer, having more than one object, and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects." Am. Law Inst., Rest. of Torts, Sec. 796.

For the reasons stated herein, and in the opinion in the Seven Up case, the orders in this case are affirmed.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent.

The strike, picketing and other economic pressure with which we are here concerned commenced some eleven months prior to the formation of the so-called company union. This is not a jurisdictional strike as encompassed within the legislation outlawing concerted action, when the only issue is which of two or more unions shall have the exclusive right to collective bargaining for employees or to have its members alone perform work for an employer. In no sense was the controversy now before us a labor dispute "arising out of a controversy between two or more labor organizations" Labor Code, § 1118, as set forth in the jurisdictional strike act. It is without contradiction in the record that the controversy here in question arose out of a dispute between the employer and the American Federation of Labor union which continued unabated for some eleven months when the company union was allegedly organized.

There is nothing in the jurisdictional strike act which authorizes an employer to thwart the constitutional guarantees attached to publicizing labor disputes by setting up an employee organization to forestall the unionization of his plant by an independent labor organization upon the theory that what started as a bona fide labor dispute has become a jurisdictional strike. As was said in McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 330, 106 P.2d 373, 383, "If the legislative policy is to be made effective courts cannot close their eyes to the subtle realities of industrial strife."

The act now under consideration does not directly impose criminal penalties, but it does provide for injunctive relief in event of its violation, and disobedience of an injunction is punishable as a contempt of court. Therefore, proceedings under the act should be held to the strict terms of the law, In re Blaney, 30 Cal.2d 643, 653, 654, 184 P.2d 892. Courts are without authority, under the guise of judicial interpretation, to add to or detract from the legislative intent as expressed in the words of a statute, and that is particularly true of a statute which provides penalties for violation of injunctions issued pursuant thereto.

Had the legislature intended that the provisions of the act should be applicable to a controversy between two labor unions which arises during the course of a pending dispute and strike between an employer and an independent labor organization, appropriate language could, and no doubt would have been used. The act speaks only of "concerted interference * * * arising out of a controversy between two or more labor organizations". It does not refer to a dispute which has arisen between labor organizations during the course of a previously existing and continuing labor dispute between an employer and a single independent labor union.

For the foregoing reasons I would reverse the orders appealed from.

Rehearing denied; WHITE, P. J., dissents.

105 Cal.App.2d 571

HOLLOWAY et al. v. SAN DIEGO FEDERAL SAVINGS & LOAN ASS'N.

Civ. 4218.

District Court of Appeal, Fourth District, California.

July 19, 1951.

Action by Joseph Holloway and Virginia Ann Holloway against the San Diego Federal Savings and Loan Association to recover damages occasioned by alleged failure of defendant to properly disburse funds in accordance with a loan agreement between the parties, and by the failure of the building contractor employed by the plaintiffs to complete his contract for the agreed price. The Superior Court of San Diego County, William A. Glen, J., gave judgment for the defendant and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that there was no evidence that defendant knowingly misrepresented the credit of the contractor, or that plaintiffs failed to secure a performance bond because of reliance upon the alleged misrepresentations of defendant.

Judgment affirmed.

1. Fraud 🔑58(2)

In action by home owners against loan association to recover damages alleged to have been occasioned by failure of association to properly disburse funds in accordance with an agreement between the parties, and by failure of building contractor employed by home owners to complete his contract for agreed price, evidence was insufficient to establish owners' contention that association knowingly misrepresented credit of contractor.

2. Fraud ⚿58(4)

In action by homeowners against loan association to recover damages alleged to have been occasioned by failure of association to properly disburse funds in accordance with an agreement between the parties, and by failure of building contractor employed by home owners to complete his contract for agreed price, homeowners failed to plead or prove that they failed to secure performance bond because of reliance upon alleged misrepresentations of association.

◆

Hillyer & Hillyer, San Diego, for appellants.

Wright, Thomas, Dorman & Fox, San Diego, for respondent.

MUSSELL, Justice.

Plaintiffs appeal from a judgment in favor of defendant in an action brought to recover damages alleged to have been occasioned by the failure of defendant to properly disburse funds in accordance with a loan agreement between the parties and by the failure of the building contractor employed by plaintiffs to complete his contract for the agreed price.

Plaintiffs secured a loan from defendant in the sum of $10,500 for use in remodeling their home in San Diego. The loan agreement, executed March 3, 1948, provided in part as follows:

"(4) The Association shall have the right to use any money in its possession payable to the borrower to pay any valid claim or claims for labor performed and/or materials furnished for any improvements upon or to the security hereunder or any part thereof * * *

"(6) I hereby authorize the Association to make all payments on this loan as the construction work progresses, as follows: 15% when and after the foundation is in and sub-floor is laid; 20% when framework and sides of building are under roof and roughed in; 20% when and after the plastering work is finished; 20% when and after a valid Notice of Completion of the buildings has been recorded in the office of the County Recorder of San Diego County; 21% or, The Balance, less all charges and expenses in connection with the loan; thirty-five (35) days after the date of recording in the Recorder's office of the valid Notice of Completion, and when release is furnished by General Contractor. It is further understood that said Association will disburse funds under its control only in proportion to its inspector's report of progress.

"(7) The undersigned has accepted and hereby accepts the so*l*d responsibility for the selection of his own contractor or contractors and the Association assumes no responsibility for the completion of said building or buildings according to the plans and specifications and for the contract price; * * *."

In April, 1948, plaintiffs entered into a written contract with one J. O. Harrell, a building contractor, wherein Harrell agreed to do the remodeling involved for the sum of $11,388 and the work was commenced on or about the 13th of April. In the latter part of that month or the first part of May, Harrell informed a representative of defendant that he was having "a little difficulty in his bills" and was "going to try to work it out." Harrell was then informed that the association would thenceforth pay the bills "direct" and Harrell would receive no money except to pay for labor bills. All disbursements were then made by defendant from the loan funds in accordance with the quoted section four of the loan agreement.

Notice of completion was filed September 10, 1948, at which time the loan account contained only the sum of $219.67. Liens of $2,454.02 were filed against plaintiffs' property after the notice of completion. These liens were paid by the plaintiffs and this action was filed to recover the amounts so paid as damages.

Plaintiffs' first argument is, in effect, that the defendant knowingly misrepresented the credit of the proposed contractor and that in reliance thereon, plaintiffs paid certain moneys to the defendant and executed a note and trust deed for $10,500, which funds were to be used to satisfy an existing encumbrance on the property and for construction; that progress payments were to be made as set forth in paragraph six of the loan agreement; that defendant failed to disburse the funds in accordance therewith and plaintiffs were thereby compelled to pay the liens.

The trial court found that the defendant had not made the misrepresentations alleged and that defendant had disbursed the funds in accordance with its agreement with the plaintiff.

[1] The contention that defendant knowingly misrepresented the credit of contractor Harrell finds no support in the evidence. While there was testimony that defendant's representatives informed plaintiffs that Harrell did good work and that all of the association's dealings with him had been satisfactory, such statements were supported by the record and did not amount to misrepresentations of fact.

Plaintiff Joseph Holloway testified that he was informed by Mr. Clark, vice-president and appraiser for defendant, that a contractor's performance bond was not necessary because Harrell had done several jobs for the association and it had no complaint about him. However, Mr. Clark testified that he discussed the matter with Mr. Holloway and informed him that he would have to use his own judgment about securing a performance bond; that such a bond would be an extra cost and that the decision about it would have to be his.

Plaintiffs employed an architect to prepare plans and specifications for the remodeling before discussing the proposed loan with the defendant and at the original meeting with the defendant, plaintiff Joseph Holloway was advised to get a contractor and secure a bid for the proposed work. Plaintiffs then obtained a bid based upon labor, material and a fixed fee, which was approximately $3,000 more than the bid subsequently obtained from contractor Harrell. The first bid was rejected and a contract was executed with Harrell.

Plaintiff Joseph Holloway testified that Mr. Clark recommended to him that Harrell be asked to submit a bid for the work. This testimony was contradicted by Mr. Clark, who stated that he did not recommend Mr. Harrell as a contractor to build or to do the remodeling work. The record is not clear as to when Holloway first met Harrell, but it appears that following Harrell's submission of the bid, plaintiffs made inquiries of the architect employed by them to prepare plans and specifications for the proposed remodeling and of another builder as to Harrell's qualifications. The architect so employed advised plaintiffs to secure a contractor's performance bond and the record shows that the specifications called for the bid to include the cost of such a bond and stated that the owner was to determine whether it would be required.

[2] Plaintiffs failed to allege or prove that they failed to secure a performance bond because of their reliance upon the alleged misrepresentations of the defendant. The defendant was neither a contractor nor a surety company. Under their own specifications plaintiffs had the duty to determine whether a bond would be required and if so, to pay the premium. In addition, the loan agreement specifically provides that the borrower accepts the sole responsibility for the selection of his own contractor and that the defendant assumes no responsibility for the completion of the job for the contract price.

Plaintiffs argue that the defendant association was under a duty to disburse the funds held by it under the provisions of section 6 of the loan agreement and that if such a procedure had been followed, no damage to plaintiffs would have resulted.

The record shows that shortly after the work commenced it became apparent to defendant that the contractor was having difficulty meeting his financial obligations. The association then determined to proceed with disbursements as provided in section four of the agreement by paying the labor and material bills "direct"; thus applying such funds to the payment of bills for labor performed and materials actually furnished in the construction. In this connection, it should be noted that defendant's inspector testified that he made from eighteen to twenty trips to the job in order to be assured that the payments to be made under paragraph four of the loan agreement were actually for labor and materials that had gone into the job. The method of disbursal used by defendant afforded more protection for plaintiffs than they would have received if progress payments had been made direct to the contractor. Plaintiffs' architect testified that the ultimate cost to plaintiffs for the work was reasonable. He also testified that the job was well done, the materials were of good standard quality and that he was satisfied with the manner and method in which the work was done.

Judgment affirmed.

BARNARD, P. J., concurs.

105 Cal.App.2d 401

IMPERIAL VALLEY BOX CO.
v. REESE.

Civ. 4232.

District Court of Appeal, Fourth District, California.

July 12, 1951.

Rehearing Denied Aug. 2, 1951.

Hearing Denied Sept. 7, 1951.

Imperial Valley Box Company, a corporation, brought an action against William P. Reese to recover for certain materials sold to a third person and used by plaintiff in construction of two school buildings. The Superior Court of Imperial County, Elmer W. Heald, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that plaintiff could recover from defendant since the third person who bought the materials did so under an agreement whereunder such third person was to buy materials for defendant who was successful bidder for the construction jobs.

Judgment affirmed.

1. Estoppel 🔑72

Where one of two innocent persons must suffer by act of a third, the one by whose negligence it happened must be the sufferer. Civ.Code, § 3543.

2. Principal and agent 🔑145(1), 146(1)

Where one deals with another whom he believes to be the principal, but subsequently learns that the other was an agent of an undisclosed principal, he may recover from either.

3. Principal and agent 🔑145(3, 4)

Where plaintiff sold materials subsequently used on school construction jobs, and plaintiff then believed buyer to be principal and plaintiff had no notice at time of sale of agreement whereunder buyer was to buy materials for general contractor who constructed the schools, plaintiff could recover for such material from contractor upon learning that buyer from plaintiff was agent for contractor, and fact that plaintiff charged materials to such agent and attempted to collect from such agent did not demonstrate that plaintiff extended exclusive credit to such agent so as to preclude recovery from contractor.

◆

Leslie L. Burr, of El Centro, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment awarding the plaintiff payment for certain materials used in the erection of two school buildings.

In December, 1948, the defendant entered into an agreement with one T. F. Benson. After reciting that the defendant was a licensed contractor, that he was about to bid on certain contracts for buildings to be erected, that he needed skilled assistance and that Benson was skilled in building construction, this agreement provided that Benson was to make all purchases of material and hire all labor for the contracts entered into; that accounts were to be kept, and checks signed by both parties and by a named accountant; that the defendant was to receive 5% of the gross amount of all contracts entered into; and that Benson, in lieu of salary, was to have any remaining profits earned on such contracts.

In January and February, 1949, the defendant was awarded the two construction contracts here involved. These contracts were duly recorded, together with the statutory bonds. Notices of completion of the work were filed on April 9, and April 15, 1949.

The material in question was purchased by Benson from the plaintiff and was used on these school jobs. It was charged to Benson on the plaintiff's books and the invoices showed his name and the job to which it was delivered. The plaintiff had no knowledge of the agreement between the defendant and Benson until July 12, 1949. In this action which followed, the court found that within two years last passed the defendant became indebted to the plaintiff upon an open book account for materials sold and delivered to him at his request for these two school jobs in the total amount of $1486.59. It further found that the defendant, as a general contractor, caused these materials to be supplied for construction work on these school jobs; that said materials were ordered by the defendant's agent Benson, and delivered to and used on said jobs for the benefit of the defendant; that demand had been made on the defendant for payment; and that no part of said sum has been paid and the whole is now due, owing and unpaid. Judgment was entered and the defendant has appealed.

[1] The appellant contends that the court erred in admitting certain evidence of the items furnished since it disclosed that those items were charged to Benson; and that the facts of this case bring the parties within the rule that where one of two innocent persons must suffer by the act of a third, the one by whose negligence it happened must be the sufferer. Civ.Code, Sec. 3543. It is argued that the respondent sold these goods to Benson and charged them to him on its books; that it neglected to file a notice of mechanic's lien until after the expiration of the time within which this could be done; and that it conclusively appears that the appellant was not an undisclosed principal, since the recording of the construction contracts gave constructive notice that the buildings were being erected by him. The appellant particularly relies on the case of Rigney v. De La Salle Institute, 10 Cal.App.2d 492, 52 P.2d 579. In that case, it was held that the materialmen had a right to assume that the person buying the goods was an independent contractor so long as they knew nothing of the employment agreement between that person and the owner of the building, and that when the fact of such agency was disclosed to them they could then look to the principal unless some other element had intervened which prevented a recovery from the principal. It was then held that such an element had there intervened, since it affirmatively appeared that credit had been exclusively extended to the agent, without regard to whether he was an agent or an independent contractor. This was shown by several facts, including the fact that the materialmen had given the agent lien waivers and receipts for amounts in excess of what was coming to them, in order to enable the agent to get money he needed for other purposes not connected with the job in question.

[2, 3] The general rule is well settled that where one deals with another whom he believes to be the principal, but subsequently learns that the other was an agent of an undisclosed principal, he may recover from either. That situation appears here, and there is no intervening element which prevents the application of the usual rule. The fact that these materials were charged to Benson, and that an effort was made to collect from him, would not be sufficient to demonstrate that exclusive credit had been extended to him personally. While the respondent had constructive notice, through the recording of the building contracts, that the appellant held the general contracts it had no notice, constructive or otherwise, that Benson was acting as the appellant's agent. The respondent was entitled to assume that Benson was an independent contractor or subcontractor, Rigney v. De La Salle Institute, 10 Cal.App.2d 492, 52 P.2d 579 and nothing was known to the respondent which would dis-

close or in any way indicate the true situation. Under the facts shown by the evidence Benson was the undisclosed agent of the appellant who directly authorized him to buy these materials for use on these jobs, and the usual rule applies.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

105 Cal.App.2d 635

BISOGNO et al. v. BROWNE et al.

Civ. 4233.

District Court of Appeal, Fourth District, California.

July 25, 1951.

Action by John H. Bisogno and Marcella Bisogno against Joseph H. Browne and Merryl Browne for declaratory relief, to quiet title and for ejectment. The Superior Court, San Diego County, John M. Cranston, Judge pro tem, rendered judgment for plaintiffs, and the defendants appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to support findings that plaintiffs were in all respects bona fide purchasers in good faith without actual or constructive notice of any disputes, discrepancies or questions as to boundaries when they took title.

Judgment affirmed.

1. Vendor and purchaser 🔑244

In action for declaratory relief and to quiet title evidence supported finding that plaintiffs were in all respects bona fide purchasers in good faith without any actual or constructive notice of any disputes, discrepancies or questions as to boundaries when they took title.

2. Appeal and error 🔑991

In action for declaratory relief and to quiet title, it was for trial court to determine whether possession by defendants' predecessors in title was of such character as to give notice of rights of plaintiffs or put them upon inquiry with reference thereto, and to determine ultimate fact of notice, in answer to defendants' contention that plaintiffs acquired their property with constructive notice of occupancy by defendants' predecessors in title and that plaintiffs were therefore estopped from asserting their title as shown on their deed.

◆

J. Dean La Motte, Oceanside, for appellants.

Ruel Liggett and Roy M. Cleator, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs and defendants in this action seek a determination and declaration of the true common boundary line between their respective properties. Both parties obtained title from common grantors, Ernest D. Drake and his wife, who, in 1945, were the owners of a certain tract of land in San Diego county described as follows: "The North 6 acres of the West 8 acres of the South one-half of the Southwest one-quarter of the Northwest one-quarter of Section 20, Township 9 South, Range 3 West, S.B.M., in the County of San Diego, State of California."

The west boundary line of this property is the north and south section line in the center of a county road, 40 feet in width, known as Stage Coach Lane. In April, 1945, the Drakes sold and conveyed to Bernard Burton and his wife approximately .81 of an acre in the southwest corner of said 6 acre tract and the deed described the property so conveyed as:

"The West 187 feet of the South 175 feet of the North 6 acres of the West 8 acres of the South one-half of the Southwest one-quarter of the Northwest one-quarter * * *" (of said section.)

On May 8, 1946, the Drakes conveyed to the Burtons an additional 15 feet to the east, which was described in the deed as: "The East 15 feet of the West 202 feet of the South 175 feet" (of the same 6 acres).

By these conveyances Burton and his wife acquired from the Drakes a plot measuring, overall, 175 feet north and south by

202 feet east and west; the west boundary line being the north and south section line in the center of Stage Coach Lane.

On June 20, 1947, Drake and his wife deeded all of their remaining part of the 6 acre tract to the plaintiffs Bisognos and the deed described the 6 acre tract as first herein described, excepting the westerly 202 feet of the southerly 175 feet.

In July, 1947, the defendants Browne bought the Burton property and their deed called for "The West 202 feet of the South 175 feet of the North 6 acres" (Etc.).

The evidence shows that when Burton and his wife purchased from the Drakes, in locating the boundaries on the site, they measured 187 feet eastward from the east line of Stage Coach Lane instead of from the section line in its center; thus mistakenly including an additional 20 foot strip on the east side of their property, not conveyed by their deed. Likewise, when the Brownes acquired their title, the Burtons pointed out to them the easterly line of their property as theretofore erroneously measured by the Drakes and the Burtons on the ground. It appears that the Burtons and the Brownes believed that the true east boundary of their property was as pointed out to them on the ground and was 20 feet farther east than called for in their deeds.

Plaintiff John Bisogno testified that at the time he purchased his property there were no fences marking the boundaries of the Burton property; that he did not go on the premises when he made the purchase; that he bought the property according to the "paper description"; that he, in company with Mr. Burton and Mr. Drake, visited the property before his (Bisogno's) escrow was closed and were unable to find the surveyor's marks; that when they walked over the land on this occasion he observed that the Burtons were living on the property and had improved it with a residence, avocado trees, a garden and a shed; that he did not know the dimensions of the land occupied by the Burtons and did not measure his property until a few months after the Brownes moved in; that there was no dispute as to the boundary line until Browne started measuring his property several months after he had acquired it.

[1] The trial court found that when the plaintiffs purchased their land from the Drakes, they saw the property or area then being used and occupied by the Burtons, but they made no measurements of any of the boundaries, either of the land they bought from the Drakes or the land then occupied by the Burtons and did not know of any dispute, discrepancy or question as to the location of the easterly boundary line then claimed by the Burtons; that they believed that the conveyances to them and to the Burtons truly described the land claimed and occupied by the Burtons; that the plaintiffs were in all respects bona fide purchasers in good faith without any actual or constructive notice of any disputes, discrepancies or questions as to boundaries. These findings are supported by substantial evidence.

[2] Appellants' principal contention is that the plaintiffs acquired their property with constructive notice of the occupancy of the Burtons and they were therefore estopped from asserting their title as shown by the deed to them. It was for the trial court to determine whether the possession by the Burtons was of such character as to give notice of the rights of the plaintiffs or put them upon inquiry with reference thereto, and to determine the ultimate fact of notice. Keese v. Beardsley, 190 Cal. 465, 474, 213 P. 500, 26 A.L.R. 1538.

While the evidence indicates that the Burtons might have established title to the disputed strip as against the Drakes, and, likewise, the Brownes might have had an action to establish such title as against the Burtons, these matters were not known to plaintiffs who purchased the property, relying upon the description contained in their deed and upon a certificate of title showing the property purchased by them. While the plaintiffs went on their property after the escrow was opened and observed improvements made by the Burtons, they did not measure the Burton property on the ground and from an inspection such as was made by them, it cannot be said that they should have observed that the Burtons were occupying more land than called for in their deed. Under the circumstances disclosed by the record, the plaintiffs were entitled to rely on the description contained in their deed from the Drakes. The evidence shows that the dispute as to the boundary lines did not arise until long after plaintiffs had purchased their property and no prescriptive rights were shown to have been acquired by the defendants.

Judgment affirmed.

BARNARD, P. J., concurs.

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105 Cal.App.2d 701

PEOPLE v. HARRIS.

Cr. 4635.

District Court of Appeal, Second District,
Division 3, California.
July 27, 1951.

Rehearing Denied Aug. 2, 1951.

Carl Stewart Harris was convicted in the Superior Court of Los Angeles County, Percy Hight, J., of incest, and from the judgment and an order denying motion for a new trial, he appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Incest ⚷14

Evidence was sufficient to sustain conviction for incest. Pen.Code, § 285.

2. Criminal law ⚷814(16)

In incest prosecution, court's failure to grant instruction to effect that statements or admissions by defendant should be viewed with caution was not error, where record did not contain any incriminating statement of defendant to which such an instruction would have been relevant. Pen.Code, § 285.

3. Criminal law ⚷814(17)

In incest prosecution, trial court's failure to grant instruction on circumstantial evidence was not error where there was a minimum of circumstantial evidence, and proof of guilt consisted of direct evidence. Pen.Code, § 285.

4. Criminal law ⚷13

The statute relative to incest is not unconstitutional on ground that it is vague and ambiguous. Pen.Code, § 285.

Max Tendler and William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant was convicted in a jury trial of two offenses of incest, the victim being his 16 year old daughter. He moved for a new trial, which was denied, and he was sentenced to state prison for concurrent terms.

The points raised on the appeal are: (1) Insufficiency of the evidence; (2) misdirection of the jury; (3) failure to properly instruct the jury; (4) errors in the admission and exclusion of evidence; (5) alleged misconduct of the deputy district attorney, and (6) Penal Code, section 285 is unconstitutional. Appellant's argument on the first point is, in reality, but an attack upon the credibility of the prosecutrix, the claim being that her testimony was unworthy of belief and contradicted and discredited by the testimony of a physician who examined her a short time after the latest alleged act of intercourse.

The prosecutrix testified that she had submitted to appellant "on an average of about once a week" over a period of a year and a half or two years. The information charged that one offense was committed on September 2, 1950 and the other September 10, 1950. The prosecutrix testified that on September 14th she walked about two miles to the home of a Mrs. Case and made complaint of her father's conduct; that she and Mrs. Case went to her home and she repeated her complaints to her mother; that although she had not previously made complaint to anyone about the matter her silence was due to fear of the consequences if she complained. Mrs. Case gave corroborative testimony as to the complaints that were made to her and repeated to the mother of the prosecutrix. There was nothing indefinite or uncertain in the testimony of the prosecutrix as to the acts charged. Neither was there anything in her narration of the occurrences that was improbable or unbelievable; it was not shown that she was actuated by malice, nor that she would have had any reason to accuse appellant falsely. She testified without evasion or contradiction and the record discloses no weakness in her testimony that would have required the jury to disbelieve it. A recitation of the girl's testimony would only demonstrate that it was not incredible.

[1] A police surgeon testified that he examined prosecutrix on September 18th and concluded that there had been recent vaginal penetration and what appeared to be a recent rupture of the hymen; that in his opinion it was not an old rupture. It is insisted that the testimony of the physician was contradictory of that of the prosecutrix that appellant had had intercourse with her for a period of one and a half or two years. There was, in this respect, a conflict between the testimony of the girl and the opinion of the physician. But it was for the jury to choose between the two. While in one respect there was contradiction in the testimony of the physician, there was also corroboration upon the vital questions in the case. The testimony of the physician gave substantial support to the girl's testimony as to the commission of the crimes on the dates charged. The jury could have believed that having told the truth as to recent occurrences she was probably truthful in all her testimony and that the physician was mistaken in his opinion. The evidence was legally sufficient to support the verdict. We cannot agree with appellant's contention that the jury would have understood the instruction he criticizes to mean that a finding of guilt as to one offense would have justified a conviction of both.

[2, 3] It is claimed the court should have instructed that statements or admissions by defendant should be viewed with caution. We do not find in the record any incriminating statement of defendant to which such an instruction would have been relevant. Neither was there occasion to give an instruction on circumstantial evidence. There was a minimum of circumstantial evidence. It amounted to no more than would normally be found in a case where proof of guilt consisted of direct evidence.

The charges of prejudicial statements by the court and the deputy district attorney are unsubstantial. Appellant does not contend there was misconduct requiring a reversal but only such as would give emphasis to the other points he makes. We do not share this view.

[4] Appellant suggests that Penal Code, section 285 (Incest) is so vague and ambiguous as to render it unconstitutional and void. He also says that since the prosecutrix was under 18 years of age the offense of rape was an included offense and the jury should have been so instructed, and also instructed that if defendant should be convicted of rape the verdict should determine whether punishment should be by imprisonment in the state prison or in the county jail. The code section is not ambiguous or vague. The theory of included offenses is that in the lesser offenses some element of the greater is absent. In the present case, the relationship of the parties being established, appellant could not have committed rape without also committing the crime of incest. If he has committed two crimes he does not have the right to designate the one he would prefer to answer.

The judgment and order are affirmed.

WOOD and VALLÉE, JJ., concur.

105 Cal.App.2d 780

BRUBAKER v. MALLICKZADHA.

Civ. 7958.

District Court of Appeal, Third District, California.

July 31, 1951.

Rehearing Denied Aug. 27, 1951.

Action by Fred A. Brubaker against A. J. Mallickzadha, to recover unpaid balance due for services rendered to defendant, wherein defendant filed a cross-complaint which was subsequently dismissed and, upon death of defendant, Sarah D. Mallickzadha, as administratrix of the estate of A. J. Mallickzadha, deceased, was substituted as defendant and cross-complainant. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Schottky, J., pro tem, held that the evidence sustained judgment for unpaid balance due plaintiff for services rendered.

Judgment affirmed.

1. Pleading ⚷193(5)

Complaint alleging that plaintiff had rendered services for defendant for which he was to receive $15 per day disclosed that plaintiff was suing for wages and not upon a contract and complaint was not subject to demurrer for failure to state whether contract was in writing.

2. Appeal and error ⚷1040(10)

Overruling demurrer to complaint on ground that it did not show whether contract allegedly sued on was oral or written was not prejudicial to defendant where defendant set up a written contract as a defense and court found that such agreement had been rescinded.

3. Appeal and error ⚷1010(1)

Where a judgment is attacked as being unsupported by the evidence, appellate court has jurisdiction to determine only whether there is any substantial evidence which will support the conclusion reached by the trial court.

4. Executors and administrators ⚷221(5)

Evidence sustained judgment for unpaid balance due plaintiff for services rendered to defendant's decedent in remodeling kitchen and building a sun room.

W. Coburn Cook and H. E. Gleason, Turlock, for appellant.

Rodin & Nelson, Turlock, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff filed an action against defendant in the Justice's Court alleging that he had rendered services to defendant for which he was to receive $15 per day; that the total of wages earned amounted to $1,533, and that there was a balance of $743.83 due him from defendant.

Defendant filed a demurrer to the complaint on the ground that it could not be ascertained whether the contract was oral or in writing. The demurrer was overruled. Defendant filed a cross-complaint alleging a written agreement by which plaintiff undertook to remodel defendant's kitchen and build a new sun room, furnishing and paying for all labor and material necessary, defendant to pay plaintiff the cost of all materials plus $15 per day per man, provided defendant should not be required to pay more than $2,850; that plaintiff proceeded to do the work, purchasing large quantities of materials for which he did not pay so that defendant was required to pay for labor and materials himself, expending $4,232; that in addition defendant paid plaintiff $1,000 for his services; that as a result defendant has been damaged in the sum of $2,382. The prayer is for that amount. The answer refers to the same written agreement and alleges that plaintiff did not have a contractor's license; that under the terms of the contract defendant could withhold payment of $500 until the job was completed and plaintiff delivered to him receipted bills for all labor and material furnished, and that plaintiff has never delivered such receipted bills; that all sums due plaintiff under the said agreement have been paid. A copy of the written agreement is attached to both the answer and the cross-complaint. The case was transferred to the Superior Court. Plaintiff's demurrer to the cross-complaint was overruled. In plaintiff's answer to the cross-complaint it is alleged that the written agreement was rescinded; that thereafter it was agreed that plaintiff would work for defendant as an employee, being paid $15 a day as wages; that the balance unpaid for plaintiff's services is $745.83; that the $1,000 paid by defendant was paid to plaintiff and his two sons to be applied on account of labor performed by them; that plaintiff is not indebted to defendant in the sum of $2,382 or any other amount.

Defendant having died while the action was pending, his administratrix was substituted as defendant and cross-complainant. The case was tried by the court without a jury and before the close of the trial the cross-complaint was dismissed on motion of defendant.

The court found that plaintiff was employed by defendant at a wage of $15 per day; that the amount of plaintiff's earnings which remains unpaid is $630; that the written contract referred to in the answer and cross-complaint was rescinded by the parties; that plaintiff's services were rendered as an employee rather than as a contractor so his recovery would not be barred by the lack of a contractor's license; that the $1,000 paid by defendant was not paid for the account of plaintiff but for the account of other workers and creditors of defendant. Judgment was entered for plaintiff in the amount of $630. The appeal is from the judgment.

[1, 2] Appellant first contends that the court erred in overruling the demurrer to the complaint. The complaint alleged that plaintiff had rendered services for defendant for which he was to receive $15 per day. Plaintiff was suing for wages and not upon a contract, and we do not believe he was required to state whether or not there was any writing. Certainly if there was any writing that constituted a defense defendant could set it up as a defense. But, in any event, no prejudice could have resulted to defendant as defendant did set up a written agreement as a defense and the court found that said agreement had been rescinded.

Appellant next argues that the judgment in favor of plaintiff for $630 is not supported by the evidence. Plaintiff's son, Ted Brubaker, testified that he had worked on the job beginning the 29th day of March through the 7th day of May, six days a week; that he then took a vacation and did not return to the job until the 13th or 14th of June; that he then worked every day with the exception of four or five days until the middle of July; that plaintiff worked every day that the witness worked. Because the action was against the estate of a deceased person against whose estate the claim had been filed by him, plaintiff himself did not testify as to the work performed by him, but other witnesses testified as to such work. The bill of particulars lists the days for which plaintiff is claiming compensation beginning March 29 through July 9, totaling $888. It lists Ted Brubaker as having worked March 29 through May 7, then May 17 and June 9 and 12, then June 13 through July 9, earning $510. It lists Kenneth Brubaker as having earned $135. Total labor is listed as $1,533. Material furnished is listed as $212.83. From the combined total of $1,745.83 is subtracted the $1,000 admittedly paid by defendant, of which $135 was applied to the account of plaintiff, leaving $745.83 due for plaintiff's labor. Ted Brubaker testified that when defendant paid the $1,000 he asked if it would be agreeable to plaintiff to have the money due plaintiff's sons included in the check, and plaintiff assented.

[3, 4] We have read the record carefully, and bearing in mind the rule that when a judgment is attacked as being unsupported by the evidence the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, we are satisfied that the record amply supports the judgment and finding of the trial court. In fact, if it were not for the apparent earnestness of counsel for appellant, we would be inclined to regard the appeal as frivolous.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

105 Cal.App.2d 608

PHILLIPS et ux. v. ISHAM et al.

Civ. 8016.

District Court of Appeal, Third District, California.

July 24, 1951.

Fred Phillips and Helen Phillips, husband and wife, sued Charles A. Isham and Clara Isham to quiet title to a small parcel of land. The trial court rendered a judgment adjudging that plaintiffs were in fact the owners of the property described in their complaint, but ordered that if defendants should, within a limited time, pay to plaintiffs the sum of $250 then it would be the judgment of the court that they were the owners of the disputed parcel, and from such order plaintiffs appealed. Defendants filed a motion to dismiss the appeal. The Supreme Court transferred the appeal and the motion to the District Court of Appeal. The District Court of Appeal, Van Dyke, J., held that the conduct of plaintiffs' counsel in accepting the $250 sent by registered letter and the deposit of such sum in the plaintiffs' counsel's trustee account pending the decision of the appeal had not amounted to an acceptance of the benefit of the order appealed from such as would justify a dismissal of the appeal.

Motion denied.

1. Appeal and error ⚷161

Voluntary acceptance of benefit of judgment or order is bar to prosecution of appeal therefrom.

2. Appeal and error ⚷162(1)

In order that acceptance of payment of or on judgment or decree may be binding, so as to bar appeal, such acceptance by appellant, or by some one authorized to bind him, must be shown, and it must appear upon clear and decisive grounds that acceptance or receipt therefor was understood or intended as constituting an acquiescence in judgment or decree.

3. Appeal and error ⚷162(1)

Where decree in quiet title action had adjudged that plaintiffs were in fact owners of property described in complaint but had ordered that if defendants should, within limited time, pay to plaintiff sum of $250 then defendants should be adjudged owners of disputed parcel, and within prescribed time defendants' counsel had sent required sum to office of plaintiffs' counsel by registered mail and plaintiffs' counsel, in acknowledging receipt of registered letter, had notified defendants' counsel that sum had been deposited in plaintiffs' counsel's trustee account to be held pending decision of appeal in case, and counsel for defendants had offered no objection thereto, there had been no such acceptance of benefit of judgment as would justify dismissal of appeal therefrom.

◆

Nicholas H. Dubsick, Fresno, for appellants.

Chester F. Gannon and Cecil J. Bishop, Sacramento, for respondents.

VAN DYKE, Justice.

Appellants brought an action to quiet title to a small parcel of land claimed by them to be part of a lot they owned, and respecting which they alleged that respondents asserted title. It appeared that respondents owned the contiguous lot and the dispute involved certain encroachments by reason of their having located a carport and some hedge partially over the true line. The trial court rendered a judgment adjudging that appellants were in fact the owners of the property described in their complaint, but ordered that if respondents should within a limited time pay to appellants the sum of $250 then it would be the judgment of the court that they were the owners of the disputed parcel. If they should not so make that payment then appellants' title would be quieted and respondents would be compelled to remove the encroachments and restore possession to appellants. Counsel for appellants has his office in Fresno and counsel for respondents have their office in Sacramento. Within the time limited counsel for respondents placed $250 in currency in an envelope, addressed the same to counsel for appellants and forwarded it to him by registered mail. They also enclosed a letter stating as follows: "In accordance with the Judgment of the above-entitled Court made on December 14th, 1950, we enclose herewith the sum of $250.-00, as thereon ordered to be paid from Defendants to Plaintiffs therein." The envelope arrived upon the desk of appellants' counsel, having been receipted for by his secretary in ordinary course. Thereupon he deposited the currency in his attorney's trust account and wrote to respondents' counsel as follows: "This is to acknowledge receipt of your registered letter together with the $250.00 enclosed therein representing payment as ordered by the court in the above matter. I have deposited this money in my trustee account and will hold the same pending the decision of the appeal in this case." Under the same date he forwarded notice of appeal to the clerk of the trial court and on the day following forwarded a copy thereof to counsel for the respondents. No reply was made by them either to the letter concerning the $250 or to that enclosing copy of notice of appeal. Appellants proceeded to perfect their appeal, but before the transcripts were filed and on February 23, 1951, some two months after the exchange of the correspondence we have referred to, respondents filed in the Supreme Court, to which the appeal had been taken, their notice of motion to dismiss. Both the appeal and the motion were transferred to this Court, along with the record on appeal which, on March 27th, had been filed in the Supreme Court.

[1] In support of the motion to dismiss reliance is placed upon the familiar rule recently declared and applied by the Supreme Court in the case of Schubert v. Reich, 36 Cal.2d 298, 223 P.2d 242, 243. It is therein stated as follows: "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." Opposing counsel assert that there was no such acceptance of the benefits of the order as to warrant the application of the above rule, and he files herein an affidavit in opposition to the motion which in substance states as follows: That the registered letter containing the currency was delivered at his office and receipted for by his secretary; that neither he nor his secretary at that time knew what was within the registered mail and signed merely as a general business practice and in good faith; that when he opened the letter he found the currency therein. He avers that he at no time accepted the money either as partial or in full satisfaction of the order and that he made the deposit in his trust account in order to safeguard the currency which thus had been placed in his possession. He alleges that he deposited the money under his name as trustee and that he so deposited it for the use and benefit of counsel for the defendants from whom it had been received; that the account contains no money of his own, but is maintained solely for depositing moneys held in trust; that the sum so deposited was not commingled with any money of his or with any money of his clients, the appellants; that he wrote the reply letter—which we have quoted—but he received no answer thereto; that concurrently therewith he prepared notice of appeal, forwarded the same to the court clerk, forwarded copy thereof to respondents' counsel and that ever since depositing the money the same has remained in said account for the use and benefit of counsel for respondents, who sent the money to him; that none of the money has at any time been used by his clients and he avers they have received no benefits therefrom, but that the money is and always has been available for the use and benefit of respondents' counsel.

[2] There is presented the question of whether or not there has been such an acceptance of the benefits of the order and judgment appealed from as will bar the plaintiffs' appeal. As to what constitutes an acceptance, the following appears in 4 Corpus Juris Secundum, Appeal and Error, § 216e (1), page 420: "In order that the acceptance of a payment of or on a judgment or decree may be binding, so as to bar an appeal, such acceptance by appellant, or by some one authorized to bind him, must of course be shown, and it must appear, upon clear and decisive grounds, that the acceptance or receipt

therefor was understood or intended as constituting an acquiescence in the judgment or decree." We think the foregoing is a proper statement of the considerations which govern us in determining the questions presented.

[3] The transmittal of the currency by registered mail was of course unsolicited by appellants' counsel, and was not sent or received as the result of any prior dealings between counsel. When the currency appeared on the desk of appellants' counsel an unsolicited duty was thereby cast upon him properly to care for it, and his deposit in his trustee's account was a practical and appropriate performance of that duty. He ought, perhaps, to have returned the money in some business-like way, but we think that his statement that he would hold it in his trust account pending the outcome of the appeal was fair notice that he was not accepting the same as a benefit deriving to his clients from the order of the court. It is fair to say that when he told opposing counsel that he had deposited the money in his trustee's account and would hold the same pending the decision of the appeal that he meant to inform them and did inform them that he was holding it in trust, that he intended to appeal and that he was not going to turn the money over to his clients until and unless the appeal had been decided adversely to them. We think it also fair to say that counsel for the defendants acquiesced in this proposed handling of the money by offering no objection thereto and that by nothing that occurred were they led to believe or were justified in believing that the holding of the money constituted an acceptance or any understanding or intent that by what was done appellants or their counsel were acquiescing in the trial court's orders. We therefore hold that there was no such acceptance of benefit of the orders appealed from as would justify a dismissal of the appeal.

The motion to dismiss is accordingly denied.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 392

WILKINSON v. WILKINSON.

Civ. 7895.

District Court of Appeal,
Third District, California.

July 12, 1951.

Hearing Denied Sept. 7, 1951.

Action by Harold E. Wilkinson against Geraldine M. Wilkinson, wherein the defendant filed a motion for modification of the divorce decree between the parties to secure custody of the two small children from the paternal grandparent. The Superior Court, Lake County, Benjamin C. Jones, J., denied defendant's motion for modification and defendant appealed. The District Court of Appeal, Adams, P. J., held that in absence of any showing that the mother of the two small children was not presently a fit and proper person to have their custody, the trial court erred in granting custody to the paternal grandparent.

Order reversed.

1. Parent and child ⚷2(1)

As between a parent and a grandparent, the latter is a stranger to an action involving custody, and between grandparents and mother of child the mother's rights are paramount.

2. Parent and child ⚷2(1)

The right of a parent to care and custody of a child cannot be taken away merely because court may believe that some third person can give child better care and greater protection, for one of natural rights incident to parenthood is right to care and custody of a minor child and his right can only be forfeited by a parent on proof that parent is unfit to have such care and custody.

3. Parent and child ⚷2(3.3, 4)

Whether a parent is fit or proper person to have custody of a minor child refers to his or her fitness at time of hearing and is not necessarily controlled by conduct many years prior thereto, however evidence of prior acts of misconduct may be admissible if it can be said to have a direct bearing upon issue of present unfitness, but such evidence should be limited to that issue alone.

4. Infants 🔑19

Parent and child 🔑2(1)

Generally best interest of a child in controversy over custody is a matter for determination by trial court, and its determination will not be overruled if fairly considered and supported by competent evidence, but as between a mother and a grandparent of a child, rights of a mother are paramount and grandparent should not be permitted to regain custody where there is no showing that mother is not presently a fit and propert person to have custody. Civ.Code, § 138.

5. Parent and child 🔑2(1)

In absence of any showing that mother of two small children was not presently a fit and proper person to have their custody, trial court erred in granting custody of children to a grandparent.

Spurr & Brunner, Ukiah, for appellant.

Lovett K. Fraser, Lakeport, for respondent.

ADAMS, Presiding Justice.

On February 2, 1948, in the Superior Court of Lake County, an interlocutory decree of divorce was made and entered in favor of the plaintiff, Harold E. Wilkinson, in which it was ordered that the care, custody and control of two minor daughters of the parties, to wit: Patricia Jean, then aged about three years, and Connie Elizabeth, aged about two years, be awarded to plaintiff with the "strict condition" that said children be kept and maintained in the home of plaintiff's mother (Mrs. Helen Wilkinson), under her supervision and care, with the right of defendant to visit with them at any and all reasonable and proper times. A final decree was entered February 18, 1949.

On May 8, 1949, defendant married one Manuel N. Smith, and these two set up a home for themselves near Kelseyville. On September 19th Mrs. Smith filed notice of motion to modify the decree of divorce to provide that the custody of the two children be awarded to her, subject to the right of plaintiff to visit with them at all reasonable times and places.

In the meantime Harold Wilkinson had remarried and was then living with his new wife and her two children, aged seven and four years, at a place about 17 miles north of Upper Lake, where he was employed on a lumber operation.

Mrs. Smith's motion for modification was supported by her own affidavit in which she averred that she and her husband maintained a home at Kelseyville, in which there was adequate room and provision for the care of her children. Manuel Smith filed a supporting affidavit stating that he desired that his wife's children be awarded to her, and that he would treat them as his own children. Helen Wilkinson, the grandmother, filed an affidavit in opposition stating that the children were happy in their present home, were kept clean and neat, and that it was for their best interests that they remain with her. Harold Wilkinson also filed an opposing affidavit in which he asserted that there had not been a sufficient change in circumstances to justify change of custody; that the children were being given good care by his parents, kept clean, furnished good food, a good place to sleep, plenty of milk to drink, and were happy; and that it was for their best interests that they remain in the home of his parents.

A hearing was had on defendant's motion, at which testimony was adduced by both parties. The Smiths testified that Mr. Smith had permanent employment at the Lake Laundry which paid him about $200 per month; that Mrs. Smith also worked there and was earning about $35 per week; that their home consisted of 3½ acres of land with a three room house to which a fourth room was being added; that they were paying $1,000 for the property, but still owed about $350 which was being paid off in monthly installments; that their earnings were being applied largely to improvements; that the interior of the house had been refloored, a ceiling of sheetrock added, cabinets, a sink, etc., built, and the whole interior painted. It was admitted they had no water on the place except what they brought in, and had no garden; but they testified they were negotiating for the sinking of a well, and intended to stucco the outside of the house. Four witnesses testified for Mrs. Smith and expressed the view that she was a fit and proper person to have the custody of her children. Regarding opportunities which had been given Mrs. Smith to see her daughters, she stated that when she went to see them her welcome had been according to the mood of the grandmother; that the latter had taught the children to call her "Gerry", and did not tell them she was their mother; that on one occasion when she went there with Mr. Smith, they were told by the grandmother and grandfather to leave, though Mrs. Wilkinson had told Mrs. Smith that she could bring her husband; and that Mrs. Wilkinson then upbraided defendant in the presence of the children, telling her she was "no good."

Harold Wilkinson, called under Section 2055 of the Code of Civil Procedure, testified that he was supporting his new wife and her two children, four and seven years old; that he gave his mother $5 or $10 per week for support of the children, but that he did not take his children into his own home.

Testimony in opposition to the motion was given by the grandmother, who stated she was able to take care of the children, that they were bathed twice daily, had 3 or 4 dresses a day and never went to bed with the same gowns on, that they had all the milk and butter they wanted, that their house had running water, a bath tub and inside toilet. She admitted that she did not talk to the children about their mother, and they knew her only as Gerry. She also admitted that she worked outside her home during the summertime, and that the children were then left to the care of their grandfather. The grandfather testified as to his four cows, his garden, some 4,000 chickens that he had raised, etc., and that the children were happy. He also said that their mother was not talked about to the children; that the mother was received when she came alone, but when anyone came with her they were requested to leave. Four witnesses, two of them relatives, testified that they thought the grandmother a fit person to take care of the children. No testimony was adduced as to any unfitness of Mrs. Smith to have the custody of her children, nor of any unfitness of Mr. Smith.

At the conclusion of the testimony the trial court stated that it would like a report by the probation officer "respecting the conditions in the respective homes," after the receipt of which the matter would stand submitted. Counsel for Mrs. Smith asked that he be permitted to see the report of the probation officer, and was told a copy would be sent to both sides.

The report of the probation officer, though she was asked to report only "respecting the conditions in the respective homes," exceeded that scope. It was unverified. As for the Smith home it confirmed the testimony given at the trial, and also reported that it was adequately furnished exclusive of plumbing, and was neat, clean and well kept on the inside; also that there was evidence of an effort to establish a home by this young couple. But the report also contained a report on the Wilkinson family and on Mrs. Smith's parents and their children, which was derogatory to the latter. The probation officer expressed the view that she did not doubt that Mrs. Smith was serious in her desire to have her children with her in her home and that the conditions there had improved over those of the past, but that the "security and stability that the children are deserving of is not established there," and that it would not be for their best interest to take them from the home of the grandparents.

To this report Mrs. Smith filed exceptions and objections on the ground that much of it was hearsay and was irrelevant, incompetent and immaterial, as were the conclusion and recommendation of the probation officer. The court, however, without a hearing upon the objections, made its order in which it stated that the recommendation of the probation officer was that the children remain in the home of the grandparents, but that this should be a matter in the discretion of the father; and it amended the prior order awarding the custody of the children to their father with the "recommendation that their present status be not disturbed in accordance with the findings of the Probation Officer." There were no findings of unfitness of Mrs. Smith, nor mention of the changed conditions since the divorce decrees, and the only thing upon which the denial of Mrs. Smith's motion was based was apparently the greater desirability of the *home* of the grandparents, as compared with that of the Smiths.

Mrs. Smith has appealed, and it is urged for reversal that the court erred in receiving and acting upon the unsworn report of the probation officer, that the court abused its discretion when it neither granted nor denied defendant's motion for modification but made an unsolicited order modifying its original order in favor of the father, and that the change of conditions established by the evidence entitled her to preference over the grandparents and the non-desirous father.

It is plain that the contest here is between the grandparents and the mother of these children, for though their ostensible custody is in the father, with a recommendation only they remain with the grandparents, the father has expressed no desire or intention to take them into his own home, and has, in effect, abdicated in favor of his parents; and the result of course will be that the grandparents retain custody of these little girls, unless it be awarded to their mother.

[1] It is well established that as between a parent and a grandparent the latter is a stranger to an action involving custody, Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999; Robertson v. Robertson, 72 Cal.App.2d 129, 133, 164 P.2d 52; Becker v. Becker, 94 Cal.App.2d 830, 833, 211 P.2d 598, and as between them and the mother of the children her rights are paramount. In re White, 54 Cal.App.2d 637, 129 P.2d 706; Roche v. Roche, supra; Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229; Newby v. Newby, 55 Cal.App. 114, 202 P. 891; Robertson v. Robertson, supra, 72 Cal. App.2d at page 132, 164 P.2d 52.

While it is true that in the original divorce decrees the custody of the children was denied to their mother, and that in order to justify a change of custody a change in circumstances must be shown, there is ample evidence here of such change. It was shown that the father of these children has remarried, has established a home of his own and has taken the two small children of his present wife into his home and undertaken to support them; and that he has expressed no desire or intention to take the children of his former marriage into his present home. It was likewise shown that the mother of these children has remarried and that she and her husband have now established a home of their own. Both of these changes of circumstances are sufficient to justify the change of custody prayed for by Mrs. Smith. Ott v. Ott, 127 Cal.App. 322, 323, 15 P.2d 896; Peterson v. Peterson, 64 Cal. App.2d 631, 633, 149 P.2d 206; Noon v. Noon, 84 Cal.App.2d 374, 379, 191 P.2d 35; Robertson v. Robertson, supra, 72 Cal.App. 2d at page 134, 164 P.2d 52.

It is provided by Section 138 of the Civil Code that in actions for divorce, as between parents adversely claiming the custody of minor children, neither is entitled to it as of right, but, other things being equal, if a child is of tender years it should be given to the mother. This has often been held to be of special importance if the child is a girl. Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96; Juri v. Juri, 69 Cal.App.2d 773, 779, 160 P.2d 73; Estate of Lindner, 13 Cal.App. 208, 212, 109 P. 101; Bemis v. Bemis, 89 Cal.App.2d 80, 83, 200 P.2d 84; Noon v. Noon, supra.

[2] While these grandparents may be able to give to these infants greater material advantages, this court said in Re White, supra, 54 Cal.App.2d at page 640, 129 P.2d at page 708, that: "The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and cus-

tody." That language was quoted and approved in Roche v. Roche, supra, 25 Cal.2d at page 144, 152 P.2d 999. Also see Robertson v. Robertson, supra, 72 Cal. App.2d at page 133, 164 P.2d 52.

[3] While it is urged upon us that the findings of the trial court, when the divorce was granted to plaintiff in this action, recited that the mother of the infants was not a fit and proper person to have their custody, these findings were not referred to in the present proceeding. It is undenied that nothing has been shown in this proceeding which reflects unfavorably upon the conduct of Mrs. Smith since the making of the interlocutory decree, or is incompatible with the conclusion that if she once erred she has rehabilitated herself, and that she is now a fit and proper person to have the custody of her offspring. It is her present fitness and not her past conduct which should be determinative of present rights. In Prouty v. Prouty, 16 Cal.2d 190, 194, 105 P.2d 295, 297, the court said: "The question as to whether a parent is a fit or proper person to have the custody of a minor child refers, however, to his or her fitness at the time of the hearing and is not necessarily controlled by conduct many years prior thereto. Ott v. Ott, 127 Cal.App. 322, 15 P.2d 896; In re Green, 192 Cal. 714, 221 P. 903. Evidence of prior acts of misconduct may be admissible if it can be said to have a direct bearing upon the issue of present unfitness, but such evidence should be limited to this issue alone." Also see In re Guardianship of Jones, 86 Cal.App.2d 35, 194 P.2d 141; In re Guardianship of Case, 57 Cal.App.2d 844, 847, 135 P.2d 681; In re Wood, 103 Cal.App. 790, 793, 285 P. 323.

Regarding appellant's contention that the trial court erred in acting upon the report of the probation officer, respondent says in his brief that such report "was simply a report on everything that had been testified to by both parties", and that it "added nothing to the case." Such, however, is not the situation. While the probation officer was requested to report solely respecting "the conditions in the respective homes" she exceeded that request by including commendatory statements regarding the Wilkinson family, and purely hearsay matters derogatory to Mrs. Smith's family, and alleged misconduct of her brother; and it also included an unsolicited recommendation that the children remain in the home of their grandparents. Appellant filed objections to the report on these grounds, but they were ignored by the court which within four days, including a Saturday and a Sunday, made its order which recited that "the recommendation of the Probation Officer" is that the children remain in the home of the grandparents. It then awarded the custody to the father "with the recommendation that their present status be not disturbed in accordance with the findings of the Probation Officer."

The conclusion from such order is that the court relied upon and followed the recommendation of the probation officer, disregarding the changed circumstances, the absence of any request on the part of the father that the custody be retained in him, and his testimony that he did not take his children into his own home and that he saw them only about once a week.

There is no statutory authority for reports of probation or other investigative officers in divorce actions, except such as are provided under Sections 261a and 1744 of the Code of Civil Procedure, which do not apply to Lake County; and even regarding Los Angeles County, to which they do apply, the Supreme Court said, in Fewel v. Fewel, 23 Cal.2d 431, 434, 144 P.2d 592, that reports of investigators of domestic relations cases were to be used to *assist* the court, and not to *replace* it, that they should be presented in affidavit form or otherwise *under oath,* and, upon timely demand, such investigators should be required to testify as any other witness subject to the right of cross-examination. Here there was neither a verification of the report or an opportunity to cross-examine the reporting officer.

[4, 5] While, generally speaking, the best interests of a child in a controversy

over its custody is matter for determination by a trial court, and its determination will not be overruled if fairly considered and supported by competent evidence, the fact remains that, as between a mother and the grandparents of a child, the rights of the mother are paramount; and the grandparents should not be permitted to retain custody where there is no showing that a mother, seeking the custody of her two small girls, is not *presently* a fit and proper person to have their custody. Conceding that the home of the Smiths is not as adequate as that of the grandparents in that it lacks running water, a bath tub and an inside toilet, the rights of a mother to bring up her little daughters and the rights of the children to know and to have the love and care of their natural mother should not be denied because of the lack of plumbing facilities. Sanitary plumbing is not essential to the welfare of small children. Unnumbered children today prosper without it, and to earlier generations it was unknown. Also it may be added that three or four clean dresses each day, or dresses at all for that matter, are not standard requirements today even for the children of the "best families". And finally, as this court said in Robertson v. Robertson, supra, 72 Cal.App.2d at page 135, 164 P.2d at page 56: "In the case of a child of tender years, experience has taught that in the vast majority of cases there is no one who will give such complete and selfless devotion, and so unhesitatingly and unstintingly make the sacrifices which the welfare of the child demands, as the child's own mother. The record herein abounds in evidence showing the anxious desires of a mother to care for her child. Under such circumstances fairness alone requires that she and not a third person be allowed the opportunity to carry out the trust she as a mother owes her child. Juri v. Juri, [69] Cal.App.[2d 773, 778, 779], 160 P.2d 73; In re Estate of Lindner, 13 Cal.App. 208, 212, 109 P. 101."

The order appealed from is reversed.

VAN DYKE and PEEK, JJ., concur.

Hearing denied; SHENK, SCHAUER, and SPENCE, JJ., dissenting.

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105 Cal.App.2d 340

DEVEREUX et al. v. SIRKUS et al.

Civ. 18064.

District Court of Appeal, Second District,
Division 3, California.
July 10, 1951.

William G. Devereux, doing business under the fictitious firm name and style of Devereux & Company, and William H. Barley, sued Jack Sirkus and others, to recover the amount of two brokers' commissions claimed to have been earned in negotiating an exchange of real estate for defendants. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that escrow agreement signed by one of the defendants as alleged agent of the other defendants, which recognized right of plaintiffs to receive a commission of $4,500 was a sufficient written note or memorandum of the employment of plaintiffs.

Judgment reversed with directions.

1. Brokers 🔑43(3)

Where brokers alleged that escrow agreement providing for exchange of defendants' properties and which recognized right of brokers to receive a commission of $4,500 was signed by one of the defendant owners as agent for the other owners escrow agreement was a sufficient written note or memorandum of the employment of brokers by the defendants. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

2. Brokers 🔑82(1)

Complaint alleging that defendant landowners orally agreed to pay plaintiff brokers a commission for handling the exchange of certain real estate and that the defendants signed an agreement for the exchange of the property which contained below their signature an unsigned provision that they would pay the brokers the commission of $2,050 and that the signed escrow instructions directed escrow holder to pay at close of escrow the sum of $2,050, stated a cause of action for recovery of a commission.

3. Brokers 🔑40

If there is a valid employment of a broker to buy or sell realty, and the service is performed, the broker is entitled to compensation even in absence of an express agreement for payment of a commission or agreement as to the amount.

4. Escrows 🔑8(2)

Where agreement for cancellation of escrow agreement providing for exchange of properties provided that certain defendants were to assume all escrow and title costs, charges and expenses and pay owners of other property the amount of attorney's fee, term "all escrow and title costs, charges, and expenses" did not also relate to a broker's commission.

5. Brokers 🔑63(1)

Where if, as brokers alleged, they had been employed by both parties to effect an exchange of properties and had fully performed their services, it was not necessary that escrow should have been closed in any fashion in order that commissions be earned and nothing less than an express agreement in writing that no commissions would be paid unless exchange should be consummated could deprive brokers of their right to a commission which had already accrued and defendant owners could not by abandoning the transaction, escape liability to pay a commission.

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Delvy T. Walton, Los Angeles, for appellants.

Minter & Feder, Hollywood, for respondents Jack Sirkus, Marion Sirkus, Harold Senter and Ruth Senter.

SHINN, Presiding Justice.

Plaintiffs sued Jack Sirkus and wife, Harold Senter and wife, and George W. Olson and wife, to recover the amount of two broker's commissions claimed to have been earned in negotiating an exchange of real estate for defendants. The demurrers of defendants Sirkus and Senter were sustained without leave to amend and judgment was entered in their favor. No judgment has been rendered as to defendants Olson. Plaintiffs appeal.

The complaint contains three causes of action. It is alleged in the first cause of action that the defendants employed plaintiffs "to obtain a purchaser or person with whom they could trade or exchange their respective real property"; that pursuant to their employment plaintiffs produced George W. Olson and Helen G. Olson who agreed in writing to exchange their property on Senalda Road in Los Angeles for Glenrock Avenue property owned by the other defendants, and to pay, in addition, a certain amount of cash; that defendants Sirkus and Senter entered into an escrow agreement with the Olsons for said exchange of properties on terms that were mutually satisfactory and that in and by said escrow agreement defendants Sirkus and Senter promised to pay plaintiffs a commission of $4,500, and the Olsons agreed to pay a commission of $2,250. Attached to the complaint is a copy of a receipt for $10 deposited with Devereux & Co. containing an offer to exchange the Glenrock Avenue property for the Senalda Road property plus cash in the amount of the difference between the encumbrance then on the Glenrock Avenue property and $50,000. The latter provision evidently meant that if the balance of the loan was less than $50,000 the difference would be paid in cash. The offer is signed "Hal Senter." Above his signature is the statement that he represents himself to be the owner of the Glenrock property; that he agrees to sell it on the terms stated and "* * * personally agrees to pay a commission of $4,500 to above named Broker, or one-half the deposit in the event same is forfeited by the purchaser, provided that same shall not exceed the full amount of the commission. Said commission shall be payable in full at once if sale is not completed due to my failure to comply with the terms hereof." The brokers were expressly authorized to act for both parties to the exchange and accept commissions therefrom.

Typewritten in the printed agreement are certain expressions which indicate there were several persons interested in the ownership of the Glenrock Avenue property, namely, "We, the undersigned, hereby agree * * * for our equity in the multiple dwelling property located at 511 Glenrock Avenue, Los Angeles" and "The owners of the property at 511 Glenrock Avenue, Los Angeles," etc. Although Sirkus and wife and Mrs. Senter did not sign this writing, it was alleged in the complaint that Harold Senter in signing the same was acting as the "agent, servant and spokesman" for those defendants, and that said defendants knew he was acting for and on their behalf in signing the instrument, approved of his employment, and that they afterwards ratified, confirmed, approved, signed and delivered the said escrow instructions.

It was expressly alleged that the Olsons orally agreed to pay plaintiffs a commission of $2,250. Attached to the complaint is a writing alleged to have been signed by defendants Olson, which is in the main a counterpart of the writing signed by Senter. Immediately underneath the signatures of the Olsons is an unsigned provision that they will pay the brokers a commission of $2,250, this provision being the same, except as to amount, as the one signed by Senter. The two writings considered together constitute an agreement for the exchange of the properties. Also attached to the complaint are the escrow instructions which are alleged to have been signed by all six defendants. These call for an exchange of the properties on the terms stated in the two writings previously mentioned. In these instructions Sirkus and wife and Senter and wife direct the escrow holder to pay "at close of escrow" commission of $4,500 to Devereux & Co., and the Olsons authorize the escrow holder to pay "at close of escrow; upon the recording of deed commission of $2,250 to Devereux & Co."

The demurrers were sustained without leave to amend upon the theory that there was no sufficient allegation of the employment of the plaintiffs by defendants Sirkus and Senter or any of them. In this we believe the court erred.

Respondents contend that the writing signed by Harold Senter was incomplete in that it was not to become effective as to any of the defendants unless it was signed by Mrs. Senter and Mr. and Mrs. Sirkus. If the proof should show this to be the fact the writing would not constitute an executed agreement. McDowell v. Willis, 85 Cal. App. 496, 259 P. 765. Although the writing on its face implies that others were to sign, we think the implication could be dispelled by proof of the other averments of the complaint, namely, those of the agency of Harold Senter, the knowledge and approval of his acts by the other owners and their recognition of plaintiffs' right to a commission contained in the executed escrow instructions. Moreover, it is alleged that plaintiffs were employed by defendants. The proof may show that Harold Senter and some or all of the non-signing defendants orally engaged the services of plaintiffs. The demurrer specified uncertainty as to whether plaintiffs' employment was oral or in writing. Code Civ.Proc., sec. 430(10). If there was uncertainty it could have been cured by amendment.

[1] Under the facts alleged the escrow agreement which recognized the right of plaintiffs to receive a commission of $4,500 was a sufficient written note or memorandum of the employment of plaintiffs by defendants Sirkus and Senter, as stated in the writing signed by Harold Senter. In Coulter v. Howard, 203 Cal. 17, 262 P. 751, Mrs. Howard's son had given the broker a written agreement of employment; thereafter she executed escrow instructions calling for the payment of a commission to the broker out of funds due her at the close of the escrow. This was held to constitute a sufficient note or memorandum of employment under section 1624(5), Civil Code, and section 1973(5), Code of Civil Procedure. The decision in Coulter v. Howard was followed in Fritz v. Frost, 114 Cal.App. 602, 300 P. 454. The law on this point is thus settled to the contrary of respondents' contention. We are of the opinion that the first cause of action stated sufficient facts to justify a recovery against defendants Sirkus and Senter.

[2] The second cause of action is against defendants Olson and states sufficient facts for recovery of a commission from them. It does not purport to charge the other defendants with liability. It is necessary, however, to discuss the question of the Olsons' liability, although they are not interested parties on the appeal. The third cause of action is an attempt to impose liability upon defendants Sirkus and Senter to pay any commission for which the Olsons might be obligated. It repeats by reference the principal allegations of the first cause of action, including those which set out the writings signed by the Olsons. We must therefore refer to these documents, the first of which was the agreement upon their part to accept the Glenrock Avenue property in exchange for their own.

As previously stated, the provision for payment of a commission is underneath the signatures of the Olsons upon the first writing signed by them, which might imply that it was not a part of their agreement, but it was alleged also that they orally agreed to pay a commission at the time they signed the writing. This brings the case as to them within the rule of the Coulter and Fritz cases.

[3] In addition, the following sentence is found in the writing above the signatures of the Olsons and of plaintiffs: "Where an exchange is involved, the undersigned Broker is authorized to act as agent for all parties hereto and may accept a commission therefrom." The writing also was a receipt for $10 "deposited with Devereux & Company, as broker" as an initial payment on the purchase of the Sirkus and Senter property. There are many other references in the writing to the duties of the broker. It cannot reasonably be construed as anything short of an employment of the brokers to effect an exchange of properties, even if the express promise and the stated amount of the commission be disregarded. If there is a valid employment of a broker to buy or sell real property, and the service is performed, the broker is entitled to compensation even in the absence of an express agreement for payment of a commission or agreement as to the amount. This has been the settled rule ever since Toomy v. Dunphy, 86 Cal. 639, 25 P. 130.

[4] The third cause of action is a repetition of the first cause of action with certain additional averments. Liability is predicated upon an alleged assumption of the Olsons' liability by the other defendants. It alleges that the Olsons were ready, able and willing to complete the exchange but the defendants Sirkus and Senter "defaulted in the same" and induced the Olsons "to cancel and close the said escrow and to refrain from completing the balance of the exchange agreement," but that the Olsons exacted of defendants Sirkus and Senter as a condition of withdrawing from the agreement that they be indemnified against loss by an agreement approved and accepted by Sirkus and Senter, and that there was placed into escrow, for and on behalf of defendants Olson, a writing reading as follows: "December 7, 1949 'The Olsons are and have always been ready, able and willing to complete this escrow. However, they are now willing to have it cancelled providing they incur no expense * * * If the Senters and Sirkuses assume all escrow and title costs, charges and expenses, and pay the Olsons a modest attorney's fee, you may arrange to close the matter.'" It was then alleged that said instructions on behalf of the Olsons were complied with by defendants Sirkus and Senter and that the escrow was thereupon closed pursuant to said agreement. Plaintiffs contend this was an agreement to pay a commission that was due from the Olsons. Defendants say the writing related only to charges and expenses in the escrow itself. This is certainly a reasonable interpretation of the writing, and in the absence of any allegations of mistake in drafting it, the term "all escrow and title costs charges and expenses" may not be so interpreted as to relate also to a broker's commission.

[5] The third cause of action calls for further discussion of questions that will arise upon a trial. It sets forth by refer-

ence the terms of the escrow agreement and it also alleges the cancellation of the escrow and abandonment of the exchange. Defendants contend that cancellation of the escrow relieved them of all liability, since no commission was to be paid unless the exchange should be consummated. Although cancellation was not alleged in the first cause of action, it will no doubt appear in the evidence. We should therefore consider its significance. It is true that in the escrow instructions both commissions were made payable to plaintiffs at the close of the escrow, and that the commission was to be paid by the Olsons also upon the recording of a deed to them. If there had been no previous employment commissions would not have become payable in the event of failure of the parties to complete the exchange. Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576. Upon the other hand, if, as plaintiffs allege, they had been validly employed by both parties to effect an exchange of properties and had fully performed their services, it was not necessary that the escrow should have been closed in any fashion in order that commissions be earned. They would already have been earned. Jauman v. McCusick, 166 Cal. 517, 137 P. 254. Nothing less than an express agreement in the subsequent writings (the escrow instructions) that no commissions would be paid unless the exchange should be consummated could have deprived plaintiffs of their right which had already accrued. Defendants Sirkus and Senter, by abandoning the transaction, could not escape their liability to pay a commission. Fritz v. Frost, supra, 114 Cal.App. 602, 300 P. 454.

Sufficient facts having been alleged in the first cause of action to entitle plaintiffs to go to trial, it was error to sustain demurrers to that cause of action. They were properly sustained as to the second and third causes of action.

The judgment is reversed for further proceedings in accordance with the foregoing views.

PARKER WOOD and VALLÉE, JJ., concur.

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105 Cal.App.2d 363

LIPTON v. JOHANSEN et al.

Civ. 17964.

District Court of Appeal, Second District, Division 1, California.

July 12, 1951.

Hearing Denied Sept. 7, 1951.

Ruth Lipton, doing business as Ruth Lipton Realty Company, sued Harry C. Johansen and others, to recover a commission for her services as a real estate broker. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained the trial court's finding that a deposit receipt had constituted the full and final agreement between the parties, and that therefore the broker was not bound by a recital in the subsequently executed escrow instructions to the effect that broker's commission should be paid at the close of escrow.

Affirmed.

1. Contracts 🔑9(1)

A contract is not invalidated merely because, on its face, it is ambiguous or uncertain, but on contrary, such uncertainties may be resolved by parol evidence or by interpretation by court.

2. Brokers 🔑43(3)

Where deposit receipt acknowledged receipt from purchaser of $5,000 deposit, that the purchase price was to be $165,000, and that "The balance of the purchase price to be paid on or before Sept. 14, 1948, as follows to-wit: $75,000 cash to be deposited in escrow; balance of $90,000 to be paid over a period of three years" and vendors also agreed to pay broker, as commission, the sum of $8,250 or one half of the deposit should the same be forfeited, a reasonable interpretation of terms of agreement evidenced by deposit receipt was that total purchase price was $165,000 and that $75,000 thereof was to be paid in cash before Sept. 14, 1948 and the balance of $90,000 to be paid on or before three years thereafter, and therefore the contract evidenced thereby was not too unintelligible to be enforced as a contract at law or in equity, and could be enforced by broker against vendor.

3. Vendor and purchaser ⚷21

Where deposit receipt executed by vendor and purchaser provided that property was to be furnished "as per approved inventory to be placed in escrow" and purchaser checked property included in inventory before deposit receipt was executed and placed his initials on inventory signifying his approval that specific items included therein were in sale, such provision did not render terms of contract evidenced by deposit receipt too indefinite, uncertain or unintelligible to be enforced as a contract at law or in equity.

4. Appeal and error ⚷994(1)

It is not province of appellate court to pass upon credibility of witnesses.

5. Brokers ⚷86(1)

In action to recover broker's commission for sale of real estate, evidence established that deposit receipt executed by parties to sale constituted the full and final agreement between the parties thereto and that it was not contemplated that the final terms of their agreement should be set forth in subsequently executed escrow instructions, and therefore, in absence of either actual or implied consent to terms thereof, broker would not be bound by recital in escrow instructions to effect that broker's commission should be paid at close of escrow.

6. Brokers ⚷48, 60, 84(2)

A broker's commission is earned when purchaser and vendor have executed binding, written agreement between them upon terms provided in contract of employment of broker and purchaser is ready, willing and able to perform contract on terms prescribed, and readiness, willingness, and ability of purchaser are conclusively presumed in suit by broker to recover his commission upon proof that vendor has entered into valid contract of purchase and sale with purchaser, and right of broker to his commission is not affected by failure of either party to carry out agreement.

7. Brokers ⚷86(8)

In action to recover broker's commission for sale of real estate, pursuant to terms of agreement under which vendors promised to pay broker commission of $8,250 or one half of a $5,000 deposit made by the purchaser in case the deposit should be forfeited, evidence sustained trial court's finding that purchaser's deposit had not been forfeited and that broker was entitled to judgment for $8,250.

8. Vendor and purchaser ⚷101

The ordinary forfeiture provision is for exclusive benefit of vendor, who has an option either to declare forfeiture or to enforce contract.

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George I. Devor, Norman Newmark, Maurice Thorner, Richard L. Weiss, all of Los Angeles, for appellants.

Gold & Needleman, J. Geo. Gold, of Beverly Hills, Ruth Bernfeld, Sacramento, for respondent.

DRAPEAU, Justice.

Plaintiff, a licensed real estate broker, seeks to recover a commission.

Her second amended complaint alleges that on August 24, 1948, she procured a buyer able, ready and willing to purchase defendants' real property located in Bel Air, Los Angeles. That the purchase price agreed upon between defendants and the buyer was $165,000, and that defendants by an instrument in writing agreed to pay plaintiff a commission of $8,250 for her services as such real estate broker.

Defendants' answer affirmatively alleges the execution of a deposit receipt on August 24, 1948, by the terms of which they agreed to sell their property to one Donald F. Duncan. It is further alleged that an escrow was entered into on the same day; that the deposit receipt and the escrow instructions "together set forth the full terms and conditions of the entire real estate transaction"; and that the payment of the broker's commission of $8,250 was predicated upon a condition precedent, i. e., the close of the escrow, which condition was never met.

From a judgment in favor of plaintiff, defendants appeal.

The findings of the trial court may be summarized as follows:

1. That the deposit receipt standing alone and signed by the purchaser, the appellants and respondent was a valid, binding contract between all the parties thereto;

2. That respondent was not bound by the terms of the escrow instructions;

3. That the escrow instructions did not make the close of escrow a condition precedent to respondent's right to recover commissions;

4. That respondent procured a purchaser ready, willing and able to purchase upon the terms and conditions fixed by appellants;

5. That respondent was entitled to a commission of $8,250 for her services.

It is here contended that such findings are contrary to law and are not supported by the evidence.

The record herein discloses that immediately prior to August 24, 1948, appellants and respondent had numerous discussions regarding the sale of appellants' Bel Air property to Mr. Donald F. Duncan, who had been introduced to appellants by respondent. At this time appellants verbally agreed to pay respondent a 5% commission on the sale. In accordance with detailed instructions regarding the terms of sale which had been given to her by Mr. Johansen, respondent prepared several copies of a deposit receipt.

On the morning of August 24th, the parties met at appellants' home. An inventory of the furnishings was checked room by room and approved by Mr. Duncan, whereupon the deposit receipt was executed by all parties. Pursuant thereto, the buyer agreed to purchase and appellants agreed to sell "the above described property on the terms and conditions herein stated." Appellants also agreed "to pay the above signed agent as commission the sum of $8,250.00, or one-half of the deposit should same be forfeited." The deposit on the sale was $5,000.

The parties then proceeded to the escrow department of a leading bank, where respondent handed the executed deposit receipt to the escrow clerk and told the latter to draw escrow instructions conforming to such document. Respondent then joined Mrs. Johansen at the back of the escrow booth and did not participate in the discussions of Mr. Johansen, Mr. Duncan and the latter's attorney during which time changes were made in the terms of the sale. Respondent testified that she did not know that the provisions of the escrow instructions differed from the deposit receipt until some time later. She did not sign the instructions; they were not shown to her and she was not consulted with respect thereto.

Among these provisions was one to the following effect: "Pay at close of escrow any encumbrances necessary to place this title in the condition called for and the following: Pay commission of $8,250.00 to Ruth Lipton Realty Co. * * *."

Mr. Johansen testified that respondent took an active part in the discussion of each point raised at the escrow instruction conference. He also testified that he and his wife and Mr. Duncan signed the deposit receipt in the escrow office while the escrow instructions were being typed; that respondent stated: "This is a deposit receipt which it is necessary for you and Mrs. Johansen to sign, as it becomes part of the escrow, and is brought into escrow." In reply to the question: "Did you at any time ask Mrs. Lipton whether she would agree to be paid her commission only if the escrow closed?", Mr. Johansen stated: "I did not. Q. Did she volunteer or state at any time that it would be a condition acceptable to her? A. She did not. That subject never came up."

On rebuttal, respondent Lipton testified as follows:

"Q. By Miss Bernfeld: Mrs. Lipton, was it at anytime your intention in this transaction that the payment of your commission should be dependent upon the consummation of the transaction or the closing of the escrow? A. Never. I had earned my commission when I brought the buyer and seller together, and we had a deposit receipt signed. My work was finished then."

It was stipulated that appellants complied with all the conditions of the escrow instructions but that the buyer defaulted; that appellants had filed an action for damages for breach of contract against the purchaser; and that the property had been sold to a third party.

Appellants argue that the deposit receipt did not constitute a valid, binding contract between the parties because its terms "are too indefinite, too uncertain, too unintelligible to be enforced as a contract at law or in equity."

They assert that it is impossible to determine from the terms of the document either the price to be paid for the property or the manner of payment; nor what or how much furniture is included in the sale.

The deposit receipt acknowledges receipt from the buyer of a $5,000 deposit; describes the property adequately but not with particularity; states the property is to be furnished as per approved inventory to be placed in escrow. The purchase price is stated to be $165,000. "The balance of the purchase price is to be paid on or before Sept. 14, 1948, as follows to-wit: $75,000 cash to be deposited in escrow; balance of $90,000 to be paid over a period of three years." Then follow the particular amounts payable over the three year period, plus interest at 5%.

The trial court resolved the apparent conflict in these terms by its finding that the allegations of paragraph three of the second amended complaint were true, to the effect that the purchase price was $165,000, and the terms of sale were as follows:

"Seventy-five Thousand ($75,000.00) Dollars in cash to be paid on or before September 14, 1948, and the balance of Ninety Thousand ($90,000.00) Dollars to be paid on or before three (3) years thereafter with interest at the rate of five (5%) per cent per annum"; followed by the particular amounts payable each year.

[1] A contract is not invalidated merely because, on its face, it is ambiguous or uncertain, but on the contrary, such uncertainties may be resolved by parol evidence or by interpretation by the court as to its meaning. Meyers v. Nolan, 18 Cal. App.2d 319, 322, 63 P.2d 1216.

[2] It is apparent from the most casual examination of the deposit receipt, that the trial court has arrived at a reasonable interpretation of its terms. See, Deeble v. Stearns, 82 Cal.App.2d 296, 298, 186 P. 2d 173.

[3] With respect to appellants' point as to what or how much furniture is included in the sale under the provision that the "property is to be furnished as per approved inventory to be placed in escrow", respondent cites the case of Keelan v. Belmont, Co., 73 Cal.App.2d 6, 12, 165 P.2d 930, 933. In that case appellant urged that "when the clause requiring the approval of the buyer to the inventory and equipment was added to the deposit-receipt, it became merely an offer and not a binding agreement." It was there held: "An examination of the document reveals that it is complete with respect to terms and conditions of the sale; and that it is signed by both parties, who agreed to buy and to sell upon the conditions therein expressed. The fact that it was made subject to the buyer's approval of the designated items, does not detract from its binding effect, especially in view of the court's finding that the buyer by his actions and conduct approved the inventory and equipment."

Likewise here, it was established that the buyer checked the furniture included in the inventory room for room on the morning of August 24, 1948 before the deposit receipt was executed, and that he placed his initials on the inventory signifying his approval that the specific items therein were included in the sale.

[4, 5] Appellants next urge that "the finding of the court to the effect that the deposit receipt was the full and final agreement between the parties thereto and that it was not contemplated that the final terms of their agreement should be set forth in escrow instructions, is not supported by the evidence and is contrary to law."

The evidence addressed to these questions was in direct conflict. The court in finding for respondent apparently disregarded appellants' testimony. It is not the province of this court to pass upon the credibility of witnesses. The finding objected to is substantially supported by the evidence hereinabove recited.

In the case of Le Blond v. Wolfe, 83 Cal.App.2d 282, 284, 287, 188 P.2d 278, 281, it was held that the broker was not bound by a clause in the escrow instructions, added without his knowledge or consent, that the *commission was payable "if and when deal is closed"*. The court there stated: "Plaintiff had performed before the opening of the escrow. His right to the $2,500 had accrued. It makes no difference whether the 'deal' was closed or not."

[6] The established rules of law governing a broker's right to a commission are stated in Meyer v. Selggio, 80 Cal.App.2d 161, 164, 181 P.2d 690, 692:

"2. A broker's commission is earned when the vendee and vendor have executed a binding, written agreement between them upon the terms provided in the contract of employment of the broker, and the vendee is ready, willing, and able to perform the contract on the terms prescribed. (Lind v. Huene, 205 Cal. 569, 570 et seq., 271 P. 1087.)

"3. The readiness, willingness, and ability of the vendee are conclusively presumed in a suit by a broker to recover his commission upon proof that the vendor has entered into a valid contract of purchase and sale with the vendee. (Malmstedt v. Stillwell, 110 Cal.App. 393, 398, 294 P. 41.)

"4. The right of the broker to his commission is not affected by failure of either party to carry out the agreement. (Lind v. Huene, supra; Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542.)"

In the instant case, the deposit receipt constituted the full and final agreement between appellants and respondent, and in the absence of either actual or implied consent to the terms thereof, respondent is not bound by the escrow instructions.

Appellants assert that Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748, stands for "the proposition that any rights of respondent to a commission must be determined in light of the provisions of the escrow instructions. In other words, that to determine respondent's right to a commission the deposit receipt and the escrow instructions must both be considered."

In the cited case there was evidence upon which the trial court based its finding that it was the intention of all parties that the terms of the sale including payment of commissions should be included in a further written agreement in the form of escrow instructions. And as stated in the opinion at page 358 of 31 Cal.2d, at page 753 of 188 P.2d: "such evidence also supports the further implied finding that the 'Offer to Buy' did not constitute a complete or final contract. Under such circumstances this court will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties."

Here the evidence supports the finding that the parties did not contemplate that the final terms of their agreement should be set forth in escrow instructions.

Appellants argue that the finding "that the promise of appellants to pay a commission to respondent was not conditioned upon the closing of the escrow—an event which never occurred—is contrary to law."

As heretofore stated, quoting from Meyer v. Selggio, 80 Cal.App.2d 161, 164, 181 P.2d 690, 692: "The right of the broker to his commission is not affected by failure of either party to carry out the agreement." See Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542.

[7] Appellants finally urge that the findings "that the deposit of purchaser was not forfeited and that respondent is entitled to judgment in the sum of $8,250.00" are unsupported by the evidence and are contrary to law.

During the trial the parties stipulated that the purchaser defaulted and that appellants were suing for damages for breach of contract.

[8] "The ordinary forfeiture provision is for the exclusive benefit of the vendor, who has an option either to declare a forfeiture or to enforce the contract." 25 Cal.Jur. 608, sec. 113, and authorities there cited.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

105 Cal.App.2d 457

PEOPLE v. DEVORA.

Cr. 4577.

District Court of Appeal, Second District,
Division 1, California.
July 16, 1951.

Stephen J. Devora was convicted of issuing checks without funds and he appealed from an order of the Superior Court of Los Angeles County, William M. Byrne, J., denying his motion to set aside judgment, sentence and pleas of guilty, which motion was made on ground that pleas of guilty were induced through representations to defendant by his counsel that if defendant pleaded guilty defendant would receive only a county jail sentence rather than a sentence to state's prison. The District Court of Appeal, Drapeau, J., held, inter alia, that evidence justified denial of the motion.

Order affirmed.

1. Criminal law 🔑997

A motion of a defendant who was convicted of issuing checks without funds, to set aside judgment, sentence and pleas of guilty on ground that pleas were induced by representations to movant by his counsel that if movant pleaded guilty movant would receive only a county jail sentence rather than a sentence to state's prison, was in nature of application for writ of error coram nobis, and defendant was required to establish by preponderance of substantial and credible evidence that alleged error of which movant complained deprived movant of legal rights by extrinsic causes amounting to deprivation of a trial on merits.

2. Criminal law 🔑997

A convicted defendant who applies for writ of error coram nobis must establish by preponderance of substantial and credible evidence that error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on merits.

3. Criminal law 🔑997

On motion of defendant, who was convicted of issuing checks without funds, to set aside judgment, sentence and pleas of guilty on ground that pleas were induced by representations to movant by his counsel that if movant pleaded guilty movant would receive only a county jail sentence rather than a sentence to state's prison, all conflicts in evidence were required to be resolved against movant.

4. Criminal law 🔑997

The writ of error coram nobis was not designed to enable the guilty to escape punishment, but to purify and keep pure administration of justice.

5. Criminal law 🔑997

One seeking extraordinary writ of error coram nobis must show due diligence in applying therefor.

6. Criminal law 🔑997

The granting of relief to one seeking extraordinary writ of error coram nobis is largely within discretion of trial court.

7. Criminal law 🔑1147

Ruling of trial court on motion for writ of error coram nobis will not be disturbed on appeal unless an abuse of discretion is shown.

8. Criminal law 🔑997

Evidence justified denial of motion of a defendant who was convicted of issuing checks without funds, to set aside judgment, sentence, and pleas of guilty, which motion was made on ground that pleas were induced by representations to movant by his counsel that if movant pleaded guilty movant would receive only a county jail sentence rather than a sentence to state's prison.

◆

Stephen J. Devora in pro per, for appellant.

Edmund G. Brown, Atty. Gen. and Stanford D. Herlick, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

By two informations containing three counts each—numbered 132860 and 133307, filed April 10 and April 27, 1950, respectively, defendant was charged with issuing checks without sufficient funds, and with a prior conviction of the same crime.

On April 19 and May 1, 1950, defendant entered pleas of not guilty of the crimes so charged. Trial was set for May 22nd. On that date, defendant withdrew his pleas of not guilty and entered pleas of "guilty as charged in Count 1 of the information" No. 132860; "guilty as charged in Count 2 of the information" No. 133307, and admitted the prior conviction.

On July 5th, defendant's application for probation was denied, and he was sentenced to state's prison, the sentences on the two counts to run concurrently. The remaining counts of both informations were dismissed.

On August 21, 1950, defendant filed notice of motion to set aside the judgment, sentences and pleas of guilty, on the ground that such pleas were induced "through representations made to him by his counsel concerning an understanding which the said counsel had with the deputy district attorney."

The motion was denied and this appeal followed.

Appellant claims in substance that the court erred in its denial of his motion for the reason that his pleas of guilty were obtained upon representations made by his own attorney that if he so pleaded he would receive only a county jail sentence.

[1] The instant motion to set aside the pleas and the judgment entered pursuant thereto is in the nature of an application for a writ of error coram nobis. People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976, 980, citing People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657, and People v. Odlum, 91 Cal.App.2d 761, 205 P.2d 1106.

[2] "Under the well established rules governing the issuance of such writ it is incumbent upon the defendant to establish by a preponderance of substantial and credible evidence that the error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on the merits. People v. Lewis, 64 Cal.App.2d 564, 565, 149 P.2d 27; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155." People v. Kirk, supra, 98 Cal.App.2d 687, 692, 220 P.2d 976.

On May 22, 1950, when appellant withdrew his plea of not guilty and entered his plea of guilty, the following took place:

"The Court: Stephen J. Devora, you are charged in information No. 132860 with the crime of issuing checks without sufficient funds on the 17th day of December, 1949, and in Information No. 133307 with the crime of issuing checks without sufficient funds, in Count 2, committed on the 22nd day of December, 1949. Is it your wish to withdraw your plea of not guilty and enter a plea of guilty to each of these offenses?

"The Defendant: Yes, your Honor.

"The Court: You have not been promised any reward or immunity of any kind, have you?

"A. No, sir.

"The Court: It is your wish to plead guilty because you are guilty of the offense as charged in Count 1 of Information No. 132860 and Count 2 of Information No. 133307?

"The Defendant: Yes, sir.

"The Court: Re-arraign the defendant."

At that time appellant was represented by Mr. Al Matthews, who was associated with Mr. F. Murray Keslar. The People were represented by Deputy District Attorney Carr.

When appellant was about to be sentenced, he was asked if there was any cause why judgment should not be pronounced in both cases. Mr. Matthews made the following statement on behalf of appellant:

"Now, I feel that the Court will probably imprison the defendant for a substantial length of time but I wonder, your Honor, if society is benefited any more by sending the defendant to a state prison than it would be by consecutive sentences in the County Jail? * * * A two-year period, your Honor, in this case considering all the circumstances would be ample punishment."

The affidavit of appellant made in support of the instant motion avers that on

May 22, 1950 in the prisoner's anteroom of Department 44 of the Superior Court, he had a consultation with his attorneys Keslar and Matthews; that he advised said counsel that he desired a jury trial believing that he had a valid defense to all charges; that he believed he was not eligible for probation. It was also averred that Mr. Keslar advised appellant that he had a conversation with Deputy District Attorney Myers, who had stated that he would not object to a jail sentence; that Mr. Keslar advised appellant to plead guilty to one count in each case and make application for probation; that Mr. Keslar represented to appellant that he would receive a straight county jail sentence and in no event would he be sentenced to state's prison since the deputy district attorney did not oppose a county jail sentence; that the attorneys then left and upon their return a short time later, Mr. Keslar told him that he had again talked to Mr. Myers; that everything was arranged for a county jail sentence and for appellant to go ahead and enter a plea of guilty to one count in each information. Appellant then averred that he entered his pleas of guilty relying upon such representations; that when he pleaded guilty he believed he had a valid defense and "that but for the representations of said F. Murray Keslar, affiant would have continued to insist upon a jury trial." That the court by permitting affiant to apply for probation, when affiant believed he was not eligible therefor, together with the fact that Mr. Myers stood mute and made no objection to such application, "seemingly corroborated the representations" of Mr. Keslar that the latter had reached an understanding with the deputy district attorney regarding appellant's punishment.

At the hearing on the instant motion, the court read the foregoing affidavit into the record.

Deputy District Attorney Myers then took the stand and testified that he had no recollection of any discussion with appellant's counsel; that he had been a deputy district attorney for eighteen years and knew he had nothing to do with probation. He denied any conversation with Mr. Keslar concerning this case. He stated that he would not object to a county jail sentence or any kind of a sentence because it was none of his business what sentence was meted out by the court. He also testified that he would not have objected to accepting the pleas of guilty in each case, since several checks were involved; that if he stood mute when appellant asked leave to file for probation, it was because probation is a matter outside his province. That Mr. Joseph L. Carr, Deputy District Attorney, was his associate in this case, and as calendar deputy, the witness told him that it would be all right to accept a plea to one count on both informations if the appellant offered it; that he had no conversation with either Mr. Keslar or Mr. Matthews because he had nothing to do with the case after he turned it over to Mr. Carr.

Mr. Carr testified he was the deputy district attorney who handled the case for the prosecution; that before trial he asked his superior, Mr. Myers, what arrangements had been made on the two informations and was told that the People would be willing to take a plea of guilty to one count in each information; that then Mr. Matthews approached the witness and asked what the prosecution would be willing to do; that he informed Mr. Matthews that he would take a plea of guilty as to one count on each of the two informations; that nothing further was said between the witness and Mr. Matthews. Shortly thereafter, appellant appeared in the courtroom, and with the court's consent the witness took a plea of guilty as to one count of each information. That nothing was said to the witness "as to what my disposition was as to any possible sentence. I made no promises to Mr. Matthews."

Mr. Keslar testified that he represented appellant through an associate at the preliminary hearing; that on May 22nd he learned that Mr. Matthews had been retained by appellant. At a conference between appellant, Mr. Matthews and the witness, the latter told appellant that there were a number of counts which probably could be beaten because appellant was intoxicated at the time the checks were issued; that in view of the three or four counts which could not be beaten, it would be better for appellant to plead guilty to one count in each case if the district attorney's office would accept it.

That Mr. Matthews then stepped out of the room, the witness remaining; that Mr. Matthews returned soon after and stated that the prosecution would accept the proposed pleas and dismiss the other counts. This witness testified that appellant was told specifically at that time that no promises had been made. He also denied that he ever talked to deputy district attorney Myers or anybody else concerning leniency for appellant. That he was present in the courtroom when appellant was asked by the court if any promise of reward or immunity had been made to him, and heard appellant answer that none was given.

Appellant in rebuttal testified that he did not see Mr. Keslar between the dates on which he pleaded not guilty and the date of trial on May 22nd.

An examination of the record herein discloses that the testimony produced at the hearing on the motion directly controverted every material allegation of appellant's affidavit:

Mr. Keslar made no representations to appellant about promised leniency. He advised that a plea of guilty to one count in each information would benefit appellant, if the other counts were dismissed because there was a possible defense to only one count. Appellant was told that no promises had been made. Defense attorney Matthews shortly thereafter advised appellant that the prosecution would accept pleas of guilty as to two counts and dismiss the remaining counts. Mr. Keslar did not speak to anyone about leniency for appellant.

Deputy District Attorney Myers never spoke to anyone about appellant's cases except the trial deputy, Mr. Carr. He advised Mr. Carr that guilty pleas would be acceptable on one count in each information. Nothing was said about any possible sentence. When asked by Mr. Matthews, Mr. Carr relayed this information to him.

[3] All conflicts in the evidence must be resolved against appellant. In making his decision, the trial judge stated that the prosecution's evidence was corroborated by appellant's counsel at the time of sentencing, when he stated that he believed appellant would be imprisoned for a substantial length of time. The trial court also found that the deputy district attorneys did not "seemingly corroborate" any alleged representation because they discussed the matter of punishment with no one.

[4] As stated in People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489, 491: "The exceptional remedy above referred to was not designed to enable the guilty to escape punishment, but to purify and keep pure the administration of justice, and the same may be utilized only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." See, also, People v. Krug, 33 Cal.App.2d 317, 321, 91 P.2d 637.

[5–7] Moreover, one seeking the aid of the extraordinary writ of error coram nobis must show due diligence in applying therefor. People v. Shorts, 32 Cal.2d 502, 515, 197 P.2d 330. The granting of relief is a matter largely within the discretion of the trial court, and unless an abuse of discretion is shown, its ruling will not be disturbed on appeal. People v. Kirk, supra, 98 Cal.App.2d 687, 220 P.2d 976.

Appellant made no complaint at the time he was sentenced; he made no motion for a new trial and no appeal was taken. In addition, when he entered his pleas of guilty, he admitted that he had not been promised any reward or immunity.

[8] The record is free from error. The order denying the motion to set aside the judgment is supported by the evidence.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

MAYER v. NORTHWOOD TEXTILE MILLS, Inc. et al.

NORTHWOOD TEXTILE MILLS, Inc. v. KRAMER et al.

Civ. 18224.

District Court of Appeal, Second District, Division 3, California.
July 13, 1951.

Rehearing Denied July 31, 1951.

Hearing Denied Sept. 7, 1951.

L. Mayer, as assignee of Emanuel Kramer, sued Northwood Textile Mills, Inc., to recover the purchase price paid by Kramer to defendant for yardage upholstery material, purchased by sample and by description, after Kramer had rescinded the purchase and tendered the material to defendant, which had refused to accept the return of the material. Defendant filed a cross-complaint against Kramer and Mayer alleging that Kramer had converted to his own use certain other upholstery material belonging to defendant. From adverse judgments on the complaint and cross-complaint rendered by the Superior Court, Los Angeles County, Frank G. Swain, J., defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that the evidence sustained the trial court's finding that the bulk of the goods delivered had not corresponded to the samples identified in the written contract of sale.

Affirmed.

1. Sales 🔑181(12)

In suit by buyer's assignee to recover purchase price paid seller for yardage upholstery material, purchased by sample and by description, evidence sustained trial court's finding that bulk of goods delivered had not corresponded to samples identified in written contract of sale and that buyer had therefore been justified in rescinding the purchase. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768.

2. Sales 🔑126(1, 4), 130(3)

Whether party has rescinded promptly depends on circumstances of particular case, but burden of proving waiver of right to rescind is on party asserting it and relying on waiver, and question is one of fact. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768.

3. Equity 🔑71(1)

There is no hard or fixed rule as to lapse of time or circumstances that will justify application of doctrine of laches.

4. Appeal and error 🔑1010(1)

Conclusion of trial court will not be set aside by reviewing court if it finds reasonable support in evidence.

5. Sales 🔑126(4)

In action by buyer's assignee to recover purchase price paid seller for yardage upholstery goods purchased by sample and by description, jury question was presented as to whether buyer had waived right to rescind by his failure to act promptly or by manner in which he retained and used material. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768.

6. Sales 🔑121, 180(2)

Where yardage upholstery material was shipped by seller in two lots and upon receipt of material by buyer samples were cut and distributed to prospective customers before inspection of material was made and a small piece thereof was sold, without knowledge that material was defective, buyer's actions did not, as a matter of law, constitute an acceptance of the material or a waiver of his right to rescind upon discovering that bulk of goods delivered did not correspond to samples identified in written contract of sale. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768.

7. Attachment 🔑16

Any creditor, whether he is original creditor or has succeeded by assignment to rights of another, is entitled to invoke remedy of attachment. Code Civ.Proc. § 537.

8. Attachment 🔑16

In California, as a rule, any person standing in position of creditor and having claim satisfying requirement of applicable section of Code of Civil Procedure may invoke remedy of attachment. Code Civ. Proc. § 537.

9. Attachment 🔑16

A creditor who occupies fiduciary relationship with his debtor is not thereby compelled to forego right which he would have if he occupied status of creditor alone.

10. Trover and conversion ⚷4

Where buyer brought, through assignee, adversary action against seller to recover purchase price paid for yardage upholstery material, purchased by sample and by description, after rescinding contract of sale because bulk of goods delivered did not correspond to sample, and buyer's assignee, in aid of suit, caused attachment to be levied upon other material owned by seller and held by buyer under consignment for sale, buyer did not, in causing attachment to be issued and levied, convert consigned material to his own use. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768; Code Civ.Proc. § 537.

11. Trover and conversion ⚷40(4)

In action by buyer's assignee to recover purchase price paid seller for yardage upholstery material, purchased by sample and by description, after rescission of sale because of failure of bulk of goods delivered to correspond to sample, where seller filed cross-complaint against buyer alleging that other materials consigned to buyer had been converted by reason of an attachment issued and levied in support of assignee's suit, evidence supported conclusion that buyer's failure to comply with seller's demand for return of consigned goods had not amounted to conversion. Civ.Code, §§ 1691, 1734, 1735(2), 1736, 1767(3), 1768; Code Civ.Proc. § 537.

◆

Bachrack & Wilson, Los Angeles, Henry Muller, Los Angeles, for appellant.

Benjamin & Lieberman, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff, as assignee of Emanuel Kramer, brought this action to recover the purchase price paid defendant for yardage upholstery material. The material was purchased by sample and by description. The complaint alleged, and the court found, that the material delivered did not conform to the samples submitted or to the quality ordered; that, on ascertaining the inferior quality of the material, Kramer rescinded the purchase and tendered the material to defendant, which refused to accept it. Judgment was for plaintiff for the purchase price and an amount paid for freight. Defendant filed a cross-complaint against Kramer in which it alleged that about November 5, 1947, Kramer converted to his own use certain other upholstery material belonging to defendant. The judgment on the cross-complaint was for plaintiff.

The case on the complaint.

Defendant's claims for reversal are: 1) there is no evidence to support the buyer's claim that the bulk of the goods delivered did not correspond to the samples identified in the written contract of sale; 2) the buyer's use and retention of the goods barred any claim of rescission of the sale; 3) the buyer lost any right of rescission by his failure to act promptly. The claims are untenable.

[1] Defendant's office was in Philadelphia. Kramer, doing business in Los Angeles, ordered the material by samples and specific description on April 28, 1947. There was ample evidence that the material delivered did not conform to either the samples or the description. Kramer so testified. Experts called by plaintiff so testified in detail. The order described two types of material. The court had before it a sample of one type and some of the material delivered, which was to conform to that sample. It also had before it some of the second type of material delivered. The trial judge was thus in a position to determine from an inspection of the material delivered whether it conformed to the description of that ordered.

The material was shipped in two lots. The first lot, shipped by rail freight, was delivered about the middle of May, 1947. The second lot was shipped by water. A few days after Kramer received the first lot, it was unpacked and put into bins. Samples were cut and distributed to prospective customers, and a small piece was sold, before an inspection was made. About two weeks later the customer complained. Kramer then inspected the material and discovered that it was defective. Kramer's son went to Philadelphia, called on defendant during the first week in June, 1947, informed its secretary and comptroller of the customer's complaint and that Kramer had then thoroughly inspected the lot received by rail and found that it did not conform to either samples or description. The secretary asked Kramer's son to wait until the balance of the order had been received by water and if it was found that the bulk of the shipment did not conform, to let him know. The material shipped by water was delivered to Kramer in separate lots about the second week in June. He immediately inspected it and found that it did not conform to either samples or description. On July 19, 1947, Kramer tendered the material he had received to defendant upon condition that defendant pay him the price thereof and the amount expended by him for freight. Defendant declined the offer.

Where there is a sale of goods by description, there is an implied warranty that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Civ.Code, § 1734. "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." Civ. Code, § 1735(2). Defendant dealt in goods of the description ordered. Civil Code, section 1736 reads: "In the case of a contract to sell or a sale by sample:

"(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

"(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 1767(3).

"(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample." Section 1767 (3) provides a right to examine goods on c. o. d. shipment. Civil Code, section 1768 reads: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

[2–6] To effect a rescission a party must rescind promptly upon discovering the facts which will entitle him to rescind if he is aware of his right to rescind and if he offers to restore everything of value which he has received under the contract upon condition that the other party do likewise. Civ.Code, § 1691. Whether a party has rescinded promptly depends on the circumstances of the particular case. Esau v. Briggs, 89 Cal.App.2d 427, 201 P.2d 25. The burden of proving a waiver of the right to rescind is on the party asserting and relying on the waiver—in this case the defendant—and the question is one of fact. Mobley v. Richfield Oil Corp., 53 Cal.App.2d 406, 128 P.2d 105. Whether a buyer rescinded promptly is a question of fact. Miller v. Eisenberg, 90 Cal.App.2d 479, 482, 203 P.2d 11. There is no hard or fixed rule as to the lapse of time or circumstances that will justify the application of the doctrine of laches. Wagaman v. Clifford F. Reid, Inc., 5 Cal.App.2d 168, 171, 42 P.2d 678. The conclusion of the trial court will not be set aside by a reviewing court if it finds reasonable support in the evidence. McCray v. Title Ins. & Trust Co., 12 Cal.App.2d 537, 538, 55 P.2d 1234. In the present case it is obvious that we cannot say, as a matter of law, that Kramer accepted the material or that he did not rescind promptly or that he used or retained the material in such a manner as to have waived his right to rescind. The mere fact that Kramer cut samples and distributed them to prospective customers and sold a small piece of material without knowledge that the material was defective did not, as a matter of law, constitute an acceptance of the material or a waiver of his right to rescind.

The case on the cross-complaint.

Prior to the transaction complained of in the complaint, Kramer had purchased some upholstery material from defendant and cross-complainant which was defective. The parties reached a satisfactory adjustment by which cross-complainant retained title to the material and Kramer agreed to retain possession of it and to endeavor to sell it for a commission. Cross-complainant also shipped some additional material to Kramer on consignment. When this action was instituted, plaintiff caused a writ of attachment to be issued and levied on the material in Kramer's possession. Cross-complainant says that the consignment was in the nature of a trust, that Kramer breached the trust by causing the attachment to be levied, and that a conversion resulted. As we have said, judgment on the cross-complaint was for cross-defendant.

[7,8] The general rule is that any creditor, whether he is the original creditor or has succeeded by assignment to the rights of another, is entitled to invoke the remedy of attachment. 7 C.J.S., Attachment, § 20a, p. 209; 4 Am.Jur. 631, § 123. In this state, as a rule, any person standing in the position of a creditor and having a claim satisfying the requirements of section 537 of the Code of Civil Procedure may invoke the remedy.

[9,10] Assuming, without deciding that a trust relationship existed between Kramer and cross-complainant as to the consigned material and that plaintiff assignee in causing an attachment to be levied acted on behalf of Kramer, those facts did not preclude plaintiff from enforcing his rights as a creditor of cross-complainant or from invoking the remedy of attachment in doing so. A creditor who occupies a fiduciary relationship with his debtor is not thereby compelled to forego the rights which he would have if he occupied the status of creditor alone. Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 214, 152 P. 542; Kleinsasser v. McNamara, 129 Cal.App. 49, 59–60, 18 P. 2d 423. In bringing an adversary action against defendant through an assignee and in availing himself of the right of any creditor to levy an attachment, Kramer was not in any way taking advantage of his position as consignee. The rights sought and asserted by him were entirely independent of his fiduciary status. We hold, therefore, that in causing an attachment to be issued and levied, Kramer did not convert the consigned material to his own use.

[11] There was evidence that defendant mailed a letter at Philadelphia addressed to plaintiff at Los Angeles, demanding return of the consigned goods. There was also testimony that the letter was not received until the day following the attachment. The evidence supports the conclusion that failure to comply with the demand did not amount to a conversion.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

* * *

105 Cal.App.2d 347

PEOPLE v. GRANT.

Cr. 4592.

District Court of Appeal, Second District, Division 2, California.

July 11, 1951.

Hearing Denied Aug. 9, 1951.

John Henry Grant was convicted in the Superior Court of Los Angeles County, Orlando H. Rhodes, J., of attempted murder, and he appealed from judgment of guilty and from order denying new trial. The District Court of Appeal, McComb, J., held that dismissal by the prosecution of charge against defendant of violating section of the Health and Safety Code dealing with malicious use of explosives, did not constitute a bar to prosecution of defendant for offenses of attempted murder.

Judgment and order affirmed.

1. Criminal law ⚷200(1)

In prosecution of defendant who allegedly had a time bomb placed in an airplane on which his wife and children were to embark for attempted murder and for violation of section of Health and Safety Code dealing with malicious use of explosives, dismissal by prosecution of the charge of violating the section of the Health and Safety Code did not constitute a bar to defendant's prosecution for attempted murder on ground that defendant had been placed in double jeopardy, since offenses charged were not identical. Health and Safety Code, §§ 12350, 12354.

2. Criminal law ⚷878(4)

Inconsistent verdicts will not be allowed to stand, but for verdicts to be "inconsistent verdicts" they must be rendered in response to charges of offenses, the elements of which are identical.

See publication Words and Phrases, for other judicial constructions and definitions of "Inconsistent Verdicts".

3. Homicide ⚷25

The elements of "attempted murder" are the intent to murder a human being, and a direct but ineffectual act in furtherance of such intent, which act is more than mere preparation.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempted Murder".

4. Explosives ⚷4

The elements constituting the crime of violating section of Health and Safety Code dealing witth malicious use of explosives are the intent to injure, terrify or intimidate a human being and the placing or depositing or attempting to deposit an explosive in a place normally used by human beings. Health and Safety Code, §§ 12350, 12354.

5. Criminal law ⚷1165(1)

Where defendant, who had allegedly placed a time bomb in an airplane on which his wife and children were to embark, was charged with attempted murder and with violation of section of the Health and Safety Code dealing with malicious use of explosives, but after both sides had rested the district attorney moved to dismiss count dealing with violation of the section of the Health and Safety Code on ground that the evidence was insufficient, and there was no reference to the crime of malicious use of explosives in the instructions, and instructions were limited to application of the facts to the law defining attempted murder, there was no prejudicial error committed on ground that court submitted to jury the accusation charged in count dealing with crime of malicious use of explosives. Health and Safety Code, §§ 12350, 12354.

6. Criminal law ⚷369(2)

Where defendant, who had allegedly placed a time bomb in an airplane on which his wife and children were to embark, was charged with attempted murder and with violation of section of the Health and Safety Code dealing with malicious use of explosives, but after both sides had rested the district attorney moved to dismiss the count dealing with violation of the section of the Health and Safety Code on ground that the evidence was insufficient, dismissal of the count dealing with malicious use of explosives did not prevent jury from considering evidence relative thereto in connection with counts of information dealing with attempted murder. Health and Safety Code, §§ 12350, 12354.

7. Homicide ⚷308(1)

In prosecution for attempted murder, requested instructions on attempt, which provided that when a circumstance, not intended within the original design, emanates from the mind of the defendant, and is of such a nature that it prevents a consummation of the offense, it is also a fact which prevents the defendant from being punished for the crime of attempt, was properly refused.

8. Criminal law ⚷31

An unforeseen circumstance which prevents the commission of crime attempted is not a matter of defense when defendant is charged with the crime of attempt.

9. Criminal law ⇨778(11)

In prosecution of defendant who had allegedly placed a time bomb in an airplane on which his wife and children were to embark for attempted murder, evidence was sufficient to authorize giving of instructions on flight from scene of alleged crime by an accused.

10. Homicide ⇨308(1)

In prosecution of defendant who had allegedly placed a time bomb in an airplane on which his wife and children were to embark for attempted murder, it was not error to instruct jury that it was immaterial whether or not the crime attempted was impossible of completion if jury found that it was apparently possible of completion to defendant so acting with necessary intent.

11. Criminal law ⇨44

The elements of an attempt to commit a crime are the specific attempt to commit the crime and a direct ineffectual act done towards its commission, and it is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of six counts of attempted murder and from an order denying a new trial, defendant appeals.

Facts

The evidence being viewed in the light most favorable to the people (respondent) the record discloses that on April 14, 1950, defendant conceived the plan of killing his wife and two children for the purpose of obtaining the proceeds of policies of life insurance in his favor so that he might meet his financial obligations.

Defendant was a skilled aircraft machinist and technician, 32 years of age, deeply in debt and unhappily married. On April 15th defendant told his wife that he was going to take a trip to deliver parts for his company and asked for an old rawhide suitcase which was kept in a closet. After receiving the suitcase he told his wife to arrange to accompany him on a trip to San Diego the next day. In the meantime defendant purchased two six-volt batteries, an alarm clock, a sash cord, and six gallons of high test gasoline. With these and the suitcase he built an incendiary bomb with a timing mechanism consisting of an alarm clock. This alarm he set to go off at 2:37 p. m. Fastened to the frame of the clock was a plastic covered wire, a portion having been bared near the clapper arm of the alarm. Fastened to the clapper arm itself by means of solder was another length of wire fastened to the frame of the clock which led to a match packet and was fastened thereto by scotch tape. The wire then continued to the terminals of two six-volt batteries where the wires again were soldered, other wires connected thereto were interwoven between the heads of the matches. Packed around the center match packet were forty-nine other match packets. Also in the suitcase was a small four-ounce can of lighter fluid from the tip of which a cotton wick extended. The contrivance was constructed so that this wick would be ignited by the matches.

Adjacent to the ignition mechanism was a cardboard box containing an innertube filled with slightly less than five gallons of gasoline. There was a slow leak in this tube permitting the gasoline to escape. A number of strands of rope were tied at various positions about the inner tube. In addition the suitcase was filled with newspapers packed at various places wedging the parts of the mechanism.

When the alarm went off the clapper would strike the portion of the wire from which the covering had been removed causing the wire to burn red hot about the matches thus igniting them which in turn would result in the suitcase's exploding if enough gasoline vapor had escaped, or the gasoline would ignite and burn causing a fire. In any event the resulting fire would cause a temperature of 1000 degrees centigrade.

On April 16th defendant told his wife that the trip had been postponed because he could not obtain transportation on the airplane to San Diego, but that they would leave on the next day.

April 17th at about 12:50 p. m. defendant drove his wife and two children to the Los Angeles International Airport. As they approached the airport defendant told his wife to get the maximum insurance for the two children and herself. She said that she did not have the correct change for the insurance to which he replied that he would get it for her. Upon arrival at the airport defendant drove into the exit to the parking lot rather than the entrance. His wife indicated to him that there were many parking places but he replied that he desired to park in the front line next to the airport, and he parked the car so that it "headed out" while the other cars were "headed in."

Defendant then purchased three tickets for his wife and children for Flight 258, departure time 1:50 p. m. The aircraft was a DC–3, 21 passenger plane equipped with two engines. Before leaving the ticket counter defendant asked for and received four quarters in change for a dollar bill. When he returned to his wife he handed her five quarters to obtain the insurance. While she was getting the insurance defendant left the terminal, returned with the rawhide suitcase which he had weighed and checked at the counter, stating that he wanted the bag to go with his wife and children.

Defendant then told Mrs. Grant how to make out the insurance policies. He obtained an envelope, and at his instructions Mrs. Grant addressed it to him at their home address in Gardena. The policies were placed in the envelope and a stamp placed thereon. There were three policies in each of which defendant was named as beneficiary. There was one policy in the sum of $10,000 upon the life of Betty W. Grant, another for $10,000 insuring Marie A. Grant, and a third for $5,000 covering Robert E. Grant. In addition defendant held a policy under which he was the beneficiary insuring the life of his wife for $500.

Defendant, his wife and children then went through a tunnel over a ramp toward an airplane which was about 35 or 40 feet from gate 23. As they stood watching the airplane, defendant suddenly placed the insurance policies and the envelope in her hand and declared "I am in trouble. I am in a jam." He then walked quickly toward the terminal. When he reached the tunnel gate he turned and told his family to return to the car, adding "I am going to be arrested for sure." He then went under the counter where the luggage had been weighed.

In the meantime the rawhide suitcase had been taken by attendants to the airplane for flight 258, and when it was deposited in the pit of the airplane the lid blew open, a flame shot out and smoke poured out of the bag. The service man obtained a fire bottle and sprayed it over the suitcase while a fellow employee put a fire hose into the top of the suitcase and discharged some carbon dioxide gas, thus extinguishing the flame. Aboard the airplane at the time of the fire were the pilot, copilot and the stewardess.

The suitcase was removed and while the employees were inspecting the contents thereof defendant came running up saying "I am glad I got here before you put this bag in the airplane." Defendant then asked them to help him take it to the baggage area and upon their remaining silent, he stated "Never mind, I will take it up myself," whereupon he picked up the bag and ran into the baggage room and returned to his automobile where he was intercepted by the service manager for the United Air Lines who asked him what he was doing. Defendant replied "I am getting this thing out of here." When the manager asked him what was in the suitcase defendant stated that he did not know, it was not his suitcase, that his wife was going to San Diego and it appeared that someone was trying to play a joke on her.

Later however defendant admitted that the incendiary bomb was his and also admitted that he had not obtained any reservations for his family in San Diego, their destination.

Defendant was arrested and the suitcase turned over to an expert for examination who testified at the trial that in his opinion the device was a time alarm bomb which would have functioned properly at 2:37 p. m.

The DC-3 airplane on which defendant had obtained tickets for his wife and children was constructed in part in the rear cargo compartment of aluminum alloy whose melting point is 659.6 degrees centigrade. An expert testified that the airplane at 2:37 p. m. would have been near Oceanside at an altitude of about 1500 feet, and that if there had been fire in the rear compartment consuming between five to six gallons of gasoline, the heat would weaken the aluminum alloy structure of the airplane in that portion and if so weakened the plane would fall. In addition the cable controlling the tail section of the airplane is situated very near the rear baggage compartment.

Defendant was accused in six counts of attempted murder and in the seventh count with violating section 12354 of the Health and Safety Code. After the evidence had been received, in the presence of the jury, the district attorney moved for dismissal of count VII which motion was granted.

Questions

First: *Did the dismissal of the charge of violating section 12354 of the Health and Safety Code (count VII) constitute a bar to defendant's prosecution for the offenses of attempted murder?*

[1] *No.* Defendant argues that since both the charges of attempted murder and malicious use of explosives were predicated upon the same evidence the dismissal of count VII operated to relieve defendant from any punishment for his acts, since he had been placed in double jeopardy. Defendant answers this contention himself when he says:

"Counsel recognizes that an attempt to murder and a violation of Section 12354 of the Health and Safety Code are not the same offenses as would preclude a prosecution for both under separate counts * * *."

[2] Though it is true that inconsistent verdicts will not be allowed to stand, it is settled that in order to be inconsistent, verdicts must be rendered in response to charges of offenses the elements of which are identical. People v. Doxie, 34 Cal. App.2d 511, 512, 93 P.2d 1068. See also People v. Amick, 20 Cal.2d 247, 249 et seq., 125 P.2d 25.

[3, 4] In the present case the offenses as charged in the information, as conceded by defendant, are not identical. The elements of attempted murder are, (1) the intent to murder a human being, (2) a direct but ineffectual act in furtherance of such intent, such act being more than mere preparation; while the elements constituting the crime of violating section 12354 of the Health and Safety Code* are, (1) the intent to injure, terrify or intimidate a human being, (2) placing or depositing or attempting to deposit an explosive in a place normally used by human beings.

Dissimilarities in the two offenses are apparent. On the one hand (Sec. 12354, Health and Safety Code), we have the element of intent to injure or intimidate which is not the same as intent to murder a human being. The intent to injure or terrify may be included with the intent to murder but certainly the reverse is not true. Next the overt act called for by the Health and Safety Code in section 12354 is the placing of an explosive in a place usually used by human beings. On the other hand the overt act necessary for attempted murder need not go so far toward the completion of the attempt as this. (People v. Parrish, 87 Cal.App.2d 853, 856, 197 P.2d 804.) Lastly it is necessary to have, under the Health and Safety Code, section 12354, an explosive as defined by section 12350 as follows: "* * nitro-glycerine, dynamite, vigorite, hercules powder, giant powder, or any other high explosive." In the present case the expert testimony indicated that while the gasoline vapor could cause an explosion which in turn might result in the airplane's falling, such expert did not consider the gasoline a "high explosive", as referred to in the Health and Safety Code.

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* Section 12354 of the Health and Safety Code reads: "Every person is guilty of a felony punishable by imprisonment in the State prison for not less than one year who, with the intent to injure or destroy it, or with the intent to injure, intimidate, or terrify any human being, maliciously uses, places, deposits, explodes, or attempts to explode any explosive at, in, under, or near, or takes any explosive into or near, any (a) building, vessel, boat, railroad, tramroad, cable road, train, car, depot, stable, car-house, theater, schoolhouse, church, or dwelling; (b) other place usually inhabited, frequented, or passed by human beings, or where human beings usually assemble; or who by any of such acts injures or endangers any human being."

It is obvious that the elements constituting a violation of section 12354 of the Health and Safety Code would necessarily be included in an attempted murder. However, an attempted murder includes elements in addition to those constituting a violation of the mentioned section of the Health and Safety Code. Therefore though the violation of the Health and Safety Code was included in an attempted murder, an attempted murder was not included necessarily within the provisions of the crime delineated in section 12354 of the Health and Safety Code.

Second: *Did the trial court commit prejudicial error by submitting to the jury for its consideration the accusation charged in count VII of the information?*

No. The fact is that the trial court did not allow the jury to consider count VII in arriving at its verdict. After both sides had rested the district attorney moved to dismiss count VII stating: "The People move the dismissal for this reason, and for this reason alone: That the testimony of the People's witness, Chemist Ray Pinker, unequivocally reveals that gasoline, while a low velocity explosive, under no conditions can be considered a high velocity explosive or high explosive. * * * under this evidence, the defendant could not lawfully be convicted of that count. For those reasons the People move the dismissal of that count alone, and for those reasons alone."

[5] Thereupon the trial court granted the district attorney's motion. All the foregoing took place in the presence of the jury. In view of these facts it was unnecessary for the court to instruct the jury that count VII was no longer to be considered by them.

In the instructions given by the court there was no reference to the crime of malicious use of explosives and the instructions were properly limited to the application of the facts to the law defining attempted murder and the charges in counts I to VI inclusive. Had defendant wished further instruction upon this subject he should have requested the trial judge to give it. This he did not do. (People v. Ahsbahs, 77 Cal.App.2d 244, 249, 175 P.2d 33.)

[6] There is likewise no merit in defendant's contention that since count VII was dismissed the jury were bound to look for other evidence than the incendiary bomb in order to find a lethal instrumentality. The dismissal of count VII did not prevent the jury from considering the evidence received relative thereto in connection with the other counts in the information. (People v. Jollet, 60 Cal.App.2d 245, 250, 140 P.2d 479.)

Third: *Did the trial court commit prejudicial error in refusing to instruct the jury as follows?*

"An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

"Mere preparation, which may consist of planning the offense, or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt, irrespective of how morally reprehensible such preparations may be; but acts of a person who intends to commit a crime will constitute an attempt where they, themselves, clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

"When a circumstance, not intended within the original design, emanates from the mind of the defendant, and it is of such a nature that it prevents a consummation of the offense, it is also a fact which prevents the defendant from being punished for the crime of attempt.

"There has been evidence adduced at this trial which purports to show that the defendant voluntarily abandoned his attempt.

"If you find from the evidence that the defendant, of his own free will and own volition, abandoned his attempt, you must acquit the defendant. If you find from the evidence, however, that the defendant sought to abandon his attempt only after he learned that his gasoline bomb had gone off prematurely, you must convict the defendant as charged, because it is no defense if one seeks to abandon his attempt after he had been detected.

"You are hereby instructed that in every crime or public offense there must exist a union or joint operation, of act and intent. The fact of voluntary abandonment of the criminal intent or purpose of the defendant, may, however, furnish some evidence of the lack of the necessary intent."

[7, 8] *No.* These proposed instructions defined the crime of attempt but erroneously state that when a circumstance not intended within the original design prevents consummation of the offense, it is a fact which prevents defendant from being punished for the crime of attempt. The law is settled that an unforeseen circumstance which prevents the commission of the crime attempted is not a matter of defense when the defendant is charged with the crime of attempt. (People v. Fiegelman, 33 Cal.App.2d 100, 104 et seq., 91 P.2d 156. See also People v. Wallace, 78 Cal.App.2d 726, 741, 178 P.2d 771; People v. Parrish, 87 Cal.App.2d 853, 855 et seq., 197 P.2d 804.)

Fourth: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination."

[9] *No.* Defendant contends that there is no evidence to indicate that he fled from the scene of the attempted crime. The record is to the contrary. It discloses that when he became aware that something had happened aboard the airplane, he rushed to the scene, picked up the suitcase and made a rapid exit from the field, having previously instructed his family to get into the automobile, and was prevented from fleeing simply because he was intercepted by the manager of the United Air Lines and the police. It is a fair inference from the record that had they not intercepted him he would have placed the suitcase in his car and left the airport. It is also a fair inference that such flight was planned in advance because of the fact that defendant, in parking his car at the airport, had "headed out" rather than "headed in." Clearly when the evidence supports a fair inference that defendant attempted to flee from the scene of the crime it is proper for the trial judge to instruct the jury on the doctrine of flight. (People v. Arguilida, 85 Cal.App.2d 623, 625, 193 P.2d 478.)

Fifth: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"It is immaterial whether or not the crime attempted was impossible of completion if you find that it was apparently possible of completion to the defendant so acting with the necessary intent."

[10, 11] *No.* The elements of an attempt to commit a crime are (1) a specific attempt to commit the crime and (2) a

direct ineffectual act done towards its commission. (People v. Fiegelman, 33 Cal. App.2d 100, 91 P.2d 156. See also People v. Arguilida, supra; People v. Wallace, supra.)

It is not necessary that there be a "present ability" to complete the crime, nor is it necessary that the crime be factually possible. From the present case it is evident that defendant from his knowledge of airplanes intended that his bomb would cause the destruction of the airplane upon which his wife and children were about to ride.

The record discloses that defendant committed overt acts directly tending toward the commission of the crime of murder in that he constructed an incendiary bomb, placed it beyond his control so that it would be delivered to the airplane, and had there not been the intervening cause of the explosion of the suitcase a fire would have occurred on the plane at the time set by him on the alarm clock, to wit, 2:37 p. m., with the result that the aluminum alloy structure of the plane would have been weakened and the plane plummeted to the ocean below, with the resultant loss of the lives not only of his wife and children but of the passengers and members of the crew of the airplane.

People v. Sylva, 143 Cal. 62, 64, 76 P. 814, relied on by defendant, is factually distinguishable from the present case. In such case defendant had been found guilty of assault with intent to commit murder. The evidence disclosed that because of the distance between defendant and his victim, it would have been impossible to injure the latter unless the gun he had was loaded, and it appears not to have been. In the present case under the authorities set forth above, where a defendant is charged with an attempt to commit a crime it is immaterial whether the attempted crime is impossible of completion if, as in the present case, completion was apparently possible to the defendant who was acting with the intent to commit the crime of murder.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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105 Cal.App.2d 358

VALENTINE v. RATNER et al.

Civ. 3993.

District Court of Appeal, Fourth District, California.

July 11, 1951.

Robert S. Valentine brought action against Marco Ratner, doing business under the fictitious name and style of Ratner Electric Company, and others, for damages sustained when electricians turned on electricity in plaintiff's photographic studio resulting in fire caused by electric hot plate, which plaintiff had left connected into outlet plug after electricians had cut off electric service. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment for defendants and order denying plaintiff's motion to strike cost bill, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where plaintiff had called three expert witnesses, refusal of trial court to allow plaintiff an opportunity to reopen case after plaintiff had rested in order to present further expert testimony on the same subject was proper, and that cost bill was filed within time allowed by law.

Judgment and order affirmed.

1. Electricity ⇨19(5)

In action for damages sustained when electricians turned electricity on in plaintiff's photographic studio resulting in fire caused by electric hot plate, which plaintiff had left connected into outlet plug after electricians had cut off electric service, evidence was sufficient to support finding that fire was not occasioned by negligence of electricians.

2. Negligence ⇨121(2)

To recover under doctrine of res ipsa loquitur, accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality within the exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of the plaintiff.

3. Negligence ⚷136(6)

Question of whether plaintiff has established elements sufficient to allow recovery under doctrine of res ipsa loquitur is for jury.

4. Electricity ⚷19(3)

Where electricians, who had no control over plaintiff's photographic studio, turned on electricity in studio resulting in fire caused by electric hot plate, which plaintiff had negligently left connected into an outlet plug after electricians had cut off electric service, and no excess voltage was introduced into studio wiring, doctrine of res ipsa loquitur was inapplicable.

5. Negligence ⚷121(2)

Doctrine of res ipsa loquitur merely raises an inference of negligence, which may be overcome by other evidence.

6. Negligence ⚷136(6)

It is for trier of fact to determine from all the evidence whether inference of negligence arising from application of doctrine of res ipsa loquitur has been met and rebutted.

7. Appeal and error ⚷1008(1)

District Court of Appeal may not disturb trial court's findings on negligence.

8. Trial ⚷29(2)

In negligence action, wherein counsel for defendants in response to questions from court gave names of witnesses which he intended to have testify and the substance of their testimony, trial court's remark that defendants' counsel was letting himself in for something was not prejudicial error, since remark did not indicate that court prejudged testimony, but only that court desired to shorten time of trial.

9. Trial ⚷377(2)

Where plaintiff in negligence action had called three expert witnesses, trial court's refusal to let plaintiff reopen case after plaintiff had rested in order to present further expert testimony on same subject, was proper.

10. Trial ⚷377(2)

It is not an abuse of discretion to refuse to set aside a submission for the taking of further testimony unless a good excuse is offered for the failure to produce the testimony before submission.

11. Costs ⚷199

Where notice of entry of judgment was signed by attorney for defendants on April 14, 1949, and filed with clerk of court on same day, cost bill served upon plaintiff's attorney on April 18, 1949, and filed with clerk of court on same day, was within time allowed by law.

◆

Vernon F. Bennett, San Diego, for appellant.

Frank Pomeranz, San Diego, for respondents Marco Ratner, Joseph M. Spatz and D. A. Frank.

A. T. Procopio, San Diego, for respondents Irvine M. Schulman and George Neumann.

MUSSELL, Justice.

In this action for damages caused by fire it was alleged that on or about June 6, 1944, defendants were negligent in the installation and repair of electrical wiring connected with plaintiff's photographic studio and place of business in the Knickerbocker Hotel Building in San Diego; that defendants caused a fire therein and damage to his equipment and supplies by turning the electrical current into the wiring leading to plaintiff's place of business. Trial was had without a jury and judgment was entered for defendants.

The claimed irregularities relied upon by plaintiff for a reversal of the judgment are that the trial court, in effect, warned defendants' counsel not to put on evidence; that plaintiff was denied an opportunity to reopen his case; and that defendants' cost bill was not filed in time.

In November, 1942, plaintiff purchased and installed a small electric hot plate or stove on a wood counter covered with linoleum in the dark room at the rear of his shop. The plate had no switch with which it could be turned on or off. When in use, it was plugged directly into an outlet and in order to turn off the electricity, it was necessary to pull the plug and disconnect the plate. The sole purpose of the hot plate was to warm water in a two gallon bucket for use in mixing chemicals. On June 6, 1944, plaintiff came to his shop about 6:00 o'clock a. m. and plugged in the electric plate to heat the water. At about 9:30 a. m. defendant Spatz, who was an electrician, informed plaintiff that they were doing some electrical work for the hotel and were going to cut off plaintiff's electric service. About 2:00 o'clock in the afternoon plaintiff locked his shop and left for lunch, leaving the electric plate plugged in to the outlet. He returned about an hour later and found that a fire had occurred in his shop, damaging his equipment.

A deputy fire marshal, called as plaintiff's witness, testified that the hot plate was not properly insulated from the combustible surface on which it stood and that it and its location on the counter presented a fire hazard. He testified that the fire originated in the immediate vicinity of the electric hot plate; that the plate was sitting on the heaviest charred portion of the table and said: "I think the electric heater set the wood bench afire."

Plaintiff kept inflammable materials on the premises in the vicinity of the hot plate. Photographic chemicals were stored in a counter four to six feet from the hot plate and photographic film was stored on shelves immediately above the counter on which the hot plate was maintained.

Plaintiff attempted to show that the defendants Spatz and Frank, electricians, while making repairs to the building's 110–220 volt alternating current switchboard, introduced into the wiring to plaintiff's shop a 220 volt current instead of 110 volts, thereby causing the fire. However, plaintiff's own witnesses testified that the work on the 110–220 volt alternating current switchboard, as distinguished from the 500 volt direct current switchboard controlling the elevator supply, was performed one to two days prior to the day of the fire and that the only work done on June 6, 1944, was on the 500 volt direct current switchboard.

An electrical inspector for the city of San Diego, also called as plaintiff's witness, testified that if an installing electrician introduced 220 volts into the 110 volt lines, he would know instantly by the sound of the meter that something was wrong and would pull the switch, turning the current off; that when greater voltage is applied than a circuit will carry, either the element of a light fixture or the fuse will burn out.

Another electrician called by plaintiff testified that if 220 volts had been supplied to plaintiff's hot plate, which could accommodate only 110 volts, and if there was a bucket of water on top of the hot plate, the wire heating element of the unit would buckle, touch the bottom of the bucket and the current would cut off, and that if 220 volts were sent through a 110 meter, it would explode.

The trial court found that there was no negligence on the part of any of the defendants and "That on the 6th day of June, 1944, the fire was caused to be started in the place of business of the plaintiff by the plaintiff's own negligence in the plaintiff then and there leaving therein an unattended electric hot plate, then and there connected to the electrical current, which caused the fire complained of; that by reason of plaintiff's said negligence and as a proximate result thereof, he suffered damages in an undetermined amount."

[1–3] While plaintiff does not specifically urge insufficiency of the evidence to sustain the verdict as a ground for reversal, in his opening brief, he relies on the doctrine of *res ipsa loquitur*. The evidence is sufficient to support the finding of the court that the fire was not occasioned by the negligence of any of the defendants, and, as was said in Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P.2d 129, 132: " 'The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, Torts, p. 295.' It was for the jury to determine whether or not the showing made by plaintiff in respect to these elements was sufficient."

[4, 5] The defendants had no control over the plaintiff's photographic shop or his electric stove and it is apparent from plaintiff's own evidence that the fire originated underneath the heater which was installed by him and which he, himself, turned on and negligently failed to disconnect. It is also apparent from the evidence that the plaintiff failed to prove that on the day of the fire a 220 volt current was introduced into the wires leading into plaintiff's premises. Even if the doctrine of *res ipsa loquitur* was applicable, it would raise merely an inference of negligence, which may be overcome by other evidence in the case.

[6] As was said in Holt v. Henry, 58 Cal.App.2d 168, 171, 136 P.2d 97, 99: "It is for the trier of fact to determine from all the evidence in the case whether the inference of negligence arising from the application of the doctrine of *res ipsa loquitur* has been met and rebutted."

[7, 8] Since the question of negligence is one of fact, the trial court's conclusion may not be disturbed on appeal. The trial of this action consumed five full days, during which plaintiff called a total of fifteen witnesses, including three experts, in an effort to prove his case. At the conclusion of the plaintiff's case, a motion for a nonsuit was made and denied and some discussion took place between the court and counsel as to the necessity of the introduction of certain evidence on the part of the defendants. Counsel for defendants, in response to the questions from the court, gave the names of witnesses which he intended to have testify and the substance of their purported testimony. The court then said "You are letting yourself in for something, Mr. Procopio." This statement made by the court is claimed by plaintiff to be prejudicially erroneous. This contention is entirely without merit. The record discloses that the trial was conducted by the court in an impartial manner and considerable latitude was allowed plaintiff in the presentation of his case. The remark does not indicate, as plaintiff claims, that the trial court prejudged the testimony of defendants' witnesses or the evidence presented by the plaintiff. In view of the entire record, it is apparent that the trial court desired to shorten the time consumed by the trial and his remarks were in no way prejudicial to the rights of the plaintiff.

[9, 10] It is next claimed that the court improperly denied plaintiff an opportunity to reopen his case after having announced that he had rested. Plaintiff apparently desired to present further expert testimony as to the "performance characteristics of electrical appliances and currents", in an effort to apply the principal of *res ipsa loquitur*. He states in his brief: "It is here recognized that expert testimony and scientific tests are not conclusive on the trial court. It is not urged that had the testimony been allowed that the court would necessarily have had to find for the plaintiff. The plea is, merely, that plaintiff should have been given the opportunity to present his proof which was crucial in this action which was unusually difficult of proof."

Plaintiff called three expert witnesses upon the subject and had ample opportunity to prove his contentions and the trial court gave him ample and reasonable opportunity to prove his case. As was said in Kan v. Tsang, 90 Cal.App.2d 538, 542, 203 P.2d 86, 89: "It is not an abuse of discretion to refuse to set aside a submission for the taking of further testimony unless a good excuse is offered for the failure to produce the testimony before submission."

[11] Finally, plaintiff argues that the defendants' cost bill was not filed in time. It appears from the record that notice of entry of judgment was signed by the attorney for defendants Schulman and Neumann on April 14, 1949, and filed with the clerk of the court on the same day. Thereafter, on April 18, 1949, the cost bill was served upon plaintiff's attorney and filed

with the clerk of the court on the same day. The cost bill was filed within the time allowed by law. Miller v. California Roofing Co., 55 Cal.App.2d 136, 146–147, 130 P.2d 740.

The judgment and the order denying the motion to strike the cost bill are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

WEST KEY NUMBER SYSTEM

105 Cal.App.2d 541

CITY OF LOS ANGELES v. TANNAHILL et al.

Civ. 18254.

District Court of Appeal, Second District, Division 2, California.

July 18, 1951.

Rehearing Denied July 31, 1951.

Hearing Denied Sept. 13, 1951.

Action by the City of Los Angeles, a municipal corporation, against W. J. Tannahill, and others, doing business as W. J. Tannahill & Sons, a co-partnership, and others. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff and W. J. Tannahill and some of the defendants appealed. The District Court of Appeal, Moore, P. J., held that the city of Los Angeles could impose a valid license tax on trucks operated for hire and graduate such tax in proportion to their unladen weights, even though the domicile of the trucks was in a suburban city and they visited Los Angeles on an average of more than once a week during at least one quarter of the calendar year involved.

Affirmed.

1. Constitutional law 🔑208(1)

The constitution is not violated where city adopts a rational classification which affects equally all of same class, and it may classify occupations and distinguish between those of same or similar occupations. Const. art. 11, §§ 6, 8; art. 12, § 23.

2. Taxation 🔑4, 42(1)

It is an inherent quality of a state to possess power to tax and to select its subjects of taxation, and it is not bound to tax every member of a class or none.

3. Municipal corporations 🔑63(1)

Since it is right of a city to regulate its municipal affairs, courts must uphold such regulations unless it is manifest that ordinance transcends power of municipality and violates rights secured to citizen by constitution or statutes.

4. Automobiles 🔑67

Generally a license tax on vehicles may be fixed at a specified sum or graded according to type, size or use.

5. Automobiles 🔑71

The City of Los Angeles could impose a valid license tax on trucks operated for hire and graduate such tax in proportion to their unladen weights, where domicile was in a suburban city and they visited Los Angeles on an average of more than once a week during at least one quarter of calendar year involved. St. 1925, p. 1031, § 3(5); Vehicle Code, § 372; Const. art. 11, §§ 6, 8; art. 12, § 23.

◆

Lawrence Phillips, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Alan G. Campbell, Dep. City Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether a municipality can impose a valid license tax on trucks operated for hire and graduate such tax in proportion to their unladen weights where their domicile is in a suburban city and they visit the taxing municipality "on an average of more than once a week during at least one quarter of the calendar year involved."

Appellants were conducting a for-hire trucking business with headquarters only in Vernon, a city buried in the heart of the manufacturing district of Los Angeles.

They held permits as city carriers, contract carriers and radial highway common carriers and also a certificate from the Interstate Commerce Commission to operate as common carriers in interstate commerce points within 325 miles of the City of Los Angeles. From Vernon their trucks operate throughout Southern California, hauling merchandise into Los Angeles, but never moving a cargo from one point to another within that municipality. There was no evidence of the frequency of the trips into the city other than the stipulation that they averaged "more than once a week in any quarter of the year," which fact is an essential to make such carriers liable for the license tax under subsection G of section 21.159 of ordinance 77,000 of Los Angeles, to wit:

"Exemptions and Exceptions. No fee hereunder shall be required for the operation of any motor vehicle or equipment along the streets of this city if such operation is merely occasional and incidental to a business conducted elsewhere; provided, however, that no operation shall be deemed merely occasional if trips or hauls are made beginning or ending at points within this City upon an average more than once a week in any quarter, and a business shall be deemed to be conducted within this City if an office or agency is maintained here or if transportation business is solicited here."

To escape the force of the provision that a fee will not be required where the "operation is merely occasional and incidental" and to show that appellants come within the ordinance respondent caused the stipulation to include the recital that trips were on the average made into the city "more than once a week in any quarter of the year."

The ordinance forbids (sec. 21.10) every person who engages in any occupation for which a license is required, to do so "until such license is first obtained." Section 21.159, subsection 4(b) provides: "Every person whose business * * * is that of operator of any motor vehicle for the transportation of property for hire or reward, and who in the course of that business uses public streets and highways of this city for purpose of such operation, shall pay a license fee for each year, or fractional part thereof, of such operation, the amount of which shall be determined as provided in this section."

By subsection (c) the fees are computed as follows:

"1. For each vehicle, other than a tractor, or a trailer or semi-trailer, used to receive or discharge, pick-up or deliver property within this city, the annual fee shall be as follows, where the unladen weight thereof is:

4000 lbs. or less..................	$ 4.00
Over 4000 lbs. and not more than 8000 lbs.	8.00
Over 8000 lbs.	10.00

"2. For each trailer or semi-trailer so used, where the unladen weight thereof is:

1000 lbs. or less..................	$2.00
Over 1000 lbs. and not more than 3000 lbs.	4.00
Over 3000 lbs.	6.00

"3. For each tractor which is used to haul one or more trailers or semi-trailers not permanently affixed thereto ...$10.00."

During the four years involved in this action appellants operated its several trucks and trailers on the streets and highways of Los Angeles. By virtue of such ordinance the city made demand for payment of the following sums for the four years indicated, to wit: $212 for 1945, $308 for 1946, $326 for 1947, $326 for 1948. In addition, penalties for nonpayment aggregating $586 for the four years were demanded, as provided by the ordinance for nonpayment of such license fees[1] which were based upon the unladen weight of the vehicles.

Appellants contend that (1) the license tax imposed violates Article I, section 3(5) of the city's charter; (2) the license tax must be levied under general and uniform laws, Art. I, sec. 2(11) (e); (3) no discrimination in the amount of license tax shall be made between persons engaged in the same business. Art. I, sec. 3(5). Because of such provisions appellants argue that they are the victims of an unjust discrimination; that a truck weighing 4000 pounds can, and often does, handle more business than an 8000 pound truck. In making such contention appellants overlook constitutional provisions, the law as declared by the appellate courts and as created by statute and practice.

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[1] That a portion of the license tax for each year was paid is not explained.

By section 6 of Article XI of the constitution a city is empowered to make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in its charter. Licensing, taxing and regulating occupations operating within a city is a municipal affair. The power of a city to make and enforce laws and regulations with respect to municipal affairs is reinforced by section 8 of the same article. By section 23 of Article XII, every transportation entity is a public utility and is subject to control and regulation by the city in which it operates. The city's charter is not a grant of powers to the municipality. The power for levying taxes is a constitutional grant which is not limited by the charter, but is accentuated by that instrument which details the city's powers of assessing, collecting and enforcing taxes and licensing and regulating any lawful business and imposing license fees. City Charter, sec. 2, sub-sec. 11(d) (e); West Coast Advertising Company v. City and County of San Francisco, 14 Cal.2d 516, 521, 95 P.2d 138; In re Montgomery, 163 Cal. 457, 459, 125 P. 1070; Glass v. City of Fresno, 17 Cal.App.2d 555, 560, 62 P.2d 765.

The only limitation founded upon the city's power to levy license taxes for revenue is as follows: "No discrimination in the amount of license tax shall be made between persons engaged in the same business, otherwise than by proportioning the tax to the amount of the business done." Charter, sec. 3(5), Stats.1925, p. 1031. But in Barker Bros v. City of Los Angeles, 10 Cal.2d 603, at page 607, 76 P.2d 97, 99, the Supreme Court said: "Wide discretion is given to legislative bodies in the imposition of taxes, and the right to classify for such purposes is of wide range and flexibility. * * * 'The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, "but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."' "

[1] The constitution is not violated where the city adopts a rational classification which affects equally all of the same class. It may classify occupations and distinguish between those of the same or similar occupations. Bramman v. City of Alameda, 162 Cal. 648, 653, 124 P. 243. If the license tax on laundry proprietors may be graded according to the number of their employees, Ex parte Sisto Li Protti, 68 Cal. 635, 10 P. 113, or if hotels may be graded on the basis of whether the meals are cooked and served by the proprietor or are furnished "for pay", Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946, how can it be said that there is a discrimination against an operator of for-hire trucks on the basis of their unladen weights? If "any gradation will be sustained which is reasonable and fair", Bramman v. City of Alameda, supra, 162 Cal. at page 653, 124 P. at page 245, there should be no problem about grading the license tax on the vehicles of a transportation company based up on their unladen weight. Such method is excellent for "gauging the amount of business done or the capital employed therein". Ibid. The manner of conducting a business, such as that done by the peddler and the storekeeper, "is distinctive for the purpose of taxation." Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527. In City of San Mateo v. Mullin, 59 Cal.App.2d 652, 139 P.2d 351, the taxed attorney deemed himself aggrieved by the license tax of $15 required of him while some associates of law firms paid only $5.00. The court explained that it was each "business" operating a law office that was taxed. There was in fact no discrimination between an individual attorney and an individual plus an employee or associate.

[2, 3] It is an inherent quality of a state to possess the power to tax and to select its subjects of taxation. It is not bound to tax every member of a class or none. Carmichael v. Southern Coal & Coke Company, 301 U.S. 495, 508, 57 S.Ct. 868, 81 L.Ed. 1245. An ordinance must be clearly obnoxious as unreasonable and oppressive to justify nullifying it by judicial decree. Since it is the right of a city to regulate its municipal affairs the courts must uphold such regulations unless it is manifest that the ordinance transcends the power of the municipality and violates the rights secured to the citizen by the constitution or the statutes. Ex parte Lemon, supra, 143 P. at page 563, 77 P. at page 455, 65 L.R.A. 946.

[4] It is the general rule that a license tax on vehicles may be fixed at a specified sum or graded according to type, size, or use. 53 C.J.S., Licenses, § 30, page 600. From the early period of California's legislation for the purpose of regulating traffic and licensing the operation of motor vehicles, the amount of fee charged has been based upon the unladen weight of the automobile. The most recent statute upon the subject fixed the annual registry fees upon cars not exceeding 4000 pounds unladen at $10 and graduates the tax on vehicles weighing over 14,000 pounds to $120. Trailers are regulated similarly and the registration charges upon them are also graduated in proportion to their unladen weight. Vehicle Code, sec. 372. A Georgia decision is directly *apropos.*

The city of Savannah enacted an ordinance for the purpose of raising revenue. For the use of the streets for business purposes persons and firms were classified as those (1) who operate business without vehicles of any kind and (2) those who use vehicles on the streets. The first class must pay the specific tax provided for each specified kind of business. Those of the second class, in addition to the specific tax required for their principal business, must pay a graduated tax, commencing with the one-horse cart at $8; every operator of an automobile of one ton or less capacity—$10. The Supreme Court held the ordinance valid: the city has power either to impose the tax or to prohibit the use of its streets for business purposes; it does not tax motor vehicles or their operation; the city may classify businesses according to whether they are conducted on the streets or not; the ordinance is not void because it imposes the license tax as well as the "regular business license tax" for the right to carry on business generally within the city; also, the license tax is not void because the ordinance graduates the tax upon the number and sizes of the vehicles. "Two large and heavy moving motor vans of the modern type or two heavy two-horse drays will wear and damage the streets of the city more than a one-ton light type of automobile truck or a one-horse dray; and the former will congest the traffic of such streets more than the latter." Derst Baking Company v. Mayor and Aldermen of Savannah, 180 Ga. 510, 179 S.E. 763, 768.

The Derst decision is a forthright declaration of the law governing such matters. It is set in clear and emphatic language and expresses accurately the law of this state. Not only is there no constitutional prohibition against such ordinance, but on the contrary, under the cited constitutional provision, the city of Los Angeles, by virtue of its freeholders' charter is empowered to legislate upon any municipal affair. Also, it may levy a license tax upon those who have their offices elsewhere but conduct a business of transporting goods for hire in a neighboring city. California Fireproof Storage Company v. City of Santa Monica, 206 Cal. 714, 275 P. 948. In that case the plaintiff maintained offices in Los Angeles and had no depot or warehouse in the bay city; no equipment there except its trucks used in transporting household goods to and from Santa Monica; had no solicitors or agents there, but merely sent its trucks into the city on call. After reviewing appellate decisions the court held, 206 Cal. at page 722, 275 P. at page 951, that if plaintiff "is to enter said city ad libitum upon 'call,' * * * it will transact business therein precisely as it transacts its business in the city of Los Angeles. It does not matter at which end of the line the business is initiated, its situs is the municipality of Santa Monica."

[5] By virtue of the holdings of the last two cited decisions the ordinance 77,000 of respondent is valid in so far as its provision for classifying vehicles by their unladen weights for the purpose of determining the amount of license taxes is concerned.

Affirmed.

McCOMB and WILSON, JJ., concur.

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105 Cal.App.2d 511

TROTTIER et al. v. M. H. GOLDEN CONST. CO. et al.

Civ. 4237.

District Court of Appeal, Fourth District, California.

July 17, 1951.

Hearing Denied Sept. 13, 1951.

Action by Arthur Trottier and another, doing business as A. & B. Trottier Company, against M. H. Golden Construction Company and others for breach of lathing and plastering subcontract, wherein named defendants filed a cross-complaint. The Superior Court of San Diego County, John A. Hewicker, J., rendered judgment against plaintiffs on their complaint and judgment against cross-complainant on the cross-complaint and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that under prime contract for construction of a minimum of 60 and a maximum of 99 houses to be financed under the National Housing Act, 12 U.S.C.A. § 1738, owner was bound to provide financing for only 60 houses and that lathing and plastering subcontractor was bound by general conditions of prime contract incorporated in subcontract by reference.

Judgments affirmed.

1. Contracts 🔑198(2)

Under general contract for construction of a minimum of 60 and a maximum of 99 houses to be financed under National Housing Act, whereby owner agreed to commence construction up to a minimum of 60 houses under the loans granted and proceed to procure additional loans up to the maximum number of 99, the parties intended to be bound absolutely only to the extent of the construction of 60 houses and where owner failed to secure loans except for the 62 houses completed, general contractor was not required to construct an additional 37 houses. National Housing Act, § 603, 12 U.S.C.A. § 1738.

2. Contracts 🔑166

The general provisions of prime contract for construction of a minimum of 60 and a maximum of 99 houses to be financed under National Housing Act, whereby the parties were bound absolutely only to the extent of the construction of 60 houses, were incorporated in lathing and plastering subcontract by reference and subcontractor was bound thereby. National Housing Act, § 603, 12 U.S.C.A. § 1738.

3. Contracts 🔑166

Where general conditions of prime contract for construction of houses were made part of lathing and plastering subcontract by reference and prime contract was available to subcontractor at office of general contractor, subcontractor was bound to investigate terms and conditions of prime contract.

4. Contracts 🔑170(1)

In action against general contractor for breach of lathing and plastering subcontract, consisting in failure to furnish for lathing and plastering the number of houses allegedly agreed upon, trial court could consider the construction placed upon the contract by the parties.

5. Contracts 🔑170(1)

The construction given contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.

6. Contracts 🔑198(2)

Under prime contract for construction of a minimum of 60 and a maximum of 99 houses to be financed under National Housing Act, owner was bound to provide the financing for only 60 houses and general contractor assumed no obligation except upon the securing of a construction loan on each separate house and delivery of proceeds to contractor and where general conditions of such contract were incorporated in lathing and plastering subcontract by reference and subcontractor prior to execution of subcontract had actual notice that commitments and loans for only 62 houses had been obtained and that construction of additional houses was contingent upon additional commitments, general contractor was not liable in damages to subcontractor for failure to provide 99 houses for lathing and plastering. National Housing Act, § 603, 12 U.S.C.A. § 1738.

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Luce, Forward, Kunzel & Scripps, San Diego, for appellants.

H. G. Sloane, and H. M. Fisher, San Diego, for respondent M. H. Golden Const. Co.

MUSSELL, Justice.

On January 9, 1948, defendant Golden Construction Company as builder and general contractor entered into a written contract with El Centro Properties, Inc. for the construction of a minimum of 60 and a maximum of 99 houses on property in El Centro known as "Western Acres Subdivision". The contract provided, among other things, that the construction of these single family houses was to be financed under the provisions of section 603 of the National Housing Act, 12 U.S.C.A. § 1738; that the owners of El Centro Properties, Inc. would make application to the Federal Housing Administration and a bank for 99 construction loans, to be insured by the housing administration; that in the event all of the construction loans were not immediately granted, the owner would immediately commence construction up to a minimum of 60 houses under the loans granted and would thereafter proceed with all possible speed and dispatch to procure additional 603 construction loans up to the maximum number of 99.

On February 16, 1948, plaintiffs entered into a written subcontract with the defendant general contractor for the lathing and plastering. El Centro Properties, Inc. applied for and obtained the necessary commitments and loans for the construction of 62 of these single family residences. No application was thereafter made under section 603 of the National Housing Act for additional commitments to finance the remaining 37 single family residences. The 62 houses were completed under the loans obtained and construction ceased.

When the project came to a halt, plaintiffs had on hand on the job site a large quantity of lathing and plastering material which they were unable to use and which they allege became valueless to them. Plaintiffs commenced the present action for loss of such building materials and supplies and for loss of profits allegedly due to defendants' failure to construct an additional 37 dwellings.

Defendant Golden Construction Company filed a cross-complaint for damages allegedly occasioned by the failure of plaintiffs to perform the lathing and plastering according to the terms of the contract.

The trial court rendered judgment against the plaintiffs on their complaint and judgment against the cross-complainants on the cross-complaint. Plaintiffs appeal from both judgments.

The trial court found that the plaintiffs at the time of executing their subcontract knew or should have known that the construction of any number of houses in excess of 60 was dependent upon procurement by the owner of so-called 603 loans authorized by the Federal Housing Authority on each additional house above 60 and upon assignment of the proceeds of such loan to the general contractor as a condition precedent to construction; that no such loans above 62 were obtained and no funds were assigned to the general contractor for construction of any such houses beyond the aggregate of 62; that such failure was not due to any fault of the plaintiffs, of the owner, or of the defendant; that the subcontract entered into by plaintiffs, by its terms, incorporated the general contract referred to as the "prime" contract; that the defendant did not fail or refuse to provide any houses for lathing and plastering which it was required to furnish under the subcontract; that all building of "603" houses by the general contractor and all lathing and plastering thereof as required by the terms of such prime contract and such subcontract was completed prior to October 27, 1948, and the fact of such completion was then and prior thereto acknowledged by both the plaintiffs and the defendant; that the plaintiffs had performed their plastering in a good and workmanlike manner and that the defendants, who cross-complained, were not damaged by reason of the work performed by plaintiffs.

Appellants first contend that the Golden Construction Company's failure to provide more than 62 houses for lathing and plastering constituted a breach of the purchase order and subcontract agreement for the reason that it was bound under the terms and provisions of the subcontract to provide appellants with 99 houses for lathing and plastering.

[1] As heretofore noted, the prime contract provided for the financing of the houses under section 603 of the National Housing Act and that the contractor would immediately commence construction of a minimum of 60 houses. All proceeds of the 603 construction loan were to be assigned to the builder for use by it in paying the costs of construction and its compensation. The contract further provided that the owner would first secure F.H.A. commitments and construction loans in an amount not less than $7,500 for each loan upon which the builder was obligated to construct a house. Since the owner failed to secure commitments and loans except for the 62 houses completed, the general contractor was not required to construct an additional 37 houses and it is evident that the parties to the prime contract intended to be bound absolutely only to the extent of the construction of 60 houses.

The subcontract agreement, by its terms, provided that the plaintiffs were to furnish materials and perform work for Western Acres Subdivision in "accordance with the general conditions of contract between the owner and the contractor and in accordance with the drawings and specifications prepared by * * *, hereinafter called the Architect, all of which General Conditions, Drawings and Specifications signed by the parties thereto or identified by the Architect, form a part of a Contract between the Contractor and owner. * * * and hereby become section 2 of this contract." Section 5 provides, among other things, that the subcontractor agrees "to be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner." It further provided that the subcontractor should furnish labor, material and supplies and to plaster 99 houses, "more or less", according to plans as revised.

Mr. Scull, business manager for the Golden Construction Company, testified that he informed the plaintiffs prior to the execution of the subcontract that the prime contract called for 62 houses; that 62 commitments had been made and that all other jobs were contingent upon additional commitments; that "There was 62 commitments and that if and when more were made, we would build up to the maximum number of lots on that tract;" and that "this whole tract was under section 603 of the F.H.A."

[2] It is apparent that the general terms of the prime contract were incorporated in the subcontract by reference and that the plaintiffs were bound thereby. They had actual notice of the conditions applicable to their contract, as shown by the testimony of the witness Scull. Furthermore, the subcontract provided for the plastering of 99 houses, "more or less", a circumstance indicating to some extent at least that the exact number of houses to be plastered was not definitely known to the parties.

Appellants argue that the "prime contract" was not incorporated into the subcontract because it was not identified therein and because the subcontract only purported to incorporate the "general conditions" of the prime contract. The argument is without merit.

[3] The uncontradicted evidence shows there was only one prime contract; that the prime contract was available to plaintiffs at the offices of the general contractor and since its "general conditions" were made a part of the subcontract, the plaintiffs were bound to investigate its terms and conditions. Furthermore, appellants were informed by Mr. Scull of the commitments made and of the uncertainty as to the construction of houses in excess of the minimum of 60.

The trial court found "that all building of '603' houses by the general contractor and all lathing and plastering thereof, as required by the terms of such prime contract and such sub-contract, was completed prior to October 27, 1948, and the fact of such completion was then and prior thereto acknowledged by both the plaintiffs and the defendant herein."

It was shown that from July, when the plastering ceased, until September 27, 1948, the subcontractors attempted no communication with the general contractor. On the latter date they wrote calling attention to "an overdue balance on the 62 houses which were completed" and on October 12, 1948, they informed Golden Construction Company that they could not complete any further houses under their contract. The appellants acquiesced in cessation of work and dissolved their work force.

[4, 5] The trial court was entitled to consider the construction placed upon the contract by the parties. Herrlein v. Tocchini, 128 Cal.App. 612, 622, 18 P.2d 73. As was said in Barham v. Barham, 33 Cal. 2d 416, 423, 202 P.2d 289, 293: "Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement, Wachs v. Wachs, 11 Cal.2d 322, 326, 79 P.2d 1085—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting'. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481, 19 P.2d 785, 789. To this latter point it is said that 'a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.' Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P. 2d 17, 22; see also, 20 Am.Jur. sec. 1144, p. 998."

We are unable to say that the quoted finding of the trial court was without substantial evidence in the record.

[6] Finally, it is contended that the Golden Construction Company was under a contractual duty to provide appellants with 99 houses for lathing and plastering for the reason that the prime contract contained an unconditional and unqualified covenant upon the part of El Centro Properties, Inc. to provide not less than 99 lots, the necessary architectural and engineering services and the necessary financing for the purposes of constructing not less than 99 single family residences on the Western Acres Subdivision. However, as noted, the prime contract provided for 60 houses with a possibility for 39 more. Since the Golden Construction Company, under the terms and provisions of the prime contract was not in a position to compel the financing of 99 houses, the completion of any number beyond 60 was contingent upon the procurement of construction loans by the owner. It is apparent from the record that the contractor was obliged to build when furnished with funds. It assumed no obligation whatever except upon the happening of a condition precedent, namely, the securing of a 603 loan on each separate house and delivery of the proceeds into the hands of the contractor.

The judgments are affirmed.

BARNARD, P. J., concurs.

105 Cal.App.2d 576

**LOS ANGELES TRANSIT LINES et al.
v. DAWSON et al.**

Civ. 18431.

District Court of Appeal, Second District,
Division 2, California.

July 24, 1951.

Action by Los Angeles Transit Lines, a California corporation, and another against Clara Dawson and others for declaratory relief. The Superior Court, Los Angeles County, Wm. B. McKesson, J., dismissed the action and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the petition sufficiently declared facts showing a controversy over the effect of the written agreement upon the rights and duties of the respective parties and the requested declaratory relief was proper.

Judgment reversed.

1. Declaratory judgment ⚷143

Where judgment creditor claimed that written agreement with certain defendants by which she received money did not constitute release of any defendants and that other defendants were not entitled to credit on judgment obtained against all defendants, but such other defendants claimed that agreement effected release of all defendants or at least constituted partial satisfaction of judgment, actual controversy existed as to respective rights and duties of parties under agreement and declaratory relief was proper. Code Civ.Proc. § 1060.

2. Declaratory judgment ⚷316

Complaint in action seeking declaratory relief is sufficient if it declares facts showing controversy over rights and duties of parties under written agreement and seeks their adjudication. Code Civ.Proc. § 1060.

* * *

Morrow & Trippet, by Henry R. Thomas, Los Angeles, for appellants.

Betts, Ely & Loomis, Los Angeles, for respondent.

MOORE, Presiding Justice.

A motion to dismiss appellants' action for declaratory relief having been granted on the ground that a declaration of the parties' legal rights and duties was not necessary and proper under all the circumstances alleged, plaintiffs appeal from the order of dismissal.

The complaint alleges: On or about May 11, 1948, plaintiff Wilcox was operating a vehicle as agent of Los Angeles Transit Lines; on such date his vehicle collided with one driven by defendant Prettyman as agent for defendant Hughes; as a result of that collision the defendant Dawson, a pedestrian, was struck and injured; thereafter Dawson recovered judgment for $126,937.55 against plaintiffs and defendants Hughes and Prettyman; plaintiffs' appeal from that judgment is now pending.

By way of explaining how the instant controversy arose, the complaint declares that on or about August 25, 1950, Dawson, Hughes and Prettyman entered into an agreement by which Dawson was to receive $50,000 from Hughes and his agent, Prettyman; that Mrs. Dawson contends this agreement does not constitute a release of Hughes, Prettyman or plaintiffs, and also that plaintiffs are not entitled to credit on the judgment she obtained against Hughes, Prettyman and plaintiffs herein. However, plaintiffs claim that such agreement does effect a release of all defendants in the prior suit and that it at least constitutes a partial satisfaction of the judgment; that consequently an actual controversy exists as to the respective rights and duties of the parties.[1]

The complaint closes with the prayer that the court declare the nature and extent of

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[1] Attached to the complaint is a copy of the agreement. Its preamble recites the history of the previous action, the contention of Hughes that he has good grounds for appeal from the judgment, the fact of his having filed notice thereof, his inability to provide bond to stay execution pending appeal, and the contention of Dawson that no cause for appeal existed.

Following the preamble the parties set forth: (1) Hughes shall pay Dawson $50,000; (2) shall file an abandonment of the appeal by both Hughes and Prettyman; (3) Dawson shall sincerely resist the appeal of Wilcox and the rights and duties of the respective parties under the agreement of August 25, 1950. Thus, the only question presented for decision is whether the trial court abused its discretion in granting the motion to dismiss the action.

Section 1060, Code of Civil Procedure, provides that one who desires a declaration of his rights and duties with respect to another may bring an action for such declaration "in cases of actual controversy relating to the legal rights and duties of the respective parties."

The pleading clearly states the opposing

Transit Lines and prosecute any adverse decision to a final judgment of the Supreme Court; (4) in the event the appeal of the last named parties shall succeed, she will retry the action and carry the judgment to its completion by appeal; no provision herein shall be construed as restricting Dawson's right to compromise her judgment or a settlement of her claim should a new trial be granted; (5) she shall stay execution against Hughes until a judgment becomes final in the action against Transit Lines; (6) should final judgment be entered against Transit Lines, Dawson shall attempt to satisfy it out of that company's property or its insurer; (7) in the event such judgment be so satisfied, Dawson shall execute a satisfaction thereof against Hughes and Prettyman on receipt of (a) $10 from Hughes and (b) the latter's demand for such satisfaction; (8) should the existing judgment be reversed and Transit Lines finally prevail, then on payment of $100 to Dawson by Hughes either the latter or Prettyman may demand, and Dawson shall execute and deliver to either of them, a partial satisfaction of the judgment in the sum of $50,000, and Dawson agrees that any execution which she shall thereafter secure, shall run only to such portion of the judgment as shall be in excess of said partial satisfaction of $50,000. The contract then proceeds as follows:

"6. It is agreed that should the existing Judgment in favor of Dawson and against the Transit Lines be satisfied by the Transit Lines as a result of a compromise agreement between said parties, then Hughes may, at his option, make written demand for a full and complete satisfaction of the Judgment herein referred to in favor of Dawson and against Hughes and Prettyman, and Dawson agrees to execute and deliver to Hughes within thirty (30) days after receipt of said written demand such full and complete satisfaction of judgment.

"7. Hughes and his counsel are apprehensive lest a stranger to the judgment hereinbefore described should buy said judgment from Dawson, and then attempt to satisfy it out of the assets of Hughes alone. As part of the consideration under this agreement, Dawson agrees that she will not, without the written consent of Hughes, sell or assign, either in whole or in part, to any third person said judgment presently held by her against the defendants Hughes and Prettyman.

"8. It is further agreed that the Fifty Thousand Dollars ($50,000) payment provided for hereinabove shall be paid by Hughes to Dawson as follows: Thirty Three Thousand Dollars ($33,000) coincident with the execution of this agreement (and in this regard it is understood that the said sum of Thirty Three Thousand Dollars ($33,000) so paid shall include the sum of Twenty Seven Thousand Seven Hundred Twenty Seven and 41/100 Dollars ($27,727.41) which is being paid for and on behalf of Hughes and Prettyman by the Hardware Mutual Insurance Company under the terms of an insurance policy heretofore issued by said company to M. A. Hughes and his employees), and that the balance, to-wit: Seventeen Thousand Dollars ($17,000) shall be paid in four (4) equal installments of Four Thousand Two Hundred Fifty Dollars ($4,250) on each of the following dates:

September 15, 1950
October 15, 1950
November 15, 1950
December 15, 1950

and there shall be paid interest upon said Seventeen Thousand Dollars ($17,000) or the unpaid balance thereof at the rate of 3½% per annum commencing with the date of the execution of this Agreement; said interest payments to be made concurrently with, and in addition to, the four (4) installment payments provided for above. Failure of Hughes to make any of the payments in the amounts or at the times provided herein shall be considered a material and substantial breach of this Agreement, and upon such failure, Dawson may, at her option, be relieved of any further obligation to perform the covenants of this Agreement.

"Signed this 25th day of August, 1950."

views of two sides of a controversy with respect to a writing which was effected through the instrumentality of defendants for their advantage only and which, plaintiffs contend, operates for their benefit to the extent of not less than $50,000. Dawson as judgment creditor for $126, 937.55 against defendants Hughes and Prettyman, had by the agreement promised to accept payment of $50,000 from Hughes and Prettyman and agreed sincerely to resist the appeal taken by Wilcox and Transit Lines. Yet, it also provides that Dawson will endeavor to collect the whole of the judgment from plaintiffs even though she has received the $50,000, making a possible total of $176,937.55—$50,000 more than the sum awarded under the judgment.

[1, 2] Under these allegations there was a clear abuse of discretion. Appellants logically claim that the agreement constituted a release of all defendants from liability under the judgment or that, at least, the judgment was partially satisfied to the extent of $50,000. Here was an existing controversy concerning the rights and duties of the parties. "The purpose of a declaratory judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation'." Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062. The complaint is sufficient if it declares facts showing a controversy over the rights and duties of the parties under a written agreement and seeks their adjudication. Flynn v. Flynn, 103 Cal.App.2d 91, 229 P.2d 5.

The relief requested is proper in order to guide the parties in their future conduct with regard to the feasibility of continued litigation. Obviously, if the agreement effected a release of the various defendants, the pending appeal has become moot and should be dismissed forthwith, in order to prevent the useless expenditure of time and effort of this court and of all parties concerned. Assuming also that the agreement constituted a partial satisfaction of the judgment, this fact would be of considerable weight in the negotiation of a possible settlement and resulting dismissal of the appeal.

Respondents argue (1) that the pending appeal of the original action will serve to settle all questions between the parties inasmuch as plaintiffs may plead the agreement in defense at a second trial, if they should be successful on such appeal; (2) if plaintiffs here should fail on the appeal they may thereafter make a motion for satisfaction of judgment based on this agreement.

Neither alternative is an answer to the hurdle raised by appellants that this court and the parties will be forced to shoulder the burden of entertaining the appeal when it may well be that the questions for review are now moot. As regards the suggested motion for satisfaction of the judgment, it is unlikely that such remedy is "speedy and adequate or as well suited to the plaintiff's needs as declaratory relief." Maguire v. Hibernia Savings & Loan Society, supra, 23 Cal.2d at page 733, 146 P.2d at page 680.

Judgment reversed.

McCOMB and WILSON, JJ., concur.

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105 Cal.App.2d 507

RALL v. LOVELL.

Civ. 4236.

District Court of Appeal, Fourth District, California.

July 17, 1951.

Action by Zelda Rall, also known as Zelda Lovell, against Maynard M. Lovell to recover on a judgment rendered in a divorce action in the State of Montana. The Superior Court of San Diego County, Robert B. Burch, J., granted a summary judgment for plaintiff and defendant appealed. The District Court of Appeal, Mussell, J., held that the trial court erred in striking out the answer of the defendant and granting a summary judgment since the pleadings raised triable issues of fact.

Judgment reversed.

1. Judgment ⚿178

A motion for a summary judgment is not a trial upon the merits, but is merely to determine whether there is an issue to be tried.

2. Judgment ⚿940, 945

The law of state where judgment is rendered and by which its effect is to be determined must be established as a fact, though effect of law when proved is a question of law for court.

3. Judgment ⚿928

The validity and effect of a foreign judgment is governed by laws of that state.

4. Judgment ⚿823

The extent of a defendant's liability on a foreign judgment is determined by terms of foreign decree, and such decree will be enforced only for amount for which it was enforceable in state in which it was rendered and a payment of that judgment discharges obligation.

5. Judgment ⚿178

The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in trial of issues of fact. Code Civ.Proc. § 437c.

6. Divorce ⚿330

In action by former wife of defendant to recover upon a divorce decree rendered in Montana, trial court erred in striking out defendant's answer alleging that both parties sought a determination of Montana Law applicable to terms of divorce decree, that statute of limitations barred payments to be made under foreign decree, and that a petition for construction of foreign decree was pending since answer set up triable issues of facts. Code Civ. Proc. § 437c.

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Minnie N. Maguire and Bertrand L. Comparet, San Diego, for appellant.

Price, Nottbusch, Cory & Schwartz, of San Diego, for respondent.

MUSSELL, Justice.

Defendant appeals from a summary judgment for plaintiff in an action on a judgment rendered in a divorce action in the State of Montana.

It was alleged in the amended complaint, filed December 7, 1949, that plaintiff is the former wife of defendant and was plaintiff in a divorce action against defendant brought in the State of Montana; that the decree rendered therein provided "that the defendant pay to the clerk of the court as and for the support and maintenance of certain minor children, Kenneth M. Lovell, a son, Marjorie Lovell, a daughter, and Jno. Stanley Lovell, a son, the sum of $40.00 per month until further order of this court, or until said minors reach their majority;" that as of June 1, 1949, after deducting certain payments made by and on account of the defendant, the sum of $4,000 was owing and unpaid on said judgment; that Jno. Stanley Lovell is still a minor and that the other two children have reached the age of majority. Judgment was prayed for in the sum of $4,000, interest and costs.

Defendant, in his answer, admitted the rendition of the Montana decree and alleged that he had paid the sums for which he had been given credit by plaintiff and had paid an additional sum of $20.00 on February 1, 1949. He then denied the allegations of the amended complaint not expressly admitted to be true and alleged that any cause of action of plaintiff was barred by the provisions of subdivision 1, section 336 of the Code of Civil Procedure as to any and all sums of money due or payable under the decree more than five years prior to the commencement of the action; that during said five year period he had paid not less than the sum of $800 as required by the Montana decree; that during the five years immediately preceding the commencement of this action only one child of the parties, to wit, Jno. Stanley Lovell, was at any time under the age of majority. Defendant then alleged that a petition had been filed in the Montana court requesting it to construe its judgment and to adjudge that said judgment and decree provided for the payment of the sum of $13.33⅓ for each child per month, a total of $40.00 for all three children during their minority, and that when each of said children reached the age of majority or became emancipated or were not under the care of the plaintiff, that the amount to be paid by the defendant was then reduced by the sum of $13.33⅓ per month per child; that the said petition is still pending and undetermined before said court; that both of the parties hereto made their appearance before said court in the proceedings upon said petition by their respective counsel of record. The prayer of the answer was that no further proceedings be had herein until the determination of the aforesaid petition now pending before the Montana court.

Defendant's answer setting forth the foregoing matters was filed January 19, 1950, and notwithstanding the appearance of both parties in the Montana court, the plaintiff, on March 28, 1950, filed a notice of motion for a summary judgment in the instant action and in support thereof filed an affidavit of the plaintiff setting forth the terms of the Montana judgment and stating that the proceedings referred to in the Montana court to construe its judgment and decree had been vacated indefinitely without a decision having been reached, pursuant to a stipulation that said proceedings would remain in abeyance until settlement or decision had been reached in the instant case.

Defendant filed an affidavit setting forth the pendency of the hearing on the petition in the Montana court and stated that it was first noticed to be heard on September 26, 1949, and was first continued at the request of the plaintiff and that no stipulation had been entered into whereby the hearing upon said matter had been or would be vacated.

On May 1, 1950, the trial court herein granted plaintiff's motion to strike out the answer of the defendant and to enter judgment in favor of the plaintiff, and it was thereupon decreed that the plaintiff recover of the defendant the sum of $2,037.33 and costs.

The principal question involved in this appeal is whether the trial court abused its discretion in striking out the answer of the defendant and entering a judgment in favor of the plaintiff. We think this question must be answered in the affirmative.

[1] A motion for a summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried. Shea v. Leonis, 29 Cal.App.2d 184, 187, 84 P.2d 277; Walsh v. Walsh, 18 Cal.2d 439, 442, 116 P.2d 62; U. S. Fidelity & Guar. Co. v. Sullivan, 93 Cal. App.2d 559, 561, 209 P.2d 429; Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244.

As was said in Eagle Oil & Ref. Co. v. Prentice, 19 Cal.2d 553, 555, 122 P.2d 264, 265: "At the outset it should be observed that there are several pertinent fundamental principles which should be observed in the application of and procedure under section 437c. The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case." (Citing many cases.)

[2, 3] As heretofore noted, the answer of the defendant set forth the pendency of proceedings between the parties in the Montana court wherein both parties appeared and submitted to the jurisdiction of the court. Triable issues of fact were presented as to the amount, if any, due under the judgment and the applicable law of the State of Montana. The law of the state where the judgment was rendered and by which its effect is to be determined must be established as a fact, though the effect of the law when proved is a question of law for the court. 15 Cal.Jur. sec. 247, p. 243; Cummings v. O'Brien, 122 Cal. 204, 54 P. 742. The validity and effect of the Montana judgment is governed by the laws of that state. 15 Cal.Jur. sec. 246, p. 241.

A triable issue and defense was presented by the pleadings in the instant action where it appears that both parties sought a determination of the Montana law applicable to the terms of the divorce decree. Furthermore, a special defense was pleaded as to the application of the statute of limitations to certain of the payments to be made under the terms of the Montana decree. In addition, issues of fact were raised by the pleadings as to the amount paid on the judgment by the defendant and as to whether the petition for the construction of the Montana decree was pending or whether it had been dropped from the calendar by stipulation.

[4] The extent of defendant's liability is determined by the terms of the Montana decree. Such a decree will be enforced only for the amount for which it is enforceable in the state in which it was rendered and a payment of that judgment discharges the obligation. Restatement, Conflict of Laws, secs. 436 and 441.

As was said in Harding v. Harding, 140 Cal. 690, 694, 74 P. 284, 285: "'The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state. It must not be given any greater effect than it has in the state where it was rendered.'" See also, Fox v. Mick, 20 Cal. App. 599, 603, 129 P. 972.

[5] On November 29, 1950, a certified copy of the order of the Montana court construing the terms of the decree therein entered, and signed by the same judge who tried the case, was filed in this court. It is apparent that under the judgment as therein construed, and the pleadings in the present action, the defendant has complied with the terms of the Montana judgment. If the summary judgment herein is allowed to stand, we then have a judgment in the State of Montana which has been satisfied and a judgment in California establishing a liability on the part of the defendant for the sum of $2,037.33. The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. Walsh v. Walsh, 18 Cal.2d supra, at page 444, 116 P.2d 62; D. E. Sanford Co. of San Francisco v. Cory Glass Coffee Brewer Co., 85 Cal.App.2d 724, 731, 194 P.2d 127.

[6] Under the circumstances presented by the record before us, we conclude that there should have been a trial on the issues of fact raised by the pleadings and that the trial court erred in striking out the answer of the defendant and in granting a summary judgment.

Judgment reversed.

BARNARD, P. J., concurs.

37 Cal.2d 584

PEOPLE v. NOR WOODS.

Cr. 5211.

Supreme Court of California.
July 20, 1951.

Rehearing Denied Aug. 16, 1951.

Woodrow Nor Woods was convicted in Superior Court of San Diego County, John A. Hewicker, J., of grand theft and he appealed. The Supreme Court, Traynor, J., held that evidence sustained conviction for grand theft committed by misrepresenting condition of title of automobile when selling same.

Judgment affirmed.

1. False pretenses 🔑49(1)

Evidence sustained conviction for grand theft committed when defendant made misrepresentation to buyer of automobile of condition of title. Pen.Code, §§ 484, 487.

2. False pretenses 🔑26

Under statute providing that in charging theft it shall be sufficient to allege in information that defendant unlawfully took labor or property of another it was unnecessary, in information charging grand theft by seller's misrepresenting to buyer condition of title of automobile, to allege particular type of theft involved. Pen. Code, § 952.

3. Larceny 🔑14(1)

Where defendant falsely represented condition of title of automobile to buyer and accepted purchase price and finance company later repossessed automobile from buyer, if defendant seller intended that only possession of automobile should pass at time of sale, defendant was guilty of larceny by trick or device.

4. False pretenses 🔑20

Where defendant falsely represented condition of title of automobile to buyer and accepted purchase price and finance company later repossessed automobile from buyer, if defendant seller intended title should pass, defendant was guilty of obtaining property by false pretenses. Pen. Code, § 952.

5. False pretenses 🔑52
Larceny 🔑70(1)

Where defendant seller falsely represented to buyer condition of title of automobile and accepted purchase price and finance company later repossessed automobile from buyer, defendant was guilty of theft by either larceny by trick or device or by obtaining property by false pretenses, depending upon whether defendant intended title or merely possession to pass, and it was not necessary that jury be instructed upon method by which theft was committed, since it was immaterial whether they agreed as to technical pigeonhole into which theft fell.

6. False pretenses 🔑54

Where defendant seller falsely represented to buyer of automobile that title was in certain condition and seller accepted purchase price and another automobile in trade-in, and finance company later repossessed automobile from buyer, although defendant was guilty of either larceny by trick or device or of obtaining property by false pretenses, depending upon whether he intended possession or title to pass at time of transaction, there was only one theft and imposing of two sentences to run concurrently was error. Pen. Code, § 952.

7. Criminal law 🔑1177

Where two sentences were imposed for transaction which constituted but one theft, fact that sentences were ordered to run concurrently did not cure error.

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Woodrow Nor Woods, in pro. per.

Edmund G. Brown, Atty. Gen., Gilbert Harelson and Frank Richards, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Defendant has appealed from an order denying his motion for a new trial and from the judgment of conviction on two counts of grand theft.

Defendant, a used car dealer, offered to sell a 1949 Ford to the complaining witness, Campouris, in exchange for a 1946 Ford and $1,183.14 in cash. Campouris accepted the offer and delivered his car and a check for the money to defendant on the latter's representation that the title to the 1949 Ford was clear except for a $1,183.14 lien, which defendant promised to discharge with the cash payment. Defendant gave Campouris a bill of sale and in the place provided for liens wrote, "No exceptions will del title as soon as from Sacramento, California." Campouris agreed to give defendant the ownership certificate for the 1946 Ford, when defendant gave him the certificate for the 1949 Ford. At the time of the sale the ownership certificate of the 1946 Ford was in the possession of the Bank of America. The bank had made a loan on the car that had been paid. Defendant sold the 1946 Ford to a third party who was able to secure the ownership certificate from the bank. Actually the lien on the 1949 Ford was greatly in excess of $1,183.14, and defendant did not use that money or the money that he obtained from the sale of the 1946 Ford to discharge it. Approximately a year after the sale to Campouris the finance company repossessed the 1949 Ford. Defendant has not returned to Campouris either the cash or the 1946 Ford.

[1] From the foregoing evidence the jury was justified in finding that defendant, by misrepresenting the condition of the title of the 1949 Ford, defrauded Campouris of the price he agreed to pay for that car and was guilty of grand theft. Penal Code, §§ 484, 487.

[2] Defendant contends that the information was defective in failing to specify the kind of grand theft with which he was charged. Penal Code section 952 provides, however, that "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." Accordingly, it was not necessary for the information to allege the particular type of theft involved, such as false pretenses embezzlement, or larceny by trick and device. People v. Fewkes, 214 Cal. 142, 149, 4 P.2d 538.

[3–5] Similarly, there was no error in failing to instruct the jury that they must agree upon the method by which the theft was committed. If Campouris intended that only possession of the property should pass at the time of the sale, defendant was guilty of larceny by trick or device, but if Campouris intended that title should pass, defendant was guilty of obtaining property by false pretenses. People v. Delbos, 146 Cal. 734, 736, 81 P. 131; People v. De Graaff, 127 Cal. 676, 679, 60 P. 429; People v. Fawver, 29 Cal.App.2d Supp. 775, 777–779, 77 P.2d 325, and cases cited. Irrespective of Campouris's intent, however, defendant could be found guilty of theft by one means or another, and since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell. People v. Jones, 61 Cal.App.2d 608, 622–623, 143 P.2d 726; People v. Caldwell, 55 Cal.App.2d 238, 256, 130 P.2d 495.

[6, 7] Defendant contends that at most he was guilty of the commission of one offense. We agree with this contention. It is unnecessary to determine under what circumstances the taking of different property from the same person at different times may constitute one or more thefts. See, People v. Howes, 99 Cal.App.2d 808, 818–821, 222 P.2d 969, and cases cited. In the present case both the car and the money were taken at the same time as part of a single transaction whereby defendant defrauded Campouris of the purchase price of the 1949 Ford. There was, accordingly, only one theft, and the fact that the sentences were ordered to run concurrently does not cure the error. See, People v. Kehoe, 33 Cal.2d 711, 715, 716, 204 P.2d 321; cf., People v. Slobodion, 31 Cal.2d 555, 562, 191 P.2d 1.

In the light of the record, defendant's contentions that the trial was improperly conducted, that his attorney concealed his innocence, and that the case against him was a conspiracy cannot be sustained. By returning a verdict of guilty the jury rejected defendant's version of the transactions, and its determination is binding on appeal.

The order denying the motion for a new trial is affirmed. The judgment is reversed insofar as it adjudges defendant guilty on the second count of grand theft. In all other respects the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concur.

SCHAUER, J., concurs in the judgment.

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37 Cal.2d 609

KESSLOFF v. PEARSON et al.

L. A. 21918.

Supreme Court of California, in Bank.

July 27, 1951.

Rehearing Denied Aug. 23, 1951.

Alex Kessloff brought action against Edward F. Pearson, and others, for declaratory relief and an accounting, alleging employment contract whereby plaintiff was to receive salary and percentage of net profits earned by defendants' company. Defendants filed cross-complaint for reformation of the contract. The Superior Court, Los Angeles County, David Coleman, J., entered judgment dismissing action on ground that complaint did not state cause of action for declaratory relief, and plaintiff appealed. The Supreme Court, Shenk, J., held that complaint stated cause of action for an accounting, and dismissal of complaint was improper.

Reversed.

Prior opinion, 226 P.2d 27.

1. Declaratory judgment 🔑6

Under statutes providing for declaratory judgment as to mutual rights and obligations of persons under a contract in advance of breach, and providing that court can refuse to exercise such power where it is unnecessary or improper at the time under all the circumstances, discretion in refusing to exercise power is not unlimited but is a legal or judicial discretion subject to appellate review, and declaratory relief must be granted when the facts in the case justifying that course are sufficiently alleged. Code Civ.Proc. §§ 1060, 1061.

2. Declaratory judgment 🔑145

Where employee alleged in complaint that he was to receive salary and 10% of net profits as compensation and that employers improperly computed net profits, and employers answered that their method of computation of net profits was proper and filed cross-complaint for reformation alleging that contract did not show true intention of parties as to how percentage compensation was to be computed, an actual controversy as to terms and construction of contract was presented within statute providing for declaratory relief. Code Civ. Proc. § 1060.

3. Declaratory judgment 🔑362

Where employee brought action for declaratory relief and an accounting, alleging contract whereby employee was to receive salary and percentage of net profits, and that employers improperly computed net profits in arriving at actual amounts due to employee, breach of contract was alleged on which action for accounting could be based and wherein questions as to terms and construction of contract would become triable issues, and therefore, dismissal of action on ground of insufficiency of complaint was improper. Code Civ.Proc. §§ 1060 to 1062a.

4. Trial 🔑13(3)

Where employee brought action for declaratory judgment and an accounting, alleging contract whereby employee was to receive salary and percentage of net profits, if it should appear that employee mistitled action as in declaratory relief for sole purpose of obtaining preference on calendar, trial court would have power to prevent accomplishment of that purpose by appropriate order or procedure. Code Civ.Proc. §§ 1060 to 1062a.

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Aaron Sapiro and Hyman O. Danoff, Los Angeles, for appellant.

Louis Licht, Mitchell, Silberberg & Knupp and Arthur Groman, all of Los Angeles, for respondent.

SHENK, Justice.

Upon the termination of a written contract of employment the plaintiff commenced an action for declaratory relief and an accounting. After issue joined the trial court sustained an objection to the introduction of evidence on the ground that the complaint did not state a cause of action for declaratory relief. The plaintiff appealed from a judgment dismissing the action.

The complaint discloses the following:

The defendants were engaged in the manufacture and sale of candy under the name of Pearson Candy Company. On July 1, 1944, the plaintiff and Edward F. Pearson, herein designated as the defendant, entered into a written contract whereby the plaintiff was employed to make candy and advance the interests of the company for which he was to receive his regular weekly salary, to be agreed upon orally, and ten per cent of the "net profits earned by the Pearson Candy Co." The agreement specified that the plaintiff was to have nothing to do with the management of the business or of the employees, but that his duties were to be confined to candy making and its supervision. Profits were to be determined at the end of one year from the date of the contract and each year of renewal, and the plaintiff's share was to be paid to him by the company. The agreement was renewable by mutual consent each year for three years at progressively higher percentages of the profits—15% for the second year, 20% for the third year, and 25% for the fourth year. The plaintiff continued in employment under the contract until July 1, 1948, and thereafter under different terms and conditions until February 26, 1949, when his employment terminated. At the close of the first and each succeeding year under the contract the plaintiff received from the defendant a sum represented to be his share of the profits. He was told that he was not entitled to an explanation as to how the sum was computed but was obligated to accept what the defendant in his own judgment determined was the proper amount. The plaintiff specifies large sums of money paid to various persons including Fannie Pearson, the defendant's mother who was not employed, in excess of $10,000 per year; G. Florence Permar in addition to regular salary in excess of $5,000 per year; Dan Pearson, a brother who was not employed except for a limited period, in excess of $40,000 in the aggregate; and the expenditure of large sums for automobiles and other articles for the defendant and the members of his family which had no connection with the business, all of which were improperly charged as expenses of the business before the computation of net earnings in arriving at the annual amounts due to the plaintiff under the contract. The plaintiff has been denied access to and has been unable to examine the books of the company. On termination of the employment he attempted to obtain a correct statement of the earnings and expenditures during the period of the contract but the defendant refused to furnish any statement, account or explanation of the alleged excess payments. The plaintiff alleged the existence of an actual dispute and controversy as to the proper computation of net profits in determining the amounts due to him. He asked for a declaration of the parties' rights and duties under the contract; for a full and complete accounting of the gross earnings and business expenditures of the company; for a determination of the net earnings and the amounts due to him; for judgment therefor, and any other relief to which he might be entitled.

The defendants filed an amended answer. They admitted the contract, joined issue as to the matters of accounting and method of computation of net profits, and set up certain defenses. They alleged that the candy company was a co-partnership consisting of Edward F. Pearson, Dan Pearson, Fannie Pearson, and G. Florence Permar; admitted that the copartners withdrew various amounts representing their shares of the profits; alleged the propriety of deductions therefor and of profits from jobbing operations, and denied that there were improper deductions from gross earnings before the computation of the plaintiff's share of net profits. The defendants alleged other defenses including insufficiency of the complaint to state a cause of action; illegality of the agreement as in violation of the Stabilization Act of 1942, 50 U.S.C.A. Appendix, § 961 et seq., estoppel, ratification and waiver; account stated; unclean hands because of the alleged violation of the Stabilization Act; and laches. The defendants sought a declaration that the contract was illegal and void and that the plaintiff had received all sums due to him thereunder. The defendants also filed a cross-complaint for reformation of the contract alleging that by mutual mistake it did not express the true intention of the parties as to how the percentage compensation to the plaintiff was to be computed; that it did not truly identify the parties to the writing; that the parties intended that there should be deducted from operating profits a reasonable compensation for the services and capital contributed by the partners and the individual income taxes paid by them; and that the intention was that the plaintiff should not participate in the jobbing business and profits as distinguished from the candy making business. The plaintiff filed an answer to the cross-complaint.

At the commencement of the trial the court overruled an objection to the introduction of evidence. Evidence was received. Thereupon the court revived the objection and sustained it on the ground that the complaint did not state a cause of action for declaratory relief. In its own language the court conceded the existence of an actual controversy but concluded that since ultimately the only judgment which could be rendered was one for a sum of money, declaratory relief was not the proper "form of action."

In 1921 sections 1060–1062 were added to the Code of Civil Procedure whereby either alone or with other relief, in cases where an actual controversy existed, a declaration of the mutual rights and obligations of persons under a written instrument or a contract might be given and might be had in advance of a breach (sec. 1060). The court could refuse to exercise the power in cases where it was unnecessary or improper at the time under all the circumstances (sec. 1061). The remedy was cumulative and did not preclude a party from obtaining additional relief based upon the same facts (sec. 1062). In 1927 section 1062a was added to provide that the trial of actions for declaratory relief should take precedence over actions as to which precedence was not provided.

In sustaining the objection to the introduction of evidence the court assumed to exercise the power to refuse declaratory relief pursuant to section 1061 and followed the exercise of that power by a judgment of dismissal. The question is whether the court's action was proper.

[1] The discretion to be exercised pursuant to section 1061 is not unlimited. It is a legal or judicial discretion subject to appellate review, and declaratory relief must be granted when the facts justifying that course are sufficiently alleged. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747. Refusal is limited to cases where a declaration of rights and obligations would be unnecessary or improper at the time under all the circumstances. The determination rests on the facts in each case.

[2] The pleadings presented, and the trial court was of the view that there existed, an actual controversy as to the terms and construction of the alleged contract. But the court concluded that since the contract had terminated the plaintiff could not sue for the declaratory relief and thus procure a trial on the preferential calendar because he could obtain all essential relief in an action for an accounting and money judgment.

[3, 4] The code sections provide for declaratory relief in advance of breach. This salutary relief is procurable so that parties may know their rights and obligations where a controversy arises before a breach or violation occurs. For such cases see Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487; Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 733–734, 146 P.2d 673, 151 A.L.R. 1062; California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306. It is true that under the circumstances here disclosed a breach of the

alleged contract has occurred and the plaintiff may be entitled to an accounting and to a money judgment. The judgment which he may recover could therefore be afforded in an action for an accounting where questions as to the terms and construction of the contract would become triable issues. Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931. Therefore it may be said that the trial court was correct in concluding that all the relief sought could be had in an action for an accounting. But the court was in error in dismissing the action on the general ground of insufficiency of the complaint. This is so for the reason that the complaint in any event states a cause of action against the defendants for an accounting pursuant to the alleged contract and for a money judgment. In this latter connection if it appears that the plaintiff has mistitled the action as in declaratory relief for the sole purpose of obtaining a preference on the calendar, the court has the power to prevent the accomplishment of that purpose by appropriate order or procedure.

In Columbia Pictures Corp. v. DeToth, supra, 26 Cal.2d at page 761, 161 P.2d at page 221, it was recognized that the plaintiff's right to proceed was not foreclosed by the fact that the contract had been breached and that other remedies were available. It was not suggested that if the alternative relief was sought and was procurable in the action before it the court could entirely refuse to entertain the cause. In reversing a judgment of dismissal on sustaining the demurrer in Lord v. Garland, 27 Cal.2d 840, 852–853, 168 P.2d 5, we said that a general demurrer should be overruled if, upon any theory, the complaint stated a cause of action. See also Johnson v. Clark, 7 Cal.2d 529, 536, 61 P.2d 767.

The foregoing sufficiently demonstrates, without extending the review or multiplying citations, that the plaintiff was and is entitled to a trial and a judgment on the issues framed by the pleadings.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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37 Cal.2d 568

Application of KIMLER.

Cr. 5046.

Supreme Court of California, in Bank.

July 13, 1951.

Original proceeding in the matter of the application of Charles Walker Kimler for a writ of habeas corpus. The Supreme Court, Edmunds, J., held that judgment of Missouri court in habeas corpus proceeding discharging petitioner on ground that the facts and circumstances did not justify his extradition to California as a parole violator was not res judicata of issues as to effect of California parole and whether conditions of such parole had been violated and that since petitioner had voluntarily accepted parole on condition that upon his release from imprisonment in Illinois he would report to parole officer of California, California's jurisdiction over petitioner continued.

Order to show cause discharged and application for writ denied.

Carter, J., dissented.

Prior opinion, 217 P.2d 640.

1. Habeas corpus ⚿117(2)

Judgment of Missouri court in habeas corpus proceeding ordering petitioner discharged from imprisonment and detention on stated grounds that the facts and circumstances did not justify extradition and that no sufficient cause for his detention was shown did not purport to adjudicate the effect of petitioner's previous parole by state seeking his extradition.

2. Habeas corpus ⚿92(2)

Missouri court in habeas corpus proceeding to prevent extradition of alleged fugitive from justice from California had no jurisdiction to adjudicate the effect of petitioner's conditional parole by California authorities for the purpose of completing a previous term of imprisonment in Illinois.

3. Habeas corpus ⚿92(2)

The scope of inquiry in habeas corpus proceeding to prevent extradition is necessarily narrow, and it is generally necessary and proper to pass only on the legality of the requisition and rendition and determine whether the statutory prerequisites have been complied with.

4. Habeas corpus ⚷92(2)

The jurisdiction of court in habeas corpus proceeding to prevent extradition is limited to a determination as to sufficiency of papers and the identity of the prisoner and court may not inquire into the guilt of petitioner or the merits of the case.

5. Habeas corpus ⚷92(2)

Whether a prisoner released on parole by California authorities for the purpose of completing a previous term of imprisonment in Illinois violated his parole by going to Missouri after he was released from prison in Illinois was a question for determination by the courts of California and could not be determined by Missouri court in habeas corpus proceeding to prevent his extradition to California.

6. Judgment ⚷822(1)

California court should not place upon the judgment of court of another state a construction which is out of harmony with the decisions of the highest court of the state in which the judgment was rendered.

7. Habeas corpus ⚷117(2)

Judgment of Missouri court in habeas corpus proceeding discharging alleged violator of California parole on ground that the facts and circumstances did not justify his extradition to California was not res judicata of issues presented in subsequent habeas corpus proceeding in California as to effect of such parole and whether it had in fact been violated.

8. Habeas corpus ⚷85(1)

In habeas corpus proceeding to obtain release from imprisonment following revocation of parole for breach of conditions thereof, evidence supported referee's finding that prisoner had accepted condition of parole for purpose of completing previous term of imprisonment in Illinois that upon release from imprisonment in Illinois prisoner would report to parole officer of California.

9. Criminal law ⚷100(1)

Where one under sentence to life imprisonment in California voluntarily accepted conditional parole for purpose of completing a previous term of imprisonment in Illinois on condition that upon his release from imprisonment in Illinois he would report to parole officer of California, California's jurisdiction over him continued and he was subject to imprisonment under the life sentence in California upon his release from imprisonment in Illinois and breach of conditions of parole.

10. Pardon ⚷14.4

A prisoner may reject offer of parole, but once having elected to accept parole, he is bound by the express terms of the conditional release.

◆

Ernest Spagnoli, San Francisco, under appointment by the Supreme Court, for petitioner.

Fred N. Howser, Atty. Gen., B. Abbott Goldberg and Clarence A. Linn, Dep. Atty. Gen., for respondent.

EDMONDS, Justice.

By his petition for a writ of habeas corpus, Charles Walker Kimler is attacking the right of this state to continue his imprisonment after he was released upon parole. He asserts that, in effect, the parole granted to him was a pardon. He also relies upon a judgment in Missouri by which he was released from custody following his arrest upon a warrant of extradition.

After having been convicted in this state and sentenced to life imprisonment under each of three separate judgments, the sentences to run concurrently, he was released upon parole and delivered into the custody of officers of Illinois to complete a term of imprisonment there. The condition of the parole was that, upon his release from imprisonment in Illinois, he would report to the parole officer of California. However, when released by Illinois, he refused to recognize the authority of California over him. In Missouri, he was arrested upon a warrant issued pursuant to extradition proceedings initiated by the Governor of California. He resisted extradition, and obtained his release upon a writ of habeas corpus. When he was later found in Washington, he was extradited and returned to this state where he is now imprisoned under the judgments and sentences entered upon his convictions here.

[1, 2] As the basis for relief from his present imprisonment, Kimler asserts that the judgment in the Missouri proceeding is a final determination that the action of the California authorities in releasing him to Illinois was a pardon which bars his further imprisonment in this state. There are two answers to this contention. First, the Missouri court did not purport to determine the effect of Kimler's release by the prison authorities of this state. In the second place, that question could not have been adjudicated; because of the limited scope of inquiry in a habeas corpus proceeding in connection with extradition, there was no jurisdiction to do so.

In Missouri, Kimler contended that "when the State of California attempted to parole him into the custody of the Illinois authorities, this act upon their part operated as a complete pardon for the crime he was sentenced for in California * * *." However, the court did not undertake to decide that question. Preliminarily, it pointed out "* * * that this is not a new requisition on a new complaint, but a requisition on this old matter * * *." It then found that "* * * the *facts and circumstances are not sufficient to justify* the surrender and extradition of the petitioner to the State of California * * *." The judgment declared that "* * * *no sufficient cause for the detention* of said petitioner appearing, it is ordered * * * that the Writ of Habeas Corpus be sustained and made permanent, and that the petitioner * * * be * * * discharged from imprisonment and detention for the cause aforesaid." (Italics added.)

By the clear language of the Missouri judgment, the only fact determined by it was that the "facts and circumstances are not sufficient to justify" extradition, and "no sufficient cause for the detention" of Kimler was shown. It does not purport to be a final adjudication that the parole to Illinois authorities was the equivalent of a pardon. No broader interpretation of the judgment is warranted. Furthermore, such a construction would be directly contrary to the fundamental principles relating to jurisdiction.

[3, 4] "The scope of inquiry in a summary proceeding in habeas corpus to prevent extradition is necessarily narrow, and as a general rule it is necessary and proper to pass only on the legality of the requisition and rendition. The only inquiry to be made is whether the statutory prerequisites have been complied with." 39 C.J.S., Habeas Corpus, § 39, pp. 549, 550. "The courts in a Habeas Corpus proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another State. As to the guilt of the prisoner, they are not allowed to inquire. Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner." Kurtz v. Florida, 22 Fla. 36, 45.

The United States Supreme Court has described the nature of habeas corpus proceedings incident to extradition in the following language: "It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt * * * the proceedings assimilate very closely those commenced in any state for the arrest and detention of an alleged criminal. They go upon the theory that extradition is but a mere step in securing the presence of the defendant in the court in which he may lawfully be tried." Matter of Strauss, 197 U.S. 324, 333, 25 S.Ct. 535, 537, 49 L.Ed. 774.

The contention made by Kimler before the Missouri court that he was not a fugitive because he had been pardoned is similar to the one considered in Drew v. Thaw, 235 U.S. 432, 439, 440, 35 S.Ct. 137, 138, 59 L.Ed. 302, wherein Justice Holmes said: "But this is not Thaw's trial. In extradition proceedings * * *, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. * * * And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide."

[5] So in the present case, the merits of Kimler's defense were not for the Missouri court to determine. The question as to whether Kimler violated his parole by going to Missouri after he was released from prison in Illinois is one for determination by the courts of California. "If the court on *habeas corpus* inquires into the merits of the charge against the prisoner, or into the motives which inspired the prosecution in the demanding state, it exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The mandate of the Constitution requires 'a person charged in any state with a crime' to be delivered by the asylum state to the state whose laws he has violated. That state alone can determine the guilt or innocence of the offending party. The theory and the intention of the constitutional and statutory provisions are that the offender shall be compelled to submit himself for trial to the courts of the state in which the offense was committed, and hence it would be usurpation of authority for the courts of another state to undertake to determine the question of his guilt in a *habeas corpus* proceeding." Commonwealth v. Supt. of Philadelphia County Prison, 220 Pa. 401, 69 A. 916, 917, 21 L.R.A.,N.S., 939, as quoted in In re Ray, 215 Mich. 156, 165, 183 N. W. 774.

[6] Moreover, this court should not place upon the judgment a construction which is out of harmony with the decisions of the highest court of the state in which it was rendered. In State ex rel. Cooney v. Hoffmeister, 336 Mo. 682, 80 S.W.2d 195, the Supreme Court of Missouri had before it an application for a writ of certiorari to quash a judgment in a habeas corpus proceeding which discharged a paroled convict from the agent's custody. Rosenberg, an inmate of an Illinois penitentiary, had been given permission to reside temporarily and conditionally in Missouri. Upon information that he was under arrest upon a charge of having violated the law of Missouri, the warden of the Illinois institution ordered him returned to custody in the penitentiary pending a decision by the department of public welfare of Illinois upon the question of whether he had violated his parole. When arrested in Missouri upon an extradition warrant, Rosenberg attempted to secure his release in a habeas corpus proceeding. "At the trial it was admitted that the requisition conformed to the federal statutes and presented a prima facie case. However, it was contended that Rosenberg had not violated his parole, and for that reason was not a fugitive from justice. The circuit court so found and discharged him. This was the only question presented.

"Illinois contends that the courts of an asylum state are without jurisdiction on *habeas corpus* to determine the question of the guilt or innocence of the person in the custody of the agent of the demanding state. The contention must be sustained. It has been so ruled by all the authorities. 18 U.S.C.A. § 662, note 61, pp. 329, 330, 331.

"It follows that the proceedings and record of the circuit court of the city of St. Louis in the *habeas corpus* case should be quashed." State ex rel. Cooney v. Hoffmeister, supra, at page 684, 80 S.W.2d at page 196, quoted with approval in Ex parte Foster, 60 Okl.Cr. 50, 61 P.2d 37, 39, 40.

[7] In the Hoffmeister case, as here, the petitioner contended that he was not a parole violator. Rosenberg admitted his status as a parolee but argued that he had done nothing contrary to the terms of his parole. Kimler says he is not a parole violator, although substantially charged as such, because his parole became a pardon when the California authorities permitted him to be taken into custody by Illinois. The Supreme Court of Missouri held that Rosenberg's rights were governed by the rule that the asylum state may not inquire into the guilt or innocence of the accused; the question presented was for the determination of the demanding state. This is equally true as to Kimler, and his discharge in habeas corpus in Missouri is not res judicata in the present proceeding.

Kimler also contends that California relinquished all jurisdiction to enforce completion of his unexpired term of imprisonment by releasing him to the State of Illinois. He states that he did not voluntarily accept the parole to further imprisonment in Illinois, and argues that statements appearing in his "Ticket of Leave", which are contrary to his present position, were "evidently added after petitioner's signature was placed thereon".

Pursuant to an order of this court, a referee was appointed to hear and take testimony directed and responsive to the following questions:

(1) Did Kimler sign a "Ticket of Leave" which then stated: "You are being paroled into the custody of the Illinois State Authorities to be by them confined. In the event you are released from their custody prior to the expiration of your term of California imprisonment, you will contact the California State Parole Office and abide by the instructions he will give you."

(2) Did Kimler sign the "Ticket of Leave" in the presence of O. C. Morehouse, and did O. C. Morehouse affix his signature as a witness thereto at that time?

(3) Did Kimler sign a letter dated November 10, 1943, stating: "I understand that I am being paroled into the custody of Illinois State Authorities and should I be released by them before the expiration of my sentence I am to report to the Parole Officer. I also understand that failing to do so will constitute a violation of my parole."

(4) Was the letter of November 10, 1943, signed by Kimler in the presence of O. C. Morehouse, and did O. C. Morehouse affix his signature as witness thereto at that time?

(5) Did the Board of Prison Terms and Paroles order the release of Kimler from the California State Prison at Folsom on parole to the custody of officers of the State of Illinois for the purpose of subjecting him to further imprisonment in that state?

After hearing testimony, upon these issues, the referee made findings answering each question in the affirmative. The only objection to them made by Kimler concerns the determination that he was released in this state for the purpose of further imprisonment in Illinois.

Kimler's argument may be summarized by the following excerpt from his counsel's brief: "The testimony adduced before the Referee shows that Kimler was granted a parole and that he was extradited. Evidently the extradition would not have been made effective unless accompanied by a 'parole'. And, the 'parole' was not one that was accepted by or wanted by Kimler, as his testimony shows. Kimler had no desire to return to Joliet and complete there a term of imprisonment that he contended and still contends he was not legally required to complete. *There is no question but what Kimler was extradited.* The evidence and proof introduced before this Court's Referee shows that beyond doubt. Parole is a false quantity inasmuch as Kimler was removed, tied up in chains and handcuffs, from Folsom state prison, and delivered over to Illinois agents who were armed, not with parole papers, but with extradition papers, towit a warrent of rendition, whereby the Governor surrendered Kimler to Illinois."

Essentially the same position was taken by one Marzec who sought to be released from the state prison upon the ground that his parole "never in fact became effective". Marzec also claimed that he "never was released on parole" but "was removed from said Folsom Prison by the authorities of New Mexico State Prison in their custody, and through and on account of extradition papers signed by the Governor of California". Equally applicable to the present case, the court said: "But as Marzec went to the New Mexico prison voluntarily under a conditional parole, this state's jurisdiction over him continued. When he later refused to comply with the condition which had been imposed upon him, and his parole was revoked, he became a fugitive from justice within the meaning of the federal extradition statute." In re Marzec, 25 Cal.2d 794, 799, 154 P.2d 873, 874.

[8] In the present case, the evidence fully supports the referee's finding that Kimler, in connection with his application

for parole, wrote a letter to Lyle Egan, who was then Clerk of the State Board of Prison Directors and Secretary to the Board of Prison Terms and Paroles, requesting a personal interview "relative to a detainer placed against" him. At the interview, Kimler requested that arrangements be made for his release from the Folsom Prison to be returned to the Illinois prison. On November 10, 1943, an agent of Illinois took delivery of Kimler who signed the "Ticket of Leave" and his letter of that date setting forth the conditions of his parole.

[9, 10] Considering these facts, it is clear that Kimler went to the Illinois prison voluntarily under a conditional parole, and this state's jurisdiction over him continued. In re Marzec, supra. He might have rejected the offer of parole, but once having elected to accept parole, he is bound by the express terms of the conditional release. In re Tenner, 20 Cal.2d 670, 674, 128 P.2d 338.

The exceptions to the findings of the referee are overruled, and his determinations are adopted as the findings of this court.

The order to show cause is discharged, and the application for the writ of habeas corpus is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In this case the following situation is presented. In 1936 petitioner was convicted in this state on several counts of extortion and kidnapping for the purpose of extortion and sentenced to three life terms to run concurrently. He served in a prison in this state until November, 1943. When he was convicted here, he was under parole commencing December, 1928, from Illinois, having been convicted of forgery in that state. The Illinois authorities had revoked his Illinois parole and filed a detainer request with the California prison authorities, inasmuch as his Illinois term had not been completely served. In March, 1943, the California authorities decided to parole petitioner, and in November did so, to the custody of Illinois, where he would continue to serve the Illinois term. The condition of the parole was that upon release by Illinois, petitioner would contact the California parole officer and abide by his instructions. The state does not deny that no detainer of petitioner was filed with the Illinois prison authorities. Petitioner was released by Illinois in 1947, and upon his refusal to submit himself to California parole officers, his parole was revoked. He went to Missouri where, after being taken into custody pursuant to extradition proceedings instituted by California, he was ordered released from custody by a Missouri court in habeas corpus proceedings. (Those proceedings are later discussed herein.) He went to Oregon, then to Washington, from which state he was finally extradited to California, where he is now held to complete his term since he violated his parole.

The majority opinion asserts that the judgment in habeas corpus proceedings releasing Kimler in Missouri is not res judicata because the same issues are not involved and the Missouri court did not have jurisdiction to decide the issues. Neither of those propositions is correct.

In connection with the Missouri habeas corpus proceedings, it is clear that the same issues were involved as are now presented, that is, the waiver by California of further jurisdiction over petitioner rather than, as claimed by the state, the sufficiency of the warrant in the Missouri extradition proceedings.

In the Missouri case, petitioner alleged in his application that he was being held on a warrant for violation of his California parole; that the Governor had issued a warrant for his arrest pursuant to extradition proceedings on the basis that petitioner was a fugitive from justice; that he was not a fugitive from justice for he was convicted and imprisoned in California, then he was granted what was "termed" a parole into the custody of the Illinois authorities and taken by them to Illinois; that no "hold order" was placed by California with the Illinois authorities; that when California "attempted to parole him into the custody of the Illinois authorities, that this act upon their part operated as a complete pardon for the crime he was sentenced for in California and served 7 years thereof, and that they have no right or authority under the law or under the Constitution of the United States to extradite him as a fugitive from justice; that he has committed no crime since his release from the California State Penitentiary or the Illinois State Penitentiary, and is living the life of a clean, honest citizen, and for the State of California to be permitted to bring him back there and serve in the Penitentiary for the rest of his natural life would be cruel and inhuman punishment after once having pardoned him for his offense." No contention was made that the request or warrant in the extradition proceedings was insufficient.

The return to the application for the writ rested on the extradition papers and that Kimler was a fugitive from justice.

The stipulated facts joined in by the extradition agent for California set forth the events heretofore mentioned, including the parole papers. They show that Kimler was convicted and imprisoned in California; that he signed the parole ticket of leave to Illinois; that thereafter he "was taken by officers and agents of * * * Illinois who handcuffed him and took him from the California State Prison at Folsom, with the consent and acquiescence of the parole authorities of California and returned him to * * * Illinois where he was again incarcerated in the Illinois State Penitentiary at Joliet until about the 9th day of July, 1947, when he had completed his sentence and was then discharged by the State of Illinois"; that he refused to submit to the parole officers in Missouri or accept a California parole.

At the hearing it was shown that Kimler had already been convicted of the crime in California, rather than being merely charged with it; that a detainer notice had been filed by Illinois with the California prison authorities and no parole could be granted when such was the case. The judge questioned the California agent in regard to whether Kimler was only charged or had already been convicted, asking: "So he has already been tried and there has been a judgment on him, and the parole was based on that? From this Warrant it would appear there was a new charge against him. * * * I suppose there is not any question but that this is not a new requisition on a new complaint, but a requisition on this old matter?

"Mr. Brennan (California agent): That is right.

"Mr. Hough: That is agreed, your Honor. There is nothing pending against him in the State of California, except that which has already been adjudicated.

"The Court: The Court orders the discharge of the petitioner from custody."

The plain inference is that the judge wanted to make clear that there was not a charge against Kimler other than the one of which he was convicted, thus indicating that he felt Kimler's claim that California had waived any further claim over him under the conviction was well taken, and, as there was no new charge, the prisoner should be discharged for he was not a fugitive from justice. This is further evinced by the judge's judgment of discharge where he stated: "The Court finds that the *facts* and *circumstances* are not sufficient to justify the surrender and extradition of the petitioner to the State of California and no sufficient *cause for the detention* of the said petitioner appearing, it is ordered by the Court that the Writ of Habeas Corpus be *sustained and made permanent,* and that the petitioner, Charles Walker Kimler, be, by Arthur Mosely, Sheriff of St. Louis County and Joseph B. Brennan, Agent of the State of California, discharged from imprisonment and detention for the cause aforesaid." (Emphasis added.) The "facts and circumstances" referred to in the judgment indicate the delivery of Kimler to Illinois without any detainer other than some defect in the extradition warrant, and the judgment is presumed to be responsive to the claim made in the application. We may presume that the judgment was based upon the claims made in the pleadings rather than an unmentioned ground. See, Woolverton v. Baker, 98 Cal. 628, 33 P. 731. Moreover, in considering the queries by the judge concerning whether the extradition was based on an old or new charge, it has long been the practice to treat a parole violator as a person charged with a crime in extradition proceedings. See, In re McBride, 101 Cal.App. 251, 281 P. 651, cases cited 78 A.L.R. 424; 22 Am.Jur., Extradition, § 25.

Thus, I have presented and decided in favor of Kimler in the Missouri proceedings the question of whether the delivery of Kimler to the Illinois authorities by California under the circumstances established that California had relinquished any further claim over Kimler even though he signed the ticket of leave. See similar question considered: In re Marzec, 25 Cal.2d 794, 154 P.2d 873; In re Whittington, 34 Cal.App. 344, 167 P. 404; and People ex rel. Barrett v. Bartley, 383 Ill. 437, 50 N.E.2d 517, 147 A.L.R. 935.

The agent designated by California to receive Kimler in the Missouri extradition proceedings was active and participated in the habeas corpus matter. Although he did not have actual custody of Kimler (he was being held by a Missouri sheriff), he was named a respondent therein. He joined in the stipulation of facts and testified at the hearing. Under these circumstances, California was adequately represented in the habeas corpus cause.

The discharge of Kimler in Missouri must be treated as res judicata on the issue above mentioned, that is, that there is no longer any basis for California to imprison Kimler arising from his conviction here, and therefore he is entitled to a discharge in this proceeding. The general policy of treating a discharge in habeas corpus as final has been established. "No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

"1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense, by legal order or process;

"2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense." Penal Code, § 1496. In the instant case it is clear that the Missouri proceeding does not fall within either of the two exceptions. It was not a case where the accused was discharged from custody for some defect in the process or trial proceedings. Further it is stated: "Every person who either solely or as a member of a court knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor." Penal Code, § 363. This court has said on the subject: "A judgment of discharge upon habeas corpus may or may not be res adjudicata, but this will depend wholly upon the questions necessariy determined in the decision upon the writ. The rights of prisoners under the writ of habeas corpus were first crystallized in the English habeas corpus act of 31 Car. II, c. 2. By section 6 of that act for the prevention of unjust vexation by reiterated commitments for the same offense it was enacted 'that no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.' In this there was not only no recognition of the principle here contended for by petitioner, but there was a distinct recognition of the contrary, in that it is declared merely that he cannot be again imprisoned for the same offense 'other than by the legal order and process of such court,' etc. And in Attorney General [etc.] v. Kwok-A-Sing, L.R. 5 P.C. 179, where a Chinese coolie was discharged the second time upon habeas corpus, solely upon the ground that he had been committed a second time for the same offense, contrary to the sixth section of 31 Car. II, c. 2, the privy council, speaking by Lord Justice

Mellish, said they could not agree with the construction which the chief justice put upon this section of the statute: 'The principal object of the section seems to have been to prevent persons who had been brought up on a writ of habeas corpus, and discharged on giving bail and entering into their own recognizance, from being again arrested for the same offense, and obliged to sue out a second writ. This appears from the provision by which the person discharged may be again arrested by the order of the court, wherein he shall be bound by recognizance to appear. * * * Though I think, however, it [section 6] can only apply when the second arrest is substantially the same cause as the first, so that the return to the second writ of habeas corpus raised for the opinion of the court the same question with reference to the validity of the grounds of detention as the first.' This is but another way of stating the proposition that the discharge upon habeas corpus operates as a bar and estoppel only as to the particular proceeding or process under review, and it is res adjudicata only upon the same question presented under the same state of facts. Thus it has been held that a discharge upon habeas corpus for failure of proof does not bar further prosecution upon another indictment. In Re Crandall, 59 Kan. 671, 54 P. 686, it is accordingly held that, where a court discharges a petitioner because no offense was alleged for which he could be prosecuted, its order not only restores him to liberty, but terminates pending proceedings against him, and he cannot be again arrested or held in custody unless a new prosecution is instituted against him. So, in State v. Holm, 37 Minn. 405, 34 N.W. 748, it was held that a discharge upon habeas corpus for defect of proof merely terminates the particular proceeding, so that the party cannot be further prosecuted except by a new proceeding instituted upon sufficient evidence. And in the case of In re White, C.C., 45 F. 237, it is said: 'To support the plea of res adjudicata, the burden was upon the relator to show that some issue had been heard and determined in his favor in the prior [habeas corpus] proceeding, of such nature as to constitute an estoppel upon a reinvestigation of the same question. * * * In the absence of evidence, either upon the face of the record or from extrinsic sources, showing the prior discharge from arrest granted the relator was based upon a hearing and determination of some material issue, like that of identity, it cannot be held that anything is shown creating an estoppel against the proceeding now pending for the arrest and removal for trial of the relator. * * *'" In re Begerow, 136 Cal. 293, 297, 68 P. 773, 775, 56 L.R.A. 528. A similar view has been expressed in other jurisdictions, including Missouri. See, Ex parte Messina, 233 Mo.App. 1234, 128 S.W.2d 1082; United States v. Chung Shee, 9 Cir., 76 F. 951; In re Crandall, 59 Kan. 671, 54 P. 686; 25 Am.Jur., Habeas Corpus, § 157; 2 Freeman on Judgments, § 827, p. 1759 et seq. For illustration, in Ex parte Messina, supra, the Missouri court was concerned with a prisoner who was held pursuant to extradition proceedings by the Missouri police on warrant of the Governor of that state at the request of the Governor of Kansas. The Kansas agent appeared. The prisoner sought habeas corpus and pleaded a release on a writ obtained eight years previous on similar extradition proceedings where it was found that the prisoner was not a fugitive from justice, for he had not been in Kansas at the time of the crime. His plea was upheld, no new facts appearing.

The majority opinion relies upon State ex rel. Cooney v. Hoffmeister, 336 Mo. 682, 80 S.W.2d 195, but as seen above, Ex parte Messina, supra, is a later and controlling decision. I think it is clear, therefore, that the Missouri court did have jurisdiction and did decide the pertinent issue. Its adjudication should be respected. No reason for ignoring it is given.

I conclude, therefore, that a discharge in habeas corpus under the circumstances here presented, if made either in California or Missouri, would be res judicata in another proceeding in the same state.

It is the general policy of this state to give conclusive effect to the judgments of sister states. "The effect of a *judicial record of a sister state is the same in this* *state as in the state where it was made,* except that it can only be enforced here by an action or special proceeding * * *." Code Civ.Proc. § 1913. See, Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264; Gilmer v. Spitalny, 84 Cal. App.2d 39, 189 P.2d 744. And the writ of habeas corpus is the writ of freedom and where there has been a discharge thereunder, the prisoner should not be further harassed under the same set of circumstances. The State of California actively participated in the Missouri court proceedings and I assume that court applied California law in arriving at its conclusion. There is, therefore, no reason why the Missouri judgment should not be given binding effect.

There are cases which have said that a discharge through habeas corpus in another state will not be given effect in the state where the accused is charged with a crime. See, Ex parte Silverman, 69 OhioApp. 128, 42 N.E.2d 87; State ex rel. Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811, 85 A.L.R. 114; Letwick v. State, 211 Ark. 1, 198 S.W.2d 830. In the Silverman and Letwick cases, the question of waiver of further right to punish the prisoner was not involved. The issue in the asylum state habeas corpus proceedings was whether under the conditions *then* existing the prisoner was lawfully in custody. They did not concern a situation such as we have here where the conditions and issues are identical. Nor were the same issues presented in the Wall case, where the court relied on the premise that the discharge would not be res judicata in the asylum state. As we have seen, it would be res judicata in Missouri, the asylum state here, as well as in California, the demanding state.

Similar comments are applicable to the general rule that a discharge on habeas corpus from custody grounded on extradition proceedings does not bar subsequent arrest, for in those cases the release is bottomed on some defect in the extradition proceedings such as the warrant or otherwise, and naturally when those defects are corrected, the second habeas corpus proceedings involve new issues and different facts. Whatever may be the usual rule, I see no valid reason for not giving conclusive effect to the Missouri judgment here where the issues are identical, the proper law was applied, and this state was adequately represented.

It has been held in the federal courts that habeas corpus was not available to release a prisoner held on an extradition warrant where the grounds claimed were that he would be given unconstitutional treatment if the prisoner were returned to the demanding state. United States ex rel. Farris v. McClain, D.C., 42 F.Supp. 429; Johnson v. Matthews, 86 U.S.App.D.C. 376, 182 F.2d 677. But the contrary has also been held. Johnson v. Dye, 3 Cir., 175 F.2d 250, reversed for failure to exhaust remedies in state court, Dye v. Johnson, 338 U.S. 864, 70 S.Ct. 146, 94 L.Ed. 530; see Harper v. Wall, D.C., 85 F.Supp. 783; Application of Middlebrooks, D.C., 88 F. Supp. 943; Ex parte Marshall, D.C., 85 F. Supp. 771. The court in Johnson v. Matthews, supra, seemed to think it did not have jurisdiction but here the Missouri court took jurisdiction and decided the identical issue now presented, and there is no reason why we should ignore its adjudication in view of the strong policy of this state to give "full faith and credit" to judgments of sister states. The Matthews case does not hold, as has been suggested, that a court in an asylum state could not constitutionally have jurisdiction to decide the issue of whether the demanding state has waived all claim to the exaction of further penal punishment. While it may not be customary to settle such an issue in habeas corpus proceedings in the asylum state following the initiation of extradition proceedings, yet that question was presented here with this state participating and was decided. The policy arguments with respect to extradition might well have been advanced by California in the Missouri proceedings, but were not. Now we have the solemn adjudication of Missouri—a sister state—and the settled policy is to recognize that adjudication. In the interests of interstate harmony, it should not be disregarded.

I would therefore release petitioner from custody forthwith.

37 Cal.2d 629

PEOPLE v. BUCKOWSKI.

Cr. 5200.

Supreme Court of California, in Bank.
July 27, 1951.

Stanley Buckowski was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of first degree murder and there was an automatic appeal. The Supreme Court, Shenk, J., held that the evidence was sufficient to the conviction.

Affirmed.

1. Criminal law 🔑586

The granting of a continuance normally rests in discretion of trial court.

2. Criminal law 🔑598(1)

In homicide prosecution, where defendant offered no explanation as to why in due diligence he could not have obtained the requested information prior to the trial, trial court did not abuse its discretion in refusing to grant a continuance until defendant acquired desired information.

3. Criminal law 🔑661

In homicide prosecution, where ballistics expert testified that markings were identical to those found on fatal bullet and those bullets had been fired by gun found in defendant's apartment, fact that photographic enlargements of bullets compared by ballistics expert were not introduced in evidence, was not error, since no more direct evidence of conclusions of expert was necessary than his oral testimony in connection with bullets themselves. Code Civ.Proc. § 1963, subd. 6.

4. Criminal law 🔑361(1)

In homicide prosecution, where defendant admitted that he was a professional burglar, and it was shown that certain scars on palm of his hand had developed as a result of a burglary committed subsequent to time of homicide, no error was committed in admission of evidence to explain why certain scars on palm of defendant's hand could not have appeared on prints found at scene of crime.

5. Criminal law 🔑407(1)

In homicide prosecution, admission in evidence of a wire recording of statements made by defendant's wife prior to trial was admissible not for purpose of proving truth of statements therein but as an accusatory statement in light of which the defendant's conduct was probative.

6. Criminal law 🔑414

In homicide prosecution, evidence failed to establish that certain statements made by defendant received in evidence resulted from duress.

7. Criminal law 🔑412(2)

The fact that certain statements made by defendant in a homicide prosecution were secured during an automobile ride with police officers did not of itself constitute evidence of duress in securing of statements. Pen.Code, § 4004.

8. Homicide 🔑253(1)

Evidence sustained conviction for first degree murder. Pen.Code, §§ 1181, 1239(b).

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

Stanley Buckowski and his wife were charged with the murder of Helen J. Edmunds on February 1, 1950. Each pleaded not guilty and waived a jury trial. They were jointly tried. The wife was acquitted but Stanley was found guilty of first degree murder and sentenced to death. A motion for a new trial made on all the grounds contained in Penal Code section 1181 was denied. This is an automatic appeal under Penal Code section 1239(b).

Helen J. Edmunds was approximately eighty years of age and lived alone in the City of Los Angeles. On the evening of February 1, 1950, a neighbor heard a sound like a gun shot followed by moaning. The following afternoon neighbors entered Mrs. Edmund's home and found her lifeless body on the bed. The rear screen door had been slashed in one corner; the glass panel of a second door was scratched and broken; telephone wires leading to the house had been cut; a living room desk had been ransacked. The autopsy surgeon testified that death was due to a gunshot wound.

Officers later found several guns in an apartment rented by the Buckowskis. A ballistics expert testified that one of these guns had fired the bullet which killed the deceased. A fingerprint expert testified that a palm print found on broken window glass at the home of the deceased was that of Stanley Buckowski.

The defendant testified that he had acquired the alleged lethal weapon over a month after the slaying while committing a burglary and that he had never been in the home of the deceased until taken there by police investigators. He declared that he had committed burglaries too numerous to mention but that it was never his practice to cut telephone wires, to break windows, or to ransack but a single desk. He testified that he felt that if he had the opportunity he could disprove all the evidence produced, but added that in view of the fact that his wife had told officers that he left her outside while he entered the home of the deceased he could only say that if he had committed the crime he did not remember it.

[1,2] Prejudicial error is asserted in the denial of the defendant's request for a continuance to secure a private investigator's assistance to establish the particular burglary in which he believed he had acquired the lethal weapon. The prosecution had offered to inform him as to the burglary date if he would otherwise describe the particulars, but he refused to give details. He offers no explanation as to why in the exercise of due diligence he could not have obtained the information prior to the trial. The granting of a continuance normally rests in the discretion of the trial court. People v. Collins, 195 Cal. 325, 233 P. 97. No abuse of discretion appears.

[3] The defendant contends that the evidence is insufficient to justify the verdict. He claims that according to the testimony of the ballistics expert the gun alleged to have been used marked each bullet fired in a different location. The same expert, however, testified that these markings were identical with those found on the fatal bullet and that that bullet had been fired by the gun found in the Buckowskis' apartment. The defendant argues that because photographic enlargements of the bullets compared by the ballistics expert were not introduced the presumption of Code of Civil Procedure section 1963(6) arises to the effect that higher evidence would be adverse where inferior evidence is produced. No more direct evidence of the conclusions of the ballistics expert was necessary than his oral testimony in connection with the bullets themselves.

There is testimony by an expert that palm prints are as reliable as fingerprints. This view is in accord with that expressed in State v. Kuhl, 42 Nev. 185, 175 P. 190, 3 A.L.R. 1694. The defendant calls attention to certain dissimilarities between the palm print found at the scene of the crime and the defendant's palm print. The expert testified that ten points of identity are conclusive evidence of identity and that he had found twenty-six such points. He stated that while dissimilarities had been considered in reaching his conclusion, differences in prints may be attributed to such factors as the presence of foreign matter and the slipping of the finger or palm. No testimony disputing that of the expert was offered.

[4] The defendant charges error in the admission of evidence to explain why certain scars on the palm of his hand could not have appeared on the print found at the scene of the crime. The testimony disclosed that the scars had developed as a result of a burglary committed subsequent to the time of the murder. The defendant contends that this evidence was irrelevant since the scarred portion of the palm was not included in the print found in the deceased's home. He argues that he was prejudiced by this revelation of the commission of another crime. Prejudice is not shown in view of the defendant's own testimony that he was a professional burglar.

[5] The defendant objected to the admission in evidence of a wire recording

of statements made by his wife prior to the trial. The recording was not admitted as to the defendant husband to prove the truth of the statements there made but as an accusatory statement in the light of which the defendant's conduct was probative. When sentencing the defendant the trial judge, who was here the trier of fact, stated that even if the recording and the defendant's reaction to it had not been admitted he would still conclude that the defendant's guilt had been conclusively established.

The defendant argues that evidence of his conduct and statements to investigating officers in the face of various accusatory statements should not have been admitted. This evidence was proper as an exception to the hearsay rule. The conduct of the defendant in the presence of the officers was sufficiently equivocal to permit its reception on the theory that it was not merely a denial or a refusal to talk. At times he remained silent. Occasionally his reply consisted of a declaration that he did not remember. In the light of other evidence none of these alleged errors in the admission of evidence would warrant a reversal.

[6, 7] The defendant contends that he was denied due process in that certain of his statements received in evidence resulted from duress. These statements were made during questioning by officers in which the defendant indicated that he was hungry, complained of a delay previously experienced in seeing an attorney, and he expressed the belief that he would not get a "fair deal." He made no attempt at the trial to offer evidence indicating duress. A witness who transcribed his statements testified as to their free and voluntary nature. Some of them were secured during an automobile ride with the officers. The defendant claims that his removal from jail for the purpose of this trip was not authorized under the provisions of Penal Code section 4004. Any failure to comply with this statutory requirement does not of itself constitute evidence of duress.

[8] The defendant contends that since there was no evidence that any property had been removed from the house it cannot be said that the person entering the house did so in the course of a burglary, and that the evidence was therefore insufficient to establish murder of the first degree. The conclusion that the homicide was committed in the perpetration of burglary could be reasonably drawn from the circumstances of the crime and the defendant's own admissions. The expert testimony sufficiently connected the defendant with the commission of the crime. The evidence was therefore sufficient to support the verdict.

The judgment and order are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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105 Cal.App.2d 382

GUTTINGER et al. v. CALAVERAS CEMENT CO.

Civ. 7865.

Sac. 6117.

District Court of Appeal, Third District, California.

July 12, 1951.

Rehearing Denied Aug. 10, 1951.

Hearing Denied Sept. 7, 1951.

Action by Albert Guttinger, and others against Calaveras Cement Company, a corporation, to enjoin a nuisance allegedly created by the operation by defendant of a plant for the production of cement. The Superior Court, Calaveras County, Ralph McGee, J., rendered judgment in favor of all plaintiffs for injunctive relief and in favor of five of them for damages and four of the plaintiffs appealed. The District Court of Appeals, Van Dyke, J., held that there was no error in instructing the jury on the measure of damages to be awarded and that the injunctive relief granted being sufficient to abate the nuisance complained of plaintiffs could not complain.

Judgment affirmed.

1. Nuisance 🔑50(2)

Where damage to realty as result of maintenance of a nuisance is shown to be temporary in character, measure of damages is difference in rental or usable value of premises before and after injury.

2. Damages ⚿40(3)

Where an established business has been injured or interfered with any loss of profits thus caused may be recovered.

3. Damages ⚿40(3)

To allow loss of profits from injury to an established business there must only have been operating experience sufficient to permit a reasonable estimate of probable income and expense but evidence must be introduced which proved probable income and expense and that showing must be made in respect to business as a whole.

4. Appeal and error ⚿882(13)

Where plaintiffs sought damages to land used by them for cattle raising and production of calves for market as the result of maintenance of a nuisance by defendant consisting of a plant for the production of cement but although plaintiffs were engaged in an established business they did not prove probable income and expense in respect of business as a whole for purposes of showing loss of profit measure of damages but plaintiffs data from which jury could apply loss of profits measure of damages but plaintiffs could not complain that court informed jury that it might use such a measure since it was requested to do so by plaintiffs themselves and proper measure of loss of rental value was used by jury.

5. Nuisance ⚿36

An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case.

6. Nuisance ⚿36

A decree enjoining a nuisance should specifically point out the things which defendant is required to do and to refrain from doing in order to abate nuisance which is found to exist and should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it, and, when practicable, it should plainly indicate to defendant all acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ.

7. Nuisance ⚿36

Where trial court determined that operation of defendants cement producing plant and the discharge of dust and gases therefrom constituted a nuisance to plaintiff landowner and formulated a decree enjoining the maintenance of a nuisance on the proposition that escape of 13% of dust which would, without any regulatory device, be emitted from defendant's stack would not be injurious and if dust's omission were held to that percentage of total just complaints of plaintiff would be met and satisfied, injunctive decree afforded plaintiffs that relief to which they were entitled.

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Mazzera, Snyder & DeMartini, Stockton, for appellants.

Huberty & Huberty, San Andreas, for respondents.

VAN DYKE, Justice.

This was an action brought to enjoin a nuisance. Originally there were six plaintiffs. Judgment was given in favor of all of them for injunctive relief and in favor of five of them for damages. Four of the plaintiffs have appealed. They are Albert Guttinger, Louis B. Joses, Frank and Colombo Oneto. The defendant for long has operated in the vicinity of plaintiffs' lands a plant for the production of cement. During 1946 and 1947 the capacity of the plant was extended by the addition of a third kiln to the two already operating. Through this means and the increased use of the existing kilns the production of the plant was greatly increased. In 1945, 1,188,000 pounds of cement were produced and in 1948, 1,825,000 pounds were produced. In 1937 a two unit Cottrell precipitator was installed to reduce the amount of dust and gases being discharged into the surrounding atmosphere from the stack. Prior to the trial the defendant started to install an additional precipitator unit and it was testified that it would be in operation shortly after the close of the trial. During the period of increased activity in cement production and up to the time of trial dust and gases escaping from the stack were carried over and deposited upon portions of each plaintiff's land and the testimony was sufficient to sustain findings of the jury that damage was caused and to sustain the determination by the court that the method of operation constituted a nuisance. The jury awarded damages to appellant Guttinger in the sum of $3,439.75, to appellant Joses in the sum of $660, and to appellants Frank and Colombo Oneto in the sum of $2,298.80. The trial court rendered judgments in those sums and also granted injunctive relief. It commanded the defendant to desist and refrain, after June 30, 1949, from permitting stack dust or raw mix in powdered form to be discharged from its stack "in excess of thirteen per cent (13%) of all flue dust and/or raw mix in powdered form which would, or could, be emitted or discharged from defendant's said Kilns, or any thereof, in the absence of any dust collecting or precipitating device." It further ordered that in determining the quantity of discharge "the method used shall be that described in Bulletin WP 50 entitled 'Methods for Determination of Velocity, Volume, Dust and Mist Content of Gases', published by Western Precipitation Corporation, or other equally reliable, accurate and approved method of determination." The court further ordered that the defendant keep in continuous operation all three units of the precipitator during the operation of any two or more of the kilns and not less than two units of the precipitator during the operation of not more than one of the kilns; that defendant keep each precipitator unit in good operation condition in order to provide "within reasonable limits, maximum operating efficiency, and with a dust recovery efficiency of not less than eighty-seven per cent (87%) at all times." The court allowed a reasonable time, not exceeding a total of ten days in any calendar year, for upkeep and repair purposes, during which intervals the defendant was not to be subject to the restraints imposed.

Appellants, dissatisfied with the damages awarded and the restraints imposed, contend: 1. That the court committed prejudicial error in instructing the jury upon the measure of damages, and, 2. That the court did not grant a workable or sufficiently restrictive injunction.

It was shown that each of the plaintiffs was and for long had been engaged in cattle raising and particularly in the production of calves for market, and that in this business they used the injured lands for grazing purposes, which purposes, from the evidence, appears to be the highest and best use for which these lands are adapted.

The action was filed in March of 1948, and recovery of damages was sought from a date three years anterior thereto up to the time of trial. Plaintiffs claimed damages as follows: For interference with the use of the affected lands for grazing purposes; for permanent damage thereto; for damage to the improvements thereon; for cost of rehabilitation by burning over the property; for injury to the cattle through consumption of the deposited material along with the herbage, and for discomfort and annoyance in their personal use of their property. During the course of the trial, appellants withdrew all claims for permanent damage to the land. The question of the amount of damages suffered through damage to improvements, for rehabilitation, for direct injury to cattle, and for discomfort and annoyance were submitted to the jury upon instructions as to which no objections are here made. But the parties were in disagreement throughout the trial as to the proper measure of damages suffered by loss or diminution of use of the property for grazing purposes. The court gave the basic instruction contained in Section 3333 of the Civil Code, that for the breach of an obligation not arising from contract the measure of damages is the amount which will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not, and neither party objects thereto. But more specifically, the court instructed the jury with respect to the measure of plaintiffs' damages from loss of pasturage as follows:

"The elements entering into this damage are the following:

"(1) The extent to which the plaintiffs' use of their respective ranches for grazing purposes has been interfered with or denied, if at all, since March 15, 1945. To prove this element of their damage, plaintiffs have offered evidence tending to show the reasonable value of their loss of income from the cattle business carried on by them on these ranches during the period involved. On the other hand, the defendant has offered opposing evidence tending to show the difference in the fair rental values of the ranches affected, with and without the injury, if any, caused by the defendant. Both of these methods of measuring damages are approved by the law, and both or either may be considered by you, in the event you undertake to fix the amount of damages. Should you adopt the 'loss of income' method, I instruct you that loss of income, or, in other words, loss of net profit, can be ascertained only by a full calculation of all the costs of production, properly chargeable to the business of raising cattle. Should you adopt the 'fair rental value' method, I instruct you that fair rental value in the amount, in terms of money, that the property would rent for if put upon the open market and rented in the manner in which property is ordinarily rented, for cash, in the community where it is situated, with a reasonable time being given to find a tenant or renter, and to make the rental arrangement, and having in mind all the purposes to which the property is adapted."

Pursuant to their theory that the plaintiffs were conducting long-established businesses in part upon the property damaged and were entitled to recover loss of profits from their businesses caused by diminution of the productivity of their lands, the plaintiffs asked the court to instruct the jury that they should award "The reasonable value of the loss of income from any real property belonging to the plaintiffs, or any of them, affected by such cement dust, smoke and/or chemicals, if any, during the period of time that said nuisance has been maintained not to exceed three years prior to March 15th, 1948." Throughout, the defendant contended, and here contends, that the proper measure of damages was the loss of rental value.

[1] We think so hard and fast rule can be laid down in cases such as this. The code section cited rather describes the desired result, just compensation for injuries suffered, than a method of reaching that result and generally it will be proper, if not necessary, in the trial of an action of this sort for the court to give to the jury some more workable method for measuring damages than the broad language of the code section. There was no permanent injury to the real property here. Had there been, then, according to the majority of decisions on the subject, the damage would have been measured by the depreciation in the market value of the property injured. (39 Am.Jur. 396.) But the damage here was shown to be temporary in character and in such cases the general rule is that the measure of damages is the difference in the rental or usable value of the premises before and after the injury. (39 Am.Jur. 397.)

[2] Appellants, through their evidence, approached this matter of damages from the standpoint of an interference with an established business, that of cattle raising, and it is well settled in this state that where an established business has been injured or interfered with any loss of profits thus caused may be recovered. California Orange Co. v. Riverside Portland Cement Co., 50 Cal.App. 522, 195 P. 694; Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 199, 143 P.2d 12, 17. In the case last cited the court said: "In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. [Citing cases.] If, however, there has been operating experience suffi-

cient to permit a reasonable estimate of probable *income* and *expense,* damages for loss of prospective profits are awarded. [Citing cases.] In the present case plaintiff's probable gross receipts could be estimated from its sales in the preceding two years, in view of the evidence that prices were stable. Its unit costs could be estimated on the basis of detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties for the limited operations carried on in 1938. Its plant capacity was conservatively estimated at 90 tons per day, since plaintiff's old plant, using the 'carbonating process' had a proved capacity of from 35 to 40 tons a day, and the capacity of the new 'Mono Process' plant had been increased from 50 to 100 tons a day. Awards of prospective profits have been sustained on the basis of much less satisfactory evidence. [Citing cases.] Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated." (Italics added.)

[3] The proof is clear that appellants herein have for long been engaged in an established business. The case, therefore, was one which would warrant recovery of damages measured by loss of profits. But when we speak of loss of profits caused by injury to an established business we are speaking of the business as an operating unit. It appears without conflict that each of the appellants operated a cattle business upon land areas owned or rented by them greatly exceeding in total the acreage affected by defendant's tort. Therefore it would not necessarily follow that because through that tort they had been deprived of the full pasturage use of a portion of the area used in conducting their business that they would have suffered any loss of gross income. They may have been put to greater cost to produce that gross income, in which event they would have been damaged by the amount of that greater cost. Notwithstanding the diminished pasturage value of the affected lands, their gross production of cattle for market may have been equally great and none of the appellants proved anything to the contrary. What they proved was that upon the affected areas they were able before the same was injured to pasture for portions of the year a certain number of range cows and that these cows so partially maintained upon the affected lands would have produced a certain number of calves which would have become available for the market, but they did not prove that this loss of gross income actually occurred. To allow loss of profits from injury to an established business there must not only have been "operating experience sufficient to permit a reasonable estimate of probable income and expense", but evidence must be introduced which proves the probable income and expense and this showing must be made in respect of the business as a whole. Such a showing the appellants did not make. If the proof be insufficient to enable the jury to arrive at a conclusion based upon loss of profits, then the general rule of damages would have to be applied which, as we have stated, is the difference in the rental or usable value of the land before and after injury. Aside from this, it must be said further that the trial court, when it modified the requested instruction upon loss of profits, committed no error. The appellants had asked the court to instruct the jury that in measuring the damages caused by injury to the use value of the land they should find "the reasonable value of the loss of income from any real property belonging to the plaintiffs" affected by the cement dust and to this the court added the qualification that in using that measure of damage they must ascertain all of the cost of production properly chargeable to the business of cattle raising. The court might have added that they were also to ascertain the fairly estimated gross income of the business before and after injury and subtract therefrom the costs as so ascertained, but the qualification which the court did add to the instruction was correct so far as it went and the court probably considered that further instruction upon how to arrive at profit was not necessary.

[4] From what we have said it is clear, first, that the evidence did not contain sufficient data from which the jury could apply the loss of profit measure of damages. But

appellants cannot complain that the court informed the jury that it might use such a measure since it was requested to do so by the appellants themselves. The proper measure to have been used under the record here was that of loss of rental value and the jury were instructed that such a measure was usable and were given amplifying instructions as to the matters to be considered in the use of it.

Appellants complain further that rules of damage are matters of law and that the court erred in telling the jury that it could use either of the two rules—loss of profit to an established business or loss of rental value—and further telling them that they might use both. We are unable to see how the jury could use both as each rule, if used, affords complete compensation and leaves no room for the operation of another measure of damages. But to say that the court should not have told the jury that they might use both rules is not to say that prejudicial error was committed in the instant case. Appellants have been at pains to point out that "from the size of the verdicts it is quite apparent that the jury based their award of damages upon diminution of rental value rather than the loss of calf crop or loss of net income from the businesses" and we think that such is, in truth, apparent from the record. However, if that be true, then we may safely assume, since the diminution of rental value was the true measure here which ought to have been applied, that no damage has been caused by the alternative form of instruction which the trial court gave.

[5, 6] Appellants next contend that the injunctive decree was erroneous and did not afford to the successful plaintiffs who had proved the maintenance of the nuisance alleged the just relief to which they were entitled. We have hereinbefore quoted the essential provisions of that decree. The appellants as plaintiffs asked that the respondent be permanently enjoined from causing any dust, smoke or chemicals to be deposited upon their lands. This extreme restraint was not imposed by the trial court. On the contrary and upon substantial evidence the trial court determined that some dust, smoke and chemical gases could be discharged from the respondent's stacks without injury to appellants and we do not understand appellants to contend that this determination was not correct. Having so determined, the trial court was thereby of necessity required to formulate a practical decree which would restrain respondent from maintaining a nuisance and yet permit the operation of its plant with as little interference as was reasonably practicable. This we think the trial court clearly attempted to do and succeeded in doing.

"An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. * * *

"* * * A decree enjoining a nuisance should specifically point out the things which the defendant is required to do and to refrain from doing in order to abate the nuisance which is found to exist. It should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it, and, when practicable, it should plainly indicate to the defendant all the acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ." (39 Am.Jur. Sec. 171, pp. 442–443.)

For example, in Carter v. Chotiner, 210 Cal. 288, 291 P. 577, in an action brought to restrain the use of certain property for cemetery purposes upon the ground that such use would be a nuisance, the court enjoined the respondents interring any bodies within a strip forty feet wide from the boundaries of the cemetery property, which form of restraint was upheld on appeal. In Gelfand v. O'Haver, 33 Cal.2d 218, 222, 200 P.2d 790, 792, the court said: "There can be no doubt that an injunction must not be uncertain or ambiguous and defendant must be able to determine from it what he may and may not do."

[7] It was proper, therefore, for the trial court to endeavor from the evidence before it to formulate a decree which would be workable and which would abate the nuisance shown to exist. The court's de-

cree is formulated upon the proposition that the escape of 13% of the dust which would, without any regulatory device, be emitted from respondent's stack would not be injurious and that therefore if the dust's emission were held to that percentage of the total the just complaints of appellants would be met and satisfied. As we have said, there was evidence to support such a finding. For instance, there was evidence that the dust was objectionable when the cement plant first went into operation and remained that way until in 1938 when a precipitator was put on, whereupon the condition cleared up and did not become bad again until 1945. There was evidence also that within a few weeks after the conclusion of the trial an additional precipitator would go into operation and reduce the escape of dust to non-injurious quantities. There was evidence further that no damage had been done to soil by the dust that had been spread and that damage to grass was relatively slight; that the loss of pasturage on the affected area was due in part to other causes than dust from respondent's plant. It is not necessary to labor the point further. The trial court, while finding that a nuisance was being maintained, also found impliedly that the restriction imposed by the decree would eliminate the nuisance and that was all to which the appellants were then entitled. If further increase of cement production shall lead to a greater total volume of dust and gases, so that 13% thereof would be injurious, the court will be open to entertain a motion to extend the restrictions and adapt them to the new conditions. We do not understand the court's decree to adjudge that respondent has something in the nature of an easement for the deposit upon the appellants' lands of 13% of the total amount of dust and gases generated in the conduct of its business, but rather that the court has taken the situation as it found it and undertook to impose workable restrictions that would eliminate the injury for the present. There is nothing in the record that would require any change in that decree in the present or in the near future. The court of course retains jurisdiction over the cause to modify its decree from time to time to fit changing conditions.

The judgment and the order appealed from are affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

HIXSON v. HIXSON.

Civ. 18488.

District Court of Appeal, Second District,
Division 2, California.
July 18, 1951.

Rehearing Denied Aug. 6, 1951.

Hearing Granted Sept. 13, 1951.*

Action by Claranita B. Hixson against Robert M. Hixson for divorce. The divorced husband filed a motion to modify the divorce decree with respect to payments to be made to the wife. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., modified the decree, and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that, where husband and wife entered into property settlement agreement which was incorporated into interlocutory divorce decree, and decree provided, pursuant to agreement, for payment to wife of certain sum for certain period and for lesser sums in subsequent years, and decree contemplated that children would reside with mother during minority, and children voluntarily returned to the father's home, modification of divorce decree so as to require wife to make certain payments for support of each child while residing with father or to permit husband to set-off such payments under decree, was improper.

Order reversed with directions.

McComb, J., dissented.

1. Divorce 🔑309

Where husband and wife entered into property settlement agreement which was incorporated into interlocutory divorce decree and decree provided, pursuant to agreement, for payment to wife of certain sum for certain period and for lesser sums in subsequent years, and decree contemplated that children would reside with mother during minority, and children voluntarily returned to father's home, modification of divorce decree so as to require wife to make certain payments for support of each child while residing with father or to permit husband to set-off such payments due wife under decree, was improper.

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* Subsequent opinion 240 P.2d 586.

2. Divorce ⚷254

The trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory divorce decree which is res judicata with respect to all issues determined.

3. Husband and wife ⚷39

A husband and wife may contract with each other with respect to their property rights and the support of each other.

4. Divorce ⚷254

A divorce decree adjusting property rights of husband and wife is not subject to modification regardless of whether or not it is based upon agreement of parties.

5. Divorce ⚷245(2)

A property settlement agreement of periodical payments to be made to wife, when approved by the court in its decree, will not be subsequently modified, except by consent of parties.

◆

Stanley N. Gleis, Beverly Hills, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the superior court may modify a decree of divorce by reducing the amount of the payments to the wife on the ground that two of the three children voluntarily returned to the home of their father, the amounts of such payments having been fixed by the property settlement agreement and such provision having been incorporated in the decree.

The interlocutory judgment was filed March 11, 1949. It approved the formal written "property settlement agreement" of the parties made 18 days previously which agreement was "marked exhibit A and made a part hereof by reference to said exhibit is hereby approved in full, and each of the parties is ordered to perform each, every and all of the provisions on her or his part provided to be performed."

[1] The agreement contained the following: "It is the desire and understanding of both of the parties hereto that this Agreement shall be a final determination of all of their present or future obligations, one towards the other, insofar as community or separate property rights are concerned, or of the obligation to support or maintain the other, or to be in any wise obligated financially by reason of the said marriage relationship or by reason of any contracts either of the parties hereto may now be under obligation to meet, except as set forth herein or of any demand for support, maintenance, or alimony from the beginning of time or forever." The decree provided, pursuant to the agreement, for payment to the wife, appellant herein, of $7,200 per year for a period of four years in equal monthly installments of $600, and for lesser sums in the subsequent years.

In November, 1950, pursuant to an order to show cause served upon appellant, the court below heard evidence upon the issue raised by the new controversy and found that the interlocutory decree contemplated that the children would reside with plaintiff during their minority; but since September 23, 1950, Robert and Sim, ages 18 and 14, have voluntarily resided with defendant and intend to continue to do so; the reasonable sum necessary for their support is $100 a month for each. Thereupon, it was ordered that plaintiff pay to defendant for the support of each child while residing with him "$100 per month per child and * * * that said payments may be set-off by defendant against any payments due plaintiff by defendant pursuant to the decree of March 11, 1949."

Such a modification was error. The parties had made a solemn and permanent settlement of their mutual interests and community estate. By their agreement respondent was to make specified payments per month for four years and the court had approved by its decree the bargain they had made. That the children changed their minds was no cause for disturbing the judgment. Their change of sentiment could surely have no more potency than a change of desire on the part of respondent who was a party to the agreement. If his wishes could not alter the provisions of an agreement he had helped to create and to which he had pledged his faith, how may it be said that the whims, desires or needs of the two children effect a rescission? By the March contract the war and causes for war had been erased and a new status was created. After that document was signed and sealed the economy of the two households offered neither cause for dispute nor occasion for judicial pronouncements. Their community estate had by the agreement been "converted into separate property" to which the court gave its approval. By implication the writing promised there would be no change in its terms for 12 years when the court may, if not satisfied, modify the arrangement than in force whereby the husband is to pay the wife "not exceeding 10% of his net earnings."

[2-5] In Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697, 699, it was held that "the trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory decree" which is "res judicata with respect to all issues determined." In Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1, 2, a property settlement was effected by a writing after the divorce action was filed. They owned some property and had one child. They desired to "effect a complete settlement of the property rights between them, including the right of maintenance and support for the wife, and of the minor child of the parties hereto". Their contract contained many customary provisions found in property settlements. Some six years later the wife sought a modification of the divorce decree so that she might take the child to Arizona to attend school and the husband asked in return "because of his changed financial circumstances" that the $250 monthly allowance be reduced to $150. He appealed the order denying his motion. The court held, 21 Cal.2d at page 840, 136 P.2d at page 5, that (1) a husband and wife may contract with each other with respect to their property rights and the support of each other; (2) a divorce decree adjusting their property rights is not subject to modification regardless of whether or not it is based upon the agreement of the parties; (3) without regard to the effect upon the power to modify an agreement for alimony incorporated in the decree, a property settlement agreement for periodical payments to be made to the wife, when approved by the court in its decree, "will not be subsequently modified, except by the consent of the parties."

It is a doctrine familiar to all lawyers that there must be an end to litigation. If every order fixing the amount of support money for the wife that is entered in a divorce action should be reviewed on the occasion of every new desire on the part of either litigant, the increase of proceedings in chancery would soon upset the doctrine requiring a change in conditions as a prerequisite to a change of the judgment. These parties reached a definite, amicable adjustment of their differences. Their agreement was of their making. It was their decision and it concluded the question of custody and property division. Although nothing thereafter transpired by reason of any violation by appellant of the court's order, yet respondent takes the situation in hand, revamps the regimen established by his agreement and the court's decree, welcomes the boys to his home and asks the court to reduce the payments he was under contract to make. Such methods cannot be sanctioned if we maintain the integrity and dominance of the law.

That part of the order appealed from is reversed with directions to discharge the order to show cause and to dismiss the proceeding against appellant.

WILSON, J., concurs.

McCOMB, J., dissents.

Rehearing denied; McCOMB, J., dissenting.

105 Cal.App.2d 628

BIVENS v. HABER et al.
Civ. 18467.

District Court of Appeal, Second District,
Division 2, California.
July 25, 1951.

Rehearing Denied Aug. 8, 1951.

Hearing Denied Sept. 20, 1951.

Action by Fannie M. Bivens against Arnold Ivan Haber and another, for injuries sustained by plaintiff in an automobile accident. From a judgment for defendants in the Superior Court of Los Angeles County, Ellsworth Meyer, J., and from an order denying a new trial the plaintiff appealed. The District Court of Appeal, McComb, J., held that there was no prejudicial error in the giving or refusal of instructions and that the order denying a motion for new trial was not appealable.

Purported appeal from order denying motion for new trial dismissed. Judgment affirmed.

1. Appeal and error 🔑882(12)

A party may not complain of an error in an instruction given at his own request.

2. Appeal and error 🔑882(12)

Where both the plaintiff and defendant requested instruction and it was given by the trial court plaintiff could not allege error on appeal in the giving thereof.

3. Trial 🔑260(1)

Refusing plaintiff's requested instruction was harmless where the substance thereof was covered by instruction given at the request of plaintiff. Vehicle Code, § 560(a).

4. Appeal and error 🔑110

An order denying a motion for new trial in a civil action is nonappealable.

◆

Maurice J. Hindin and Robert E. Bivens, Los Angeles, for appellant.

Kenneth J. Murphy, Pasadena, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for injuries resulting to plaintiff who was struck by an automobile driven by one of the defendants and owned by the other, plaintiff appeals. There is also a purported appeal from the order denying a new trial.

Facts: About 7:30 p. m. on August 7, 1949, plaintiff was crossing the street within a marked crosswalk at the intersection of Sunset Boulevard and Hartford Way in Beverly Hills, California, when she was struck by defendants' automobile.

Immediately prior to the accident plaintiff had alighted from a bus on the south side of Sunset Boulevard and had entered the crosswalk, walking in a northerly direction across the boulevard. At the time she entered the crosswalk the green light was in her favor. Before she had completed the crossing, however, the signal changed.

Defendants' car, traveling in a westerly direction on the north roadway of Sunset Boulevard and following another car, which had been stopped awaiting the green signal, proceeded into the crosswalk when the signal light changed permitting traffic to travel in a westerly and easterly direction. The automobile in front of defendants' barely missed hitting plaintiff and the driver thereof shouted a warning to her. Thereafter defendants' car struck plaintiff.

Questions: First: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"At an intersection where traffic is controlled by an automatic signaling device, if a pedestrian starts to cross the street when the signal says 'Go' for his direction of travel, and if before he completes the crossing that signal changes to 'Stop', the law does not necessarily require that he retrace his steps or that he stand still until the signals change again, but only that he exercise ordinary care in meeting the situation at hand."

[1, 2] *No.* A party may not complain of error in an instruction given at his own request. (Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772.) In the instant case the record discloses that both plaintiff and defendant requested the foregoing instruction. Therefore this rule is

applicable and plaintiff may not allege error in the giving thereof.

[3] Second: *Did the trial court err in refusing plaintiff's request to give the following instruction?*

"You are instructed that at a signal-controlled intersection when a 'Go' signal is shown for pedestrian traffic, the pedestrian may not only lawfully enter the roadway, but may proceed across to the opposite side of the roadway, even though the signal changes before the pedestrian has completed his or her passage.

"You are further instructed that the pedestrian is entitled, not merely to just so much space as his or her body and clothes require, but to as much space as will afford the pedestrian a safe passage, one that can be taken without either physical interference or such a threat of interference as will reasonably cause the pedestrian to step back or hesitate in his going."

No. Plaintiff argues that because the jury was instructed that when a green light is exhibited for motorists, a vehicle shall yield the right of way to pedestrians lawfully in the crosswalk, and some doubt might have been present in the minds of the jurors as to plaintiff's legal right to proceed across the highway; that therefore she was prejudiced by the failure of the trial court to give the requested instruction.

This argument is invalid in the instant case for the reason that at plaintiff's request the trial court instructed the jury thus: "Another section of the Vehicle Code, Section 560(a) provides as follows: 'The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk, or within any unmarked crosswalk, at an intersection.'"

In view of this instruction it became unnecessary for the jury to determine whether plaintiff was "lawfully" in the crosswalk at the time of the accident for they were instructed that regardless of the legality of her presence, defendants were required by law to yield the right of way to her.

It therefore appears that the jury must have found that defendants were negligent and that either (a) plaintiff was contributorily negligent, or (b) the accident was unavoidable, and on such premise returned a verdict in favor of defendants.

[4] Since an order denying a motion for a new trial in a civil action is nonappealable the purported appeal from such order is dismissed.

Affirmed.

MOORE, P. J., concurs.

WILSON, J., concurs in the judgment only.

105 Cal.App.2d 679

PEOPLE v. CLEMISON et al.

Cr. 4606.

District Court of Appeal, Second District.
Division 1, California.
July 27, 1951.

Dunkin Clemison, Karl Alan Newgard and David Renek were charged with second degree burglary. The information against one defendant was dismissed and the other two, including first named defendant, were convicted in the Superior Court of Los Angeles County, Harry J. Borde, J., of burglary in the second degree and Dunkin Clemison, being denied probation, appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained conviction of burglary in the second degree for rifling coin boxes in pay telephone booths.

Judgment affirmed.

1. Criminal law 🔑404(4), 1169(1)

Pieces of bent wire which were found in defendant's possession at a previous time and were similar to wire found in automobile used by defendant at time of his arrest should have been excluded from evidence in prosecution for burglary of pay telephone booths in absence of evidence that the wires had been used to open the same locks, but admitting the wire in evidence without such proof was not reversible error under the facts of case.

2. Criminal law 🔑814(15)

Where trial court ruled at time accomplice's confession was admitted in evidence that it was not binding upon defendant and in general instructions advised jury to disregard confession and examine record to satisfy themselves that there was other evidence sufficient to connect defendant with commission of crime charged, refusal to give offered instructions that corroboration of testimony of accomplice could not be supplied by testimony of one or more accomplices, but must come from other evidence of circumstances or from testimony of witnesses who were not accomplices was not error.

3. Burglary 🔑41(1)

Evidence sustained conviction of burglary in the second degree for rifling coin boxes in pay telephone booths.

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Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Gilbert Harelson, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Shortly after midnight two police officers, cruising in a patrol car, observed an automobile standing on Wilshire Boulevard, near the Soldiers Home at Sawtelle. Three men were in the vicinity. One was behind the wheel of the car; another was standing on the sidewalk; the third was in a telephone booth.

The officers made a U-turn and came back to the automobile. By then the three men were seated in the car. The officers arrested them. Found in the car were pieces of bent wire called "picks," and other tools which could be used to pick the locks of coin boxes in pay telephones; also a paper bag containing $23.30 in nickels, dimes and quarters.

The man who was on the sidewalk later confessed that he and the other two men had been rifling coin boxes in pay telephone booths for several weeks; that he was the lookout man; that one of the other two men actually picked the locks and took the coin boxes out of telephones; that after an evening's work they would divide the proceeds equally; and that on the evening in question they had successfully picked a box on South Western Avenue in Los Angeles, had tried unsuccessfully to pick several other boxes, and were attempting to rob the coin box in the telephone booth on Wilshire Boulevard when they were arrested.

The three men were charged with three counts of burglary, second degree. On the trial the information against one defendant was dismissed. He later testified in the case. The two remaining defendants were convicted of two counts of burglary second degree, and acquitted of the third count.

One of these two defendants was granted probation. The remaining defendant was denied probation and was sentenced to state's prison. From this judgment he appeals.

The appealing defendant is the man who was seen by the officers in the telephone booth on Wilshire. It may be inferred from the evidence on the trial that the picks and other implements, and the money in nickels, dimes, and quarters, were in his possession.

The evidence shows that the lock on the coin box in the telephone in the booth on Wilshire was normally in a vertical position; that it was left that way by the telephone company's coin collector just before the evening the defendants were there; and that after the defendants were there it was in a horizontal position. And a key taken from defendant's person fitted the upper housing of the pay telephone on South Western Avenue.

During investigation of the case by police officers, defendant was confronted with his two companions. One of them told defendant that he had told the officers the truth about the telephone burglaries—that he had made a full confession.

Then defendant said to the officers, "Well, what can I say?"

The two men were taken from the room, leaving defendant there with the officers. Then defendant said, "The first time I got picked up for this a girl turned me in. Now it is a punk kid. If I had worked alone, you guys never would have got anything on me."

Then defendant admitted that he had picked the coin box at the pay station on South Western Avenue, and was attempting to pick the box on Wilshire Boulevard when he was arrested. He also admitted that the pieces of bent wire found in the automobile were the instruments he had used, and that he had made them.

It is conceded that the offenses were burglaries. People v. Miller, 95 Cal.App.2d 631, 213 P.2d 534.

Defendant presents three grounds of appeal: first, error in law on the trial; secondly, error in instructing the jury; and, lastly, that the evidence is insufficient to support the conviction.

The first ground concerns an offer in evidence by the People of three pieces of bent wire found in defendant's possession in 1946. The wire was offered in evidence on the theory that being similar to the wire found in the automobile used by the defendant it tended to connect him with the crime. In ruling on the objection to the offer the trial court directed that the wire be admitted in evidence, but stated that the witness would not be allowed to testify that he saw defendant use the wire to open a lock unless a foundation was laid that the locks were the same. This foundation was not laid, and no testimony was offered regarding defendant's use of the three pieces of wire.

[1] It would have been better trial practice to have excluded the wire unless the District Attorney was prepared to complete the proof. However, under the facts in the case, admission of the wire in evidence without completing the offer of proof was not reversible error. Defendant took the stand in his own behalf and denied any knowledge of the wire. And no request was made for any instruction relative to it.

[2] Defendant argues that it was error to refuse an offered instruction that corroboration of the testimony of an accomplice may not be supplied by the testimony of one or more accomplices, but must come from other evidence of circumstances, or from the testimony of one or more witnesses who are not accomplices. The instruction was not required because the court ruled at the time of its admission that the confession of the accomplice was not binding upon the defendant, and in the general instructions advised the jury of their duty to disregard the confession in determining defendant's guilt, and to examine the record to satisfy themselves that there was other evidence sufficient to connect defendant with the commission of the crimes with which he was charged. The jury was fully and fairly instructed as to the elements of the crime and the rights of the defendant.

[3] The last ground—insufficiency of the evidence to support the conviction—is untenable. The record contains sufficient evidence to support the verdict of the jury.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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105 Cal.App.2d 404

FILIPAN v. TELEVISION MART et al.

Civ. 4239.

District Court of Appeal, Fourth District, California.

July 12, 1951.

Action by Stephen Filipan against the Television Mart, and others to recover certain monies. On defendants' motion to dissolve an attachment. The Superior Court, San Diego County, Robert B. Burch, J., entered an order dissolving the attachment, and the plaintiff appealed. The District Court of Appeals, Barnard, P. J., held that facts showing an accomplished rescission were alleged, with a further allegation that individual defendants had agreed to repay money, and that therefore action was a proper case for an attachment.

Order reversed.

Attachment 🔑5

Allegations that plaintiff agreed to purchase one-half interest in business operated by defendants, was induced to make purchase by their false and fraudulent representations, that he paid them money in reliance thereon, discovered representations were false and notified defendants he had rescinded his agreement and demanded return of amount paid, that demand was refused and that he received no benefit, and that defendants agreed to return money, but failed to do so, showed an accomplished rescission, with agreement to repay money, and hence set forth an action on contract rather than tort, in which attachment was allowable. Code Civ.Proc. § 537.

◆

Wendell V. Harris, Los Angeles, for appellant.

Alfred Einstein and V. Lustig, National City, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order dissolving an attachment. The amended complaint upon which the attachment was issued contains three counts. The first is for money had and received. As a second cause of action, it is alleged that in August, 1949, the plaintiff agreed to purchase a one-half interest in a business operated by the defendants; that he was induced to make this purchase by certain false and fraudulent representations made by the individual defendants; that he paid them $7000 in reliance on these representations; that on August 15, four days after the agreement was signed, he discovered that the representations were false; that immediately thereafter he notified the defendants that he had rescinded his agreement of purchase by reason of said false and fraudulent representations, and demanded a return of the amount paid; that this demand was refused; and that he had received no benefits. The third cause of action alleged that on or about August 15, 1949, the plaintiff and the defendants rescinded and set aside this agreement of purchase, and the individual defendants agreed to return the $7000 paid by the plaintiff; that they have failed and refused to do so; and that they have been unjustly enriched in that amount. The prayer was for judgment for $7000 with interest and costs, and "for such other and further relief as to the court may seem just in the premises."

After a hearing on defendants' motion for that purpose the court entered an order dissolving the attachment on the ground "that this is not a proper case for an attachment." The question here presented is whether this action is one based upon an express or implied contract for the direct payment of money, within the meaning of section 537 of the Code of Civil Procedure. The respondents contend that the gravamen of the action is *ex delicto* rather than *ex contractu,* that each cause of action is predicated upon the specific facts alleged in the second count, and that it thus appears that the action is one based upon fraud and sounding in damages.

The principles set forth in Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990 and McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 645, 95 A.L.R. 1019, are controlling here. In the latter case, the court pointed out the distinction between an action to secure the beneficial results of an accomplished rescission and an action in equity to compel a rescission and thereby secure its benefits. In considering a question very similar to the one now before us, the court said: "The action in *assumpsit* in such cases is not upon the failure of consideration or upon the fraud practiced, but upon the promise or obligation set up by the law to afford the injured party additional relief. Failure of consideration, duress, fraud, or mistake, are elements only in the sense that they furnish a foundation upon which to rest the rescission from which flows the promise or obligation. We therefore conclude that in such cases when suing for the consideration paid, the injured party may, where he has received nothing of value, have the writ of attachment."

In the instant case fraud was alleged in one count merely as a foundation for the promise or obligation relied on. The action was based upon a contract theory, rather than a tort theory. Facts showing an accomplished rescission were alleged, with a further allegation that the individual defendants had agreed to repay the money. The action was one coming within the terms of the statute involved, and it follows that this was a proper case for an attachment.

The order appealed from is reversed.

MUSSELL, J., concurs.

105 Cal.App.2d 499

FORD v. HEINZE, Warden et al.
PEOPLE v. FORD.

Cr. 2278.

District Court of Appeal, Third District, California.

July 17, 1951.

Proceedings in the matter of the application of Bernard Ford for a writ of habeas corpus against Robert A. Heinze, Warden of the California State Prison at Folsom, and others, in which petitioner alleged that he had been denied the right to aid of counsel of his own choice in prosecution for robbery in which he had entered plea of guilty. The Superior Court, Sacramento County, Raymond T. Coughlin, J., directed that petitioner be returned for rearraignment, and the People appealed. The District Court of Appeal, Peek, J., held that petitioner who had at outset of prosecution talked with and had been advised by counsel of his own choice to enter plea of not guilty, and who had entered such plea, but had thereafter abandoned such advice and had entered plea of guilty, had voluntarily waived aid of counsel of his own choice.

Order reversed.

1. Criminal law 🔑641(1)

Where defendant in prosecution for robbery was originally represented by counsel with whom he talked and by whom he was advised to enter plea of not guilty, and plea of not guilty was entered by defendant but was thereafter, contrary to advice of counsel, voluntarily abandoned and changed to plea of guilty, defendant thereby waived aid of counsel of his own choice and could not thereafter be heard to argue that he was denied counsel by public defender.

2. Criminal law 🔑641(1)

A defendant is not denied constitutional right to be represented by counsel when he has voluntarily waived his right to counsel with an intelligent conception of consequences of his act.

3. Habeas corpus 🔑85(1)

In habeas corpus proceeding in which defendant who had been convicted of robbery alleged that he had been deprived of his constitutional right to aid of counsel of his own choice, record contained nothing which would indicate that defendant did not have intelligent conception of consequences of his own act when he waived advice of counsel and entered plea of guilty.

4. Habeas corpus 🔑85(1)

Person who had entered plea of guilty to charge of robbery and had been sentenced, had burden, in petition for writ of habeas corpus filed six years later, of explaining delay in raising question presented by such collateral attack.

The Attorney General, and Doris H. Maier, Dep. Atty. Gen., for appellant.

Oscar A. Kistle, Public Defender, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by the People from an order of the Superior Court of Sacramento County, after a hearing in a habeas corpus proceeding, directing that Bernard Ford be returned to the Sheriff of the City and County of San Francisco, to be by him taken before the Municipal Court of said City and County, for re-arraignment and further proper action in connection with a prior proceeding out of which the said Bernard Ford was convicted and sentenced to the state prison for robbery.

The basis of the above order was that the respondent Ford had, in the said prior proceeding, entered a plea of guilty to the crime of robbery without being represented by counsel.

In part, the transcript of said habeas corpus proceeding shows that on January

3, 1944 when respondent appeared for arraignment in the Municipal Court of the City and County of San Francisco on the charge of robbery, the following occurred:

"The Court: Are you ready to proceed, Mr. Dresow?

"Mr. Dresow: Yes, your Honor, ready for arraignment.

"The Court: All right, Bernard Ford. Let the record show Bernard Ford is represented in court by Mr. Abraham Dresow, Assistant Public Defender. Mr. Bernard Ford, I instruct and caution you that you are hereby charged with the commission of a felony, to-wit: a violation of section 211 of the Penal Code; that under the law you are entitled to a reasonable continuance for the purpose of preparing your defense, to subpoena or summon witnesses and also to engage the services of an attorney to defend you. It is your right to be represented by counsel at any and all stages of the proceedings. Arraign the defendant, Mr. Clark.

(Here the defendant was arraigned and answered his true name as set forth in the complaint on file herein.)

"Mr. Dresow: Your Honor, this man has requested me to ask for a continuance. It seems he has retained Mr. Harry Whitthorn as his attorney, who had to be in Oakland this morning. He suggested further, if there is no objection, I ask it to go over to January 7th.

"The Court: All right."

The transcript of the proceedings on January 7 is in part as follows:

"Mr. Kenny: Your Honor, the defendant informs me he has entered a plea of not guilty and desires to change the plea and plead Guilty.

"The Court: What case is this?

"Mr. Courneen: No.1 on the continued, Bernard Ford, charged with robbery.

"The Court: He has been instructed and arraigned.

"Mr. Kenny: He entered a plea of not guilty, I understand.

"The Court: (To the defendant) You desire to change your plea to a plea of guilty, now, do you?

"The Defendant: Yes, sir.

"The Court: Certified to the Superior Court.

"Mr. Kenny: Certified to the Superior Court.

"The Court: All right, the case is certified to the Superior Court."

From the testimony of petitioner at the habeas corpus proceeding it appears that prior to his arraignment he talked to Mr. Whitthorn on the telephone; that Whitthorn then called upon him at the jail telling him that he would be out of town on the day of the arraignment but that a Mr. Meadows would appear for him. Thereafter Meadows conferred with defendant at the jail advising him to plead not guilty when he was arraigned and that he, Meadows, would take care of the matter at the preliminary in the Municipal Court.

On January 11, the date set for the hearing in the Superior Court, Mr. Lynch, the assistant district attorney, informed the court that Mr. Meadows was not there and suggested that in view of that fact the case be continued for one day, and it was so ordered. When the case was called on the following day Mr. Lynch stated:

"* * * the defendant yesterday raised a question of being represented by counsel. He stated he was represented by Mr. Meadows and Mr. Meadows tells me he does not represent him but that Mr. Whitthorn did, but I don't think Mr. Whitthorn is actively engaged in the practice of law now."

The defendant then stated to the court that Mr. Whitthorn did represent him in the Municipal Court but that he pleaded guilty and "took him (Whitthorn) off the case. I was under misapprehension, and I called him and he said he would have Mr. Meadows to represent him."

"The Court: Do you want time to engage other counsel?

"The Defendant: No, sir, I want to plead guilty.

"The Clerk: He has already pleaded guilty and to-day is the fifth day.

"The Court: Let the public defender, Mr. Dresow, represent him for the purpose of judgment."

It is not denied that neither Kenny nor Dresow had consulted with respondent about the facts of his case. Respondent, however, had consulted his own attorney, Mr. Whitthorn, who, defendant testified, advised him to enter a plea of not guilty and that he followed such advice. At the hearing in the habeas corpus proceeding in the Sacramento Superior Court respondent testified that the two officers who had arrested him had attempted to persuade him to plead guilty, that they hit him in the face a couple of times and had told him if he pleaded guilty he would get off with a county jail sentence. He also testified that attorney Meadows called upon him at the county jail, and upon learning that he had changed his plea from not guilty to guilty, the following colloquy occurred: " 'Why did you plead? I was busy. Why didn't you ask for a continuance?' And I says, 'I didn't know. I have been advised by the police officers if I plead guilty, why, I would get a County Jail sentence.' He says, 'Well, you are crazy. I wash my hands of it if you want to take it in your own hands.' "

The record further shows that during the Sacramento County hearing he was asked by the district attorney: "Well, as I understand your testimony now regardless of the advice given to you by Mr. Meadows when these officers promised you the County Jail sentence it was your idea to change your plea to guilty, is that true?"

To which question respondent answered: "That is right, Mr. Sheehy."

Additional testimony in the record shows that both the attorney, whom defendant originally retained to represent him, and one of the arresting officers were dead at the time the habeas corpus proceeding was commenced, and that respondent had been previously convicted and sentenced in California for the crime of extortion and for the crime of forgery in Nevada.

As has been stated, the basis of the order here appealed from and the position now taken by respondent is that the circumstances under which the plea of guilty was entered amounted to a denial of respondent's constitutional right to effective aid of counsel. It is contended that the representation afforded respondent by Mr. Kenny and Mr. Dresow was merely a pro forma appearance. With this argument we cannot agree.

[1] The record shows without contradiction that at the outset respondent talked with and was advised by counsel of his own choice, that pursuant to that advice he entered a plea of not guilty but that he thereafter voluntarily abandoned such advice and entered a plea of guilty.

Having in effect voluntarily waived the aid of counsel of his own choice, he cannot now be heard to argue that he should have received and was denied that same aid by the public defender.

[2, 3] It is well settled that a defendant is not denied his constitutional rights where he has voluntarily waived his right to counsel with an intelligent conception of the consequences of his act. In re Tedford, 31 Cal.2d 693, 192 P.2d 3. There is nothing in the record before us to indicate that respondent, who appears to have been somewhat familiar with criminal procedures, did not have an intelligent conception of the consequences of his act when he entered the plea of guilty.

[4] Furthermore it should be noted that respondent has failed to disclose any reasons or make any excuse for the six year delay in the presentation of the facts raised by his petition for a writ of habeas corpus. He is therefore confronted by the further rule that "one who belatedly presents a collateral attack such as this [must] explain the delay in raising the question." In re Swain, 34 Cal.2d 300, 209 P.2d 793, 795.

The order is reversed.

ADAMS, P. J., and VAN DYKE, J., concur.

Ex parte DRAKE.
Cr. 2274.

District Court of Appeal, Third District, California.

July 24, 1951.

Hearing Granted Aug. 23, 1951.*

Petition by Roy Drake for a writ of habeas corpus to secure his release from the state penitentiary at San Quentin. The District Court of Appeal, Adams, P. J., held that where the governor of Mississippi took the initiative in effecting the transfer of petitioner to California when he was already serving what amounted to a life sentence in the Mississippi penitentiary, the act of the governor of Mississippi in authorizing the release of petitioner amounted to a waiver of jurisdiction of Mississippi over the person of the petitioner and the California authorities were not bound to give consideration to any hold order or detainer request of Mississippi, but since petitioner was not at time of hearing eligible for release the writ would be discharged.

Writ discharged.

1. Extradition ⚷30

A person in custody for an offense in one state may be surrendered to another state which requests his extradition, and such surrender operates as a waiver of jurisdiction of state over person of prisoner and prisoner cannot thereafter be considered a fugitive from justice from surrendering state so as to permit it to requisition him on termination of proceedings against him in second state.

2. Pardon ⚷7

Where Governor of Mississippi took the initiative in effecting transfer of petitioner to California when he was already serving what amounted to a life sentence in Mississippi penitentiary, the fact that Governor of Mississippi authorized release operated as a waiver of jurisdiction over person of the petitioner and the California authorities were not bound to give consideration to any hold or detainer request of Mississippi in dealing with petitioner's right of eligibility to parole.

3. Habeas corpus ⚷50, 92(1)

In habeas corpus proceeding, where petitioner's rights to parole would be affected by question of whether or not he was an habitual criminal, the petitioner could have determined in proceeding the effect of his release from authorities of another state and his return to California, but where petitioner was not at time of petition eligible for release, writ would be discharged. Pen. Code, § 1548 et seq.

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George K. Littlefield, Jr., Sacramento, for appellant.

Gail A. Strader, Deputy Atty. Gen., Sacramento, for respondent.

ADAMS, Presiding Justice.

The petition of Roy Drake for a writ of habeas corpus which was filed here on February 2, 1951, alleged the following facts:

On May 20, 1943, petitioner was sentenced to San Quentin from Los Angeles County on his plea of guilty to two charges of first degree robbery. On December 26, 1943, he and three other inmates escaped from San Quentin. On May 22, 1944, he was sentenced in the state of Mississippi to imprisonment for 100 years for robbery with firearms. In 1947 the Governor of Mississippi wrote to the prison authorities of California asking if they would accept petitioner to complete his term of imprisonment from which he had escaped, and the California authorities replied that they would do so and would forward extradition papers, which was done. Without petitioner's knowledge, the Governor of Mississippi, on October 3, 1947, sent the following communication to the Superintendent of the Mississippi State Penitentiary:

"This is your authorization to release Roy Drake, No. 16626, from the Mississippi State Penitentiary into the custody of the Superintendent of San Quentin Prison, State of California, or his duly authorized and accredited representatives. Said Roy Drake was sentenced to the State Penitentiary from Hinds County for a term of one hundred years on conviction of the crime of robbery with firearms, he having been sentenced on May 22, 1944.

"This release to the California authorities is granted with the distinct understanding that in the event this prisoner is ever granted executive clemency of any kind in California or is ever released for any reasons from the San Quentin Prison, State of California, he will be held by the California authorities for the State of Mississippi and will be delivered to authorities from the State of Mississippi for return to the Mississippi State Penitentiary, and it is expressly understood that the State of Mississippi will exercise its right to return this prisoner to the State of Mississippi in the event his release is ever contemplated.

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* Subsequent opinion 238 P.2d 566.

"It is the understanding of the Governor that the State of California, through its agents, has stated its willingness to accept this prisoner and that the prisoner is in fact an escapee from the State of California from the prison at San Quentin, California, and that he is wanted for prosecution for this escape and in order that he may continue serving his time in San Quentin Prison, State of California, on previous convictions there."

It does not appear that petitioner entered into any agreement to return to Mississippi when released by the California authorities, and it is to be noted that the communication of the Mississippi governor was directed only to the Mississippi prison authorities.

Extradition papers from California were honored, and on November 5, 1947, petitioner was returned to the California prison.

Petitioner also alleged that prior to the issuance of the extradition papers by the Governor of California he was, without the advice or aid of counsel, and in the presence of several Mississippi prison guards, ordered to sign the following document if he "knew what was good for him." It reads:

"I, Roy Drake MSP #16626, hereby certify that I freely and voluntarily agree to accompany San Quentin Prison authorities as a prisoner from the Mississippi State Penitentiary, Parchman, Mississippi to the San Quentin California Prison Furthermore, I hereby waive all formalities and am willing to return to San Quentin California Prison with the said authorities without the Governor's requisition or other papers necessary in such cases: I ex*h*onorate Authorities, Mississippi State Penitentiary, Parchman, Mississippi from any blame, compulsion or interference in this connection."

Thereafter, petitioner was tried and convicted in California for his escape from San Quentin, and on June 21, 1950, the Adult Authority fixed petitioner's term on the two robbery charges at seven years each, to run concurrently, and at five years on the escape judgment, making a total maximum of twelve years.

Petitioner further alleged that owing to the "hold" order from the state of Mississippi he was not eligible to parole and would not be as long as said hold order remained against him; and his prayer was in effect that this court consider the effect of said hold order and adjudge that petitioner was not to be denied parole because of said detainer. We issued the writ, and an "Answer and Return" was filed which did not deny the allegations of the petition but did demur to them as being insufficient to justify the relief prayed for by petitioner. They are therefore admitted for the purposes of this proceeding. The matter was argued before this court on April 5, 1951, and thereafter petitioner filed herein a certified copy of the minutes of the Adult Authority of June 18, 1951, which recite that petitioner was, on that date, "Granted parole effective April 14, 1952, to go to family in Indiana subject to hold."

There are two questions presented to this court for determination. The first is the legal effect of the action of the Governor of Mississippi in releasing petitioner to the California authorities; and the second, whether the relief prayed for by petitioner may be granted in this proceeding.

As to the first question, while the governor of any state may grant extradition of a fugitive from justice, here the Governor of Mississippi took the initiative by asking California if it wanted the petitioner, and, on being advised that the California authorities wanted him, personally authorized the prison authorities to release Drake into the custody of the Superintendent of San Quentin Prison, as hereinbefore set forth; and it was after said release was ordered that extradition proceedings were instituted by this state.

Mississippi has not adopted the Uniform Criminal Extradition Act, and the provisions thereof are not applicable in this proceeding.

[1] Petitioner was not on parole from Mississippi at the time of his extradition to California. He was actually serving a sentence in a penitentiary.

In 22 Am.Jur. 257, the text reads: "* * The executive of the asylum state may waive the right of that state to retain the prisoner and may surrender him to the demanding state; but there is some authority to the effect that if the prisoner is in actual custody of the court—that is, either imprisoned or paroled—then the governor has no power to grant a rendition warrant to the demanding state and the fugitive may set up such facts."

In 35 C.J.S., Extradition, § 21(b), page 350, the text reads: "* * * a person in custody for an offense in one state may be surrendered to another state which requests his extradition. Broadly speaking, such surrender operates as a waiver of the jurisdiction of the state over the person of the prisoner, and it has been held that he cannot thereafter be considered a fugitive from justice from the surrendering state so as to permit it to requisition him on termination of proceedings against him in the second state, and that it has waived its right to secure his return to answer for the offense for which he was originally held in custody." Citing In re Whittington, 34 Cal.App. 344, 167 P. 404.

In Ex parte Bell, Ohio Com.Pl., 75 N.E. 2d 186, 188–190, the court had the following to say about the power of a governor in such cases:

"In Re Opinion of the Justices to the Governor and Council, 201 Mass. 609, 89 N.E. 174, 24 L.R.A., N.S., 799, the court held that the governor has no authority to interfere with the execution of a sentence in a criminal case other than by pardoning the offender.

* * * * * *

"'[The governor's] disability so to interfere lies deeper than in the absence of an empowering statute. The powers of the government of Massachusetts are divided among three departments—the legislative, the executive and the judicial—no one of which shall ever exercise the powers of either of the others. * * *

"'It is within the province of the judicial department to try persons who are charged with crime and to impose punishment upon them if they are found guilty. Except by a pardon of the convict, neither of the other departments can nullify or set aside a sentence of the judicial department which is in process of execution under a proper warrant from the court.

"'A warrant from the Governor, such as is supposed, unless it derives some peculiar power from the Constitution of the United States, would be of no effect against the warrant from the court under which the prisoner is held in execution of its judgment after conviction. * * *

"'[The governor's] power * * * is subordinate to the power of his own state, through its proper officers, to hold its prisoners, convicted of crime, until their expiation under its laws has become complete.'

"The general rule is adequately stated in 22 American Jurisprudence page 256, section 19: 'In general under the constitution of the United States and the laws of Congress enacted thereunder, it is the imperative duty of the governor of the asylum state to deliver up a fugitive from justice upon receiving a requisition and papers in proper form from the executive of the demanding state; and, while the obvious purpose of such provision is to prevent an offender against the justice of one state from gaining an asylum and immunity from punishment by fleeing to another state, *this does not create a preference in the enforcement of the demanding state. Accordingly, it is well settled that an asylum state has the right to punish an accused fugitive for crimes committed within its jurisdiction before it becomes obligated to honor a requisition for extradition by a sister state.*' (Italics the Court's.)

* * * * * *

"The Governor of Ohio cannot transgress the jurisdiction of the judiciary without specific statutory authority, which in this instance he does not have, so that he cannot compel the extradition of Bell to the demanding state until such a time as Bell's period of probation has expired."

In People ex rel. Barrett v. Bartley, 1943, 383 Ill. 437, 50 N.E.2d 517, 521, 147 A.L.R. 935, the court said: "Other cases adopting the principle of law that where a prisoner serving a sentence is extradited as a fugitive from justice and delivered to another State, jurisdiction over his person is forever waived by the asylum State are: In re Whittington, 34 Cal.App. 344, 167 P. 404; State v. Saunders, 288 Mo. 640, 232 S.W. 973; Jones v. Morrow, 154 Kan. 589, 121 P.2d 219. The legal effect and logic of these cases convince us that the waiver of jurisdiction of a State over a fugitive is a prerogative of the Governor, and that his extradition warrant takes priority over all State process by which the fugitive is held; that a prisoner cannot be handed from one jurisdiction to another for the purpose of trial, conviction and service of a new sentence, before being returned to the asylum State for service of the unexpired sentence, without violating his constitutional rights."

In the later (1949) Illinois case of People ex rel. Milburn v. Nierstheimer, 401 Ill. 465, 82 N.E.2d 438, 439, the court reaffirmed the above holding in the Bartley case.

In the Whittington case, above cited, which was decided prior to the adoption by California of the Uniform Criminal Extradition Act, Pen.Code, § 1548 et seq., the petitioner was arrested in the state of Texas for a crime alleged to have been there committed, and was taken into custody by the peace officers at Fort Worth. While there held in custody a requisition issued by the Governor of California was honored by the Governor of the state of Texas. This requisition upon the Governor of Texas was made upon a showing that petitioner had theretofore committed the crime of murder in the state of California. The police authorities at Fort Worth, upon having presented to them the Governor's warrant of that state when in the hands of the agent of the state of California, relinquished control and custody of the petitioner and he was immediately taken under the warrant mentioned to the state of California to answer to the charge of murder. The latter charge was not pressed to trial in California. It was dismissed or otherwise disposed of; whereupon the Governor of Texas made requisition upon the Governor of California to have petitioner returned to Texas to answer to the same offense for the alleged commission of which he was held under arrest at the time the police authorities of Fort Worth relinquished him into the hands of the state agent to be returned to California. Petitioner had not been released from custody since he was first arrested in the state of Texas for the crime there alleged to have been committed by him. It was his contention that under these facts he could not be considered a fugitive from justice within the meaning of that term as it is included in section 2 of Article IV of the Constitution of the United States. The court said, 34 Cal.App. at page 347, 167 P. at page 405: "But in this case the prisoner did not leave the state of Texas by any voluntary act of his own. He was taken out of the state against his will and under compulsory process, at a time when the state of Texas had him in custody, with full right and power to prosecute him for the offense for which it now seeks to have him returned. Not only may it be said that he is not a fugitive, because he did not voluntarily leave that state, but because, also, the state of Texas voluntarily relinquished the jurisdiction of its courts over his person and waived its right to thereafter have him brought back from the California jurisdiction to answer for the same offense."

See, also, Hess v. Grimes, 5 Kan.App. 763, 48 P. 596, 597; Ex parte Guy, 41 Okl. Cr. 1, 269 P. 782; State ex rel. Falconer v. Eberstein, 105 Neb. 833, 182 N.W. 500, 501; People ex rel. Gallagher v. Hagan, 34 Misc. 85, 69 N.Y.S. 475, 477–478; State v. Saunders, 288 Mo. 640, 232 S.W. 973, 975–976; Hansen v. Edwards, 210 Mo. App. 35, 240 S.W. 489.

Regarding the use of detainers, the Handbook of Interstate Crime Control issued by the Interstate Commission on

Crime, in a report of its Joint Committee on Detainers, states:

"A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that, after the prisoner has completed his present term, he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions. For example, detainers may arise when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state, or detainers may be placed by various authorities against a man not previously imprisoned who commits a series of crimes in different jurisdictions.

"During the past two decades great progress has been made in penal treatment, by putting into ever-widening practice the ideas that thinking penologists have striven for centuries to realize. We know now that the prison administrator's task is to rehabilitate the offender and to make plans for him to return to the community as a self-respecting, law-abiding citizen. However, this task is difficult to accomplish in many cases because we have allowed the detainer, inherited from medieval thinking, to remain in our law enforcement system without making adjustment necessary to prevent hampering of the modern correctional program.

"While it would seem proper that authorities in quest of a violator of the law should have every assistance in returning him to their jurisdiction, nevertheless the detainer system now operates to the detriment of society all too often. The difficulties inherent in the existing detainer system affect the judges, the institutional officials, the paroling authorities and the individual himself.

"The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated.

"The sentencing judge is likewise often thwarted by the detainer system. The enlightened judge knows that his part is to consider the set of circumstances and the course of criminal action that brought the offender before him, and to determine a suitable sentence for the necessary correctional treatment of the offender. Often, in a short course of criminal action, the offender has committed offenses in several jurisdictions as well as committing federal offenses. The judge is at a loss when faced with detainers already filed, and with the possibility of other detainers. A rather long sentence may be indicated, but the judge hesitates to give such a sentence if the offender is going to serve subsequent sentences, or if he stands to lose the privilege of parole because of a detainer. The incidental first offender may, and sometimes does, serve years in prison because he has violated the law in several jurisdictions, although only a short sentence or probation would accomplish the necessary rehabilitation. It is obvious that proper sentencing, as well as proper correctional treatment, is not possible until the detainer system is modified. Ironically, society, in collecting its debt from the offender under the detainer system, is the real loser. Much money is spent in unnecessary extra periods of correctional treatment, and embittered offenders become recidivists, pyramiding the expense of law enforcement."

[2] While there are decisions in conflict with the cases herein cited, the somewhat peculiar circumstances of this case, particularly the fact that the Governor of Mississippi took the initiative in effecting

the transfer of Drake to California when he was already serving what amounted to a life sentence in the Mississippi penitentiary, the fact that the Governor of Mississippi authorized the release of Drake to the superintendent of San Quentin prison, the fact that the so-called "understanding" was contained only in the authorization directed to the superintendent of the Mississippi penitentiary, of which Drake had no knowledge and to which he did not agree, the absence of any showing that such conditions of the release were made known to the California authorities, and the additional fact that Drake did not leave Mississippi voluntarily and is not a fugitive from its justice, lead us to the conclusion that the legal effect of the release is that the surrender of the prisoner operated as a waiver of the jurisdiction of Mississippi over the person of the prisoner, and that the Adult Authority of this state is not bound to give consideration to any "hold" or detainer request of Mississippi in dealing with Drake's right or eligibility to parole.

While we do not question the right of the Adult Authority to impose reasonable conditions to the paroles which it grants to prisoners under its control, where, as we hold, the governor of the surrendering state has waived its right to require that the prisoner serve out the sentence imposed by its courts, such prisoner's parole should not be "subject to hold" for that state.

[3] As for the question whether in such a proceeding as this Drake is entitled to the relief which he seeks, since it is the settled custom in this state to consider in such a proceeding the effect of erroneous determinations of trial courts as to whether, by reason of prior convictions, prisoners are or are not habitual criminals—as under our statutes the status of the prisoner in this respect affects his rights to parole—we conclude that the proceeding is available to Drake to secure a determination regarding the effect of an unauthorized hold or detainer which affects his right to parole. In re McVickers, 29 Cal.2d 264, 176 P.2d 40; In re Stewart, 24 Cal.2d 344, 348, 149 P.2d 689; In re Kingsbury, 74 Cal.App.2d 959, 963, 170 P.2d 82; In re Seeley, 29 Cal.2d 294, 176 P.2d 24.

However, petitioner not being now eligible for release, the writ is discharged.

PEEK and VAN DYKE, JJ., concur.

KURLAN v. COLUMBIA BROADCASTING SYSTEM, Inc., et al.

Civ. 16859.

District Court of Appeal, Second District,
Division 3, California.

July 12, 1951.

As Modified on Denial of Rehearing
July 31, 1951.

Hearing Granted Sept. 7, 1951.*

Action by Arthur Kurlan against Columbia Broadcasting System, Inc., and others, for infringement of radio program created by plaintiff and previously submitted to defendant. The Superior Court of Los Angeles County, Allen W. Ashburn, J., sustained general demurrers of defendants, and plaintiff appealed. The District Court of Appeal, Shinn, J., held that radio program based on admittedly old idea of stupid girl embroiling herself and her more capable and sophisticated companion in series of embarrassing situations, in view of reduction of such theme to concrete form for radio presentation, was not, as matter of law, devoid of originality and novelty which would sustain suit for infringement.

Judgment reversed.

1. Literary property 🔑7

Where creator of radio program and format brought suit for breach of express contract whereby broadcasting company agreed to pay reasonable value for program, implied condition that if broadcasting company used production they were to pay nothing for it unless they made use of material that was protectible property right would not be read into agreement, since even if program lacked novelty it would not follow as matter of law that it would have been of no value whatever to defendant.

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* Subsequent opinion 256 P.2d 962.

2. Literary property ⚷9

Where creator of radio program and format brought suit for reasonable value of such program against broadcasting company to which program had been submitted for purchase but which had thereafter produced somewhat similar program, questions of originality of creator's program and similarity of that produced by broadcasting company, although normally questions for jury, require previous determination by court as matter of law as to whether allegations of fact in complaint are sufficient to support findings if they should be favorable to creator of program.

3. Literary property ⚷9

Purpose of statute providing for attachment of allegedly infringed and infringing literary productions to complaint charging infringement is to acquaint court with contents of literary production and infringing production for purpose of decision on questions of law. Code Civ.Proc. § 426.

4. Literary property ⚷8

Where general theme of plaintiff's radio program was that of stupid girl embroiling herself and her more capable companion in series of embarrassing incidents, and such theme had been reduced to concrete form as to manner of radio narration and presentation, although idea alone may have been quite old and without novelty, in view of manner of development and presentation and radio technique, it could not be said as matter of law that production lacked originality and novelty and could not have been infringed by similar production by broadcasting company.

5. Literary property ⚷9

In suit for infringement of radio program which had been submitted by creator to broadcasting company wherein it appeared that program subsequently produced by broadcasting company had principal characters which were substantially identical to those in plaintiff's creation with same manner of presentation of episode and incidents involved in plot, it could not be said as matter of law that defendant broadcasting company had not copied plaintiff's program idea.

6. Courts ⚷35, 489(4)

Where creator of radio program and format brought suit for reasonable value of such program which had allegedly been infringed by radio broadcasting company to which it had been previously submitted, if such program was copyrighted, jurisdiction of infringement action would be in federal court, but state court, in absence of showing that stories were copyrighted, would not assume against jurisdiction of state court that stories were copyrighted. Civ.Code, § 983(a).

7. Literary property ⚷9

Where creator of radio program and format had procured permission from producer of stories in magazine to use characters publicized therein as main characters in radio program, even though stories from which characters had been taken were copyrighted, subsequent embodiment of such characters in radio program did not necessarily deprive such program of originality and render it nonprotectible material, since creative expression or technique used on radio may have rendered such program novel and possessed of originality.

◆

Harold A. Fendler, Beverly Hills (Fendler, Weber & Lerner and Daniel A. Weber, Beverly Hills, of counsel), for appellant.

O'Melveny & Myers, Homer I. Mitchell, W. B. Carman, Harned Pettus Hoose, Los Angeles, for respondents, Columbia Broadcasting System, Inc., Ernest Martin, Cy Howard, Young & Rebicam, Inc.

SHINN, Presiding Justice.

Plaintiff, Arthur Kurlan, instituted this action against Columbia Broadcasting System, Inc., a corporation, and certain individual defendants, alleging five separate causes of action claimed to have arisen out of the submission to and use by the defendants of a certain radio idea and program, including a sample audition recording thereof. General demurrers of the defendants were sustained without leave to amend and judgment was entered in their favor. Plaintiff appeals.

The several causes of action may be described as follows: (1) Upon an express contract to pay plaintiff the reasonable value of his radio program idea and format; (2 & 3) upon an implied contract to pay plaintiff the reasonable value thereof as alleged in the second and third causes of action; (4) upon an implied contract based upon trade customs, practices and usages of the radio industry; (5) for plagiarism.

Before ruling on the demurrers the court, on motion of defendants under section 426(3), Code of Civil Procedure, ordered the incorporation in plaintiff's complaint of plaintiff's and defendants' respective literary properties. Pursuant to this order there were "introduced and filed" one script of plaintiff's program, "My Sister Eileen" and a transcription thereof, 32 scripts of defendants' program, "My Friend Irma" and a transcription of each. By arrangement of counsel one script and transcription thereof of plaintiff's program, and the script and a transcription of one of defendants' programs, have been furnished this Court. We have examined the scripts and have listened to the recordings.

The parties are agreed that the demurrers were sustained without leave to amend upon the grounds that it appeared from the recordings as a matter of law that there was no novelty in plaintiff's production and there were insufficient facts appearing from a comparison of the two productions to support either a finding that any substantial similarity exists between them as to legally protectible material in plaintiff's literary property, or a finding of copying.

It was alleged generally that plaintiff had acquired from one Ruth McKenney the sole and exclusive right to use for radio broadcasting purposes two unique leading female characters known as "Ruth" and "Eileen" which had been created by her and portrayed in stories published in the New Yorker magazine, and in a stage play, and a motion picture, each entitled "My Sister Eileen," and that plaintiff thereby acquired the sole and exclusive right to the use of said characters and their unique characterization and relationships for all broadcasting purposes. The radio program produced by defendants was entitled "My Friend Irma." The characters, "Irma" and "Jane" in defendants' production were alleged to be but counterparts of the characters "Ruth" and "Eileen" in plaintiff's program.

The first cause of action, on express contract, alleged the following facts: That plaintiff conceived, originated, and devised a new and original radio program idea and original untitled radio program featuring two leading female characters named "Ruth" and "Eileen," created by Ruth McKenney; that plaintiff devised new program techniques and methods of radio presentation for the program and reduced it to concrete form, embodied in written script and perpetuated upon wax records; that plaintiff expended the sum of approximately $10,000 in connection with the preparation and production of this sample audition recording; plaintiff submitted to the defendants, at their special instance and request, said original radio program idea and untitled radio program, including said sample audition recording thereof, under and pursuant to an express oral understanding and agreement wherein and whereby defendants orally promised and agreed to pay to plaintiff the reasonable value thereof if defendants used the same or any part or portion thereof, and defendants thereupon accepted from plaintiff submission of said original radio program idea and untitled radio program format, including the sample audition recording thereof, and heard the same and became fully familiar with the contents thereof; thereafter, following extensive negotiations defendants informed plaintiff they would not purchase his program but would produce one of their own and, commencing on or about the 11th day of April, 1947, and continuing upon Friday of each week thereafter, defendants did produce, present and broadcast from coast to coast, a series of radio programs entitled "My Friend Irma" substantially copying, using and embodying plaintiff's said original radio program idea and format, all without compensation paid to plaintiff.

[1] Defendants construe the alleged agreement as one to pay for plaintiff's program only in case they made use of material in which plaintiff had a protectible property right. Referring to the allegations that plaintiff conceived, originated and devised a new and original radio program idea and original radio program, and submitted to defendants "said original radio program idea and entitled radio program, including said sample audition re-cording thereof" and that "defendants promised to pay plaintiff the reasonable value thereof if defendants used the same or any part or portion thereof" etc., defendants say, in effect, that they were not to pay even if they used the particular program if it was one they could rightfully have duplicated. It may very well be that after hearing the evidence concerning the agreement a court or jury might determine there was no agreement to pay for what was in the public domain and available to defendants, but we do not so interpret the allegations of the complaint. If the program lacked novelty it would not follow as a matter of law that it would have been of no value whatever to defendants, even though it might not have been worth to them what it had cost plaintiff. The rule that there will be read into such an agreement the implication that the buyer is not required to pay for anything that he could have obtained without cost from other sources does not apply. Cf. Masline v. New York, N. H. & H. R. Co., 1921, 95 Conn. 702, 112 A. 639. It was alleged that defendants used and copied plaintiff's program. Under these circumstances there cannot be found in the alleged agreement an implied condition that if defendants used plaintiff's production they were to pay nothing for it unless they made use of material that was protectible. For these reasons the first cause of action must be held sufficient. Additional grounds for sustaining this cause of action will appear in our further discussion of the issues presented by the other causes of action.

[2] The remaining four causes of action involve questions of originality and similarity. Did plaintiff have an original expression of ideas reduced to concrete form? Did the defendants subsequently copy both the ideas and their expression? Normally these are questions for the jury. But defendants contend, and we agree, that before a jury question arises the court must determine as a matter of law that there are allegations of sufficient facts to support findings favorable to plaintiff upon these issues. Defendants further contend there are no sufficient allegations of novelty or originality, and that while there may be similarity of ideas between plaintiff's and defendants' productions, there is clearly no similarity of expression, so no question of fact arises as to issues of protectibility or copying. They say that a reading of plaintiff's program in the light of the court's judicial notice of prior dramatic situations will show that plaintiff's production is simply a hackneyed situation involving stock characters, devoid of any material that is protectible.

[3] A clear purpose of the amendment of section 426 so as to require the presentation to the court on demurrer, or other proceeding, of the allegedly infringed and infringing productions was to acquaint the court with the contents thereof for the decision of questions of law. Accordingly, the productions are a part of the complaint and we shall set forth what we consider to be sufficient of the substance of the two programs to furnish a basis for our conclusions.

Our only purpose in so doing is to answer the claim of the defendants that want of novelty and similarity are conclusively shown. The claim is twofold, namely: That the trial court properly held from what is within the common knowledge that there was no novelty in plaintiff's production, and also that a comparison of the two programs furnishes no reasonable basis for a finding of similarity due to copying. Whatever our personal views may be, we are satisfied that we cannot hold on the basis of judicial notice that there is no novelty of development and expression in plaintiff's production even if, as defendants assert, it consists only of a portrayal of the experiences of two familiar characters through a series of commonplace incidents. Neither can we hold that within the common knowledge of the average reader, observer, spectator or listener there are not sufficient similarities to induce the belief that copying has taken place. See Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 662, 221 P.2d 73. In discussing the two programs and their points of similarity we merely mention the features that a trier of the facts would have to take into consideration. Since it would be manifestly improper for us to intimate what views we hold upon these factual questions it should be understood from what is to follow that we have formulated no views except as to the questions of law we must answer. All that concerns us is whether, upon the factual issues, reasonable minds could reach opposite conclusions.

The principal characters in plaintiff's program are two sisters, Ruth and Eileen. Ruth is the capable and sophisticated balance wheel of the pair. Eileen is scatterbrained, impulsive, naive, completely thoughtless and oblivious to the consequences of most of her acts. Ruth acting as narrator introduces a series of incidents in which Eileen creates situations which to her seem perfectly natural, but are extremely embarrassing to Ruth. Ruth attempts to resolve the situations while Eileen continues to introduce complications. In most improbable ways Eileen's created situations turn out to the benefit of all. The details vary, but this developed theme runs throughout the audition record and forms the basis of plaintiff's proposed program series.

In defendants' program the principal characters are two friends, Jane and Irma. Ruth, in plaintiff's production, and Jane, in that of defendants, are capable, possessed of ordinary intelligence, stable and sophisticated, while Eileen and Irma are scatterbrained, naive, irresponsible, impulsive and oblivious to the consequences of most of their acts. Jane, like Ruth, acts as narrator to introduce a series of incidents in which Irma, like Eileen, creates situations which to her seem perfectly natural but are extremely embarrassing to Jane, just as Eileen's are to Ruth. In plaintiff's production Ruth attempts to resolve the situation while Eileen continues to introduce complications. In defendants' production Jane attempts to resolve the situation while Irma continues to introduce complications. In both radio plays the situations created by the scatterbrained girl turn out to the benefit of all in most improbable and unexpected ways.

There are incidents in the sample programs which have points of similarity as to the weight of which we express no opinion. In both programs the girls are living in an apartment obtained or provided by the scatterbrained girl; both involve visits to the apartment by a gentleman friend of the capable one, and in both the action takes place in the apartment. In plaintiff's program the friend is represented by the scatterbrained girl to be the fiancé of the other girl, much to the latter's dismay. In the other program the scatterbrained girl invites the other girl's employer to dinner in the apartment and suggests that they marry, to the great embarrassment of the other girl.

We may say, preliminarily, that there is little, if any, originality or novelty in the contentions advanced by defendants. The applicable legal principles have been clearly established by the decisions of our Supreme Court and the District Courts of Appeal. Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 221 P.2d 73; Golding v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 221 P.2d 95; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Kovacs v. Mutual Broadcasting System, 99 Cal.App.2d 56, 221 P.2d 108; Weitzenkorn v. Lesser, —— Cal.App.2d ——, 231 P.2d 889; Yadkoe v. Fields, 66 Cal.App.2d 150, 151 P.2d 906; See also, Dezendorf v. Twentieth Century-Fox Film Corporation, 9 Cir., 1938, 99 F.2d 850; Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 1936, 81 F.2d 49.

There is, of course, no legally protectible property in ideas alone apart from their expression. With respect to ideas alone, it is repeatedly said, "there is nothing new under the sun." Defendants point out that the "idea" of a "dumb" girl getting an intelligent one into various scrapes is as old as written expression, if not older. Nevertheless, it is also true that the essence of art is expression of these commonplace ideas in ways that are unique with the artist, be he writer, painter, musician or other. It is this novelty of expression, this product of the creative mind, this embellishment of skeleton "ideas," that gives rise to a legally protectible interest. (See cases, supra.)

[4] The generalized theme of a dumb girl embroiling herself and her more capable companion in a series of scrapes is undoubtedly quite old, but particular extension of this broad theme may be quite new. In the present case the evidence within the issues may establish that plaintiff has done more than use the generalized theme—that he has given it a more specific nature, added a new radio technique, reduced to concrete form, and in addition, that he has presented characters with personalities so developed they are clearly recognizable. After reading the scripts and listening to the records we cannot say there is such obvious lack of originality in plaintiff's use of familiar dramatic elements as to render the question of originality one of law.

[5] Our conclusion is the same with respect to the issue of copying. The similarities in the two programs and defendants' familiarity with plaintiff's program before they produced their own would justify an inference and a finding that defendants copied plaintiff's program idea. 35 Cal.2d 690, 221 P.2d 95; 99 Cal.App.2d 56, 221 P.2d 108, supra.

Assuming, without conceding, that something was copied, defendants nevertheless contend that as a matter of law what was copied was not novel, and hence not protectible. With this we cannot agree. We deem the preceding analysis of the recorded programs and scripts sufficient to show that upon proof of the facts pleaded a jury could properly find novelty and originality in what was copied.

[6, 7] It was not alleged in the complaint whether the McKenney stories were copyrighted. Defendants point out that if they were not, their publication rendered them open to use in any manner by any person, citing section 983(a), Civil Code: "If the owner of a composition in letters or art publishes it the same may be used in any manner by any person, without responsibility to the owner, insofar as the law of this State is concerned." In this particular the complaint was uncertain, although it was not demurred to upon that ground. If the stories were copyrighted, jurisdiction of an action for infringement would be in the Federal Court. Loew's, Inc., v. Superior Court, 18 Cal.2d 419, 115 P.2d 983. We may not assume as against the jurisdiction of the State court that the stories were copyrighted. Peterson v. Donelley, 33 Cal.App.2d 133, 91 P.2d 123; Cheney v. Trauzettel, 9 Cal.2d 158, 69 P.2d 832. Assuming then, that they were not, defendants assert, correctly, that the material of the stories was in the public domain. Section 983(a), Civil Code, so provides. Defendants say: "Therefore with respect to the basic situation and characterizations upon which plaintiff relies, the publication which he alleges destroys any right he has to recover compensation for their use from any person so far as the California courts are concerned." Defendants' argument proceeds upon the supposition that plaintiff's production contains nothing more than the basic theme of the McKenney stories, or the basic theme developed through a succession of incidents and through expression substantially copied from the McKenney stories. Hence, they say, it is devoid of originality and protectible material. They also say that the complaint describes plaintiff's production as one having the sole purpose to capitalize upon the title "My Sister Eileen," and thus take advantage of the name and fame of the stories and play; and that if this is property which is protectible they have not used it. This is but another phase of the argument of absence of originality in plaintiff's radio program. It is merely a claim that the program contains nothing of creative expression or technique other than that to be found in the published stories. This does not appear from the complaint. The general allegations are to the contrary,

and, since there is nothing before the court to controvert them, they must be taken as true. If uncopyrighted, the material of the stories is open to use like any other material in the public domain, but the fact that plaintiff has made use of such material does not necessarily rob his work of originality. The stories are not before the court. Manifestly, it cannot be said as a matter of law from the complaint, including the recording, that plaintiff in his program has not developed the theme, the characters and the situations of the stories by unique and original expression. Although the complaint alleges previous publication of the stories containing the characters and theme which plaintiff made use of, it is a non sequitur that the radio program he has produced is lacking in creative expression. But we think it would be a waste of words to comment further along this line upon the mere supposition that the stories were not copyrighted. Certainly no useful purpose can be served by keeping the court in the dark upon that score. Plaintiff should be required to allege the facts as to copywriting before defendants are required to answer.

Our conclusion that facts are stated in the complaint which give plaintiff the right to go to trial requires a reversal of the judgment. In view of the decisions first cited, which settle all the questions of law that have been briefed, it is unnecessary to extend this opinion.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

SEEDBORG et al. v. LAKEWOOD GARDENS CIVIC ASS'N.

Civ. 18025.

District Court of Appeal, Second District, Division 1, California.

July 16, 1951.

Action by Marjorie Seedborg and Paul Seedborg against Lakewood Gardens Civic Association, a corporation, to recover damages for personal injuries suffered by first named plaintiff when a sign struck her while she was decorating at a Halloween party arranged by defendant. The Superior Court, Los Angeles County, Frederick F. Houser, J., after a jury verdict, rendered judgment for plaintiffs, and the defendant appealed. The District Court of Appeals, White, P. J., held that evidence was sufficient to support finding for plaintiffs and that $2,500 verdict was not excessive.

Judgment affirmed.

1. Appeal and error ⚿1041(4)

Where original complaint alleged that plaintiffs were husband and wife, that as result of defendant's negligence wife was injured in her health, strength and activity, that wife had been unable to work, that wife could not perform usual household duties, that husband was obliged to act as housekeeper, allowing complaint to be amended after taking of evidence, to allege that wife was in good health and capable of performing usual duties of housewife and as result of injuries husband was deprived of services, did not result in a miscarriage of justice, especially when court offered to continue case and permit it to be reopened, but defense declined offer.

2. Appeal and error ⚿1050(1)
Damages ⚿177

In husband and wife's action for damages for wife's personal injuries allegedly caused by defendant's negligence, evidence that wife's sister-in-law who took care of her, was a substitute teacher earning $12 a day and that she lost five days pay in taking care of her sister, and that husband also took a week off from work to care for his wife at a loss of wages was properly admitted and was not prejudicial in view of fact that jury were entitled to consider nature of services rendered as shown by evidence and draw upon their own judgment and experience in determining reasonable value thereof.

3. Trial ⚿194(16)

In husband and wife's action against a non-profit corporation to recover for wife's injuries sustained when a sign being used as a back drop for a dart booth fell, instruction that it had been established that sign board was property of corporation, and was in charge of an agent thereof acting within scope of her authority, and that her conduct was to be deemed by jury as to have been conduct of corporation, was not error in absence of any evidence whatever to rebut showing of agency on part of such agent.

4. Negligence ⚿138(2)

Where volunteer worker came to playground for purpose of putting up decorations for Halloween party sponsored by nonprofit corporation, and while standing on a ladder fastening some streamers to dart booth, a sign previously placed against the back thereof to serve as backdrop, fell and struck either her or ladder or both and caused her to fall to ground and sustain injuries, in worker's subsequent action against corporation to recover for such injuries, instructions on subject of res ipsa loquitur were proper.

5. Trial ⚿243

In action against a nonprofit corporation to recover for injuries sustained when a sign previously installed as a backdrop in a dart booth fell and injured a worker as she was putting up decorations, instruction to effect that mere fact that accident happened did not support inference that some party to action was negligent and instruction upon subject of res ipsa loquitur were not in conflict.

6. Trial ⚿252(8)

In volunteer worker's action against nonprofit corporation which was conducting a Halloween party and at which event worker was injured while she was putting up decorations when a sign previously placed as a backdrop for a dart booth fell, refusal to give two instructions to general effect that liability of owner to injured invitee must be based on actual or constructive knowledge of dangerous condition or evidence that condition had existed long enough for owner in exercise of reasonable care to have discovered condition and remedied it, was not error when undisputed evidence left no issue whether corporation had reasonable time in which to discover and remedy dangerous condition.

7. Negligence ⚷134(1)

In volunteer worker's action against nonprofit organization, to recover after a sign fell and injured her while she was putting up decorations at a Halloween party conducted by corporation, evidence was sufficient to support conclusion that an agent of corporation caused sign to be placed in position where it was likely to be blown over by slight gust of wind, or that unusually strong breeze, not reasonably to be anticipated, arose at time of accident.

8. Damages ⚷130(1)

Award of $2,500 to woman injured by a falling sign who, some 14 months after accident was still nervous, found it difficult to ride in elevators, and was having difficulty with her neck and in other ways had not fully recovered and who in physician's opinion was totally disabled for six weeks and suffered pain, suffering, disability and inconvenience was not excessive nor result of passion or prejudice.

◆

Kenneth J. Murphy, Pasadena, for appellant.

Albert J. Corske, Long Beach, for respondents.

WHITE, Presiding Justice.

Defendant has appealed from a judgment entered upon the verdict of a jury in an action for damages for personal injuries.

Defendant, a nonprofit corporation organized for civic purposes and the betterment of the community, owned and operated a clubhouse and playground as a recreation center. A Halloween party was planned for October 31, 1948, and one of the members of the association, Mrs. Worley, was placed in charge of the affair, which was to include a costume parade in the afternoon for the children, and entertainment at the clubhouse in the evening, with food, dancing and concessions. Among the concessions planned by Mrs. Worley was a dart booth, to be arranged more or less as a square, with two sides, a front counter, a backdrop, and to be decorated in Halloween colors. For the backdrop, to which the dart board was to be fastened, Mrs. Worley proposed to use a large sign, about eight feet square, which was on the grounds. The sign was of wood and weighed approximately 140 to 150 pounds. It was not currently in use, but was kept or stored along a fence on one side of the grounds and fastened to the fence with a chain and padlock.

On October 30, 1948, Mrs. Worley had the sign removed by some of the volunteer workers to a position in the rear of the dart booth, where it was placed against a fence at the rear of the booth. The sign was not fastened to the fence in any way, but was left leaning against the same at an angle with its base a foot and a half to two feet from the fence. The latter was constructed of vertical one-by-six boards with a four to six inch space between the boards. Early in the afternoon Mrs. Worley left the grounds to procure, among other supplies, some nails or spikes with which to fasten the sign securely to the fence.

About the time of Mrs. Worley's departure, around 1 o'clock in the afternoon, plaintiff Mrs. Seedborg came to the grounds for the purpose of putting up decorations. Mrs. Seedborg was standing on a ladder fastening some streamers to the dart booth when the sign fell, striking her or the ladder, or both, and causing her to fall to the ground. It would appear from the evidence that the falling of the sign was probably caused by a gust of wind.

Appellant urges as grounds for reversal (1) that the court erred in permitting an amendment to the complaint "to conform to proof"; (2) that evidence was erroneously admitted; (3) that error was committed in the giving and refusal of instructions; (4) that the verdict is not supported by the evidence; and (5) that the amount of the verdict, $2,500, is excessive. Examination of the entire record, however, compels the conclusion on our part that the asserted errors did not result in a miscarriage of justice and did not impair any substantial right of the defendant.

It was alleged in the original complaint that the plaintiffs were husband and wife; that as a result of defendant's negligence "plaintiff was hurt and injured in her health, strength and activity, sustaining severe shock, sprains, multiple contusions and abrasions about and upon her head and body, all of which said injuries are of a permanent nature and have caused and will continue to cause plaintiff great physical pain and suffering, nervousness, loss of appetite and sleep, and impairment of her ability to perform usual household duties or to be employed at gainful employment, * * *". Further, it was alleged that "plaintiff Marjorie Seedborg was and has been unable to work, and plaintiffs were compelled to incur bills for medical attention, hospitalization, nursing, housekeeper, medicines, ambulance and laundry, all to plaintiffs' damage in the sum of Seven Hundred Fifty Dollars; * * * plaintiff Paul Seedborg was compelled to remain home from work for a period of one week to care for plaintiff Marjorie Seedborg and to act as housekeeper, * * *."

In arguing to the jury after the taking of evidence had been concluded, counsel for plaintiffs urged that the husband was entitled to the reasonable value of the services which he lost as a result of Mrs. Seedborg's being incapacitated. Upon objection that this claim was without the issues made by the complaint, a recess was taken, and after considering the matter in chambers, the court allowed an amendment to the complaint to be filed, which amendment alleged, in substance, that prior to her injuries the plaintiff wife was in good health and capable of performing and did perform the usual duties of a housewife, "was a pleasing and loving wife to said husband, and as a consequence thereof said husband received much comfort and happiness in her society and companionship." That as a result of the injuries the husband "has been deprived of the services of his said wife, and his comfort and happiness in her society and companionship have been greatly impaired"; that such deprivation will continue for a long time; and the wife "has become highly nervous and irritable; all to plaintiffs damage in the sum of $25,000.00."

Appellant argues that the amendment allowed by the court introduced a new and different cause of action—a cause of action in the husband, rather than in the wife or in the community, for loss of his wife's services. Further, it is pointed out, this new cause of action accrued on October 30, 1948, and was barred by the statute of limitations when it was allowed to be added as an amendment on March 2, 1950. Appellant asserts that the allowance of such amendment was prejudicial, in that appellant had had no opportunity to investigate the merits of such an action or go into it at the time of the taking of depositions or at the trial, and when the claim was made for the first time at such a late date the benefit of making investigation was lost. Despite appellant's able and earnest arguments in this regard, however, we are not persuaded that prejudice to any substantial right resulted from the trial court's action. The trial court, when the question arose, offered to continue the case and permit it to be re-opened, but counsel for the defense declined the offer. In this respect, the record shows, in part, the following:

> "The Court: * * * As far as the new matter being brought in and the surprise alleged the Court is of the opinion that you are entitled to have the case reopened and to a reasonable time to make further investigation. I think, as Mr. Corske says, most of the investigation would have been made under the allegations which are already contained in the complaint so that I don't think you are damaged too much by the surprise but the Court will permit the case to be reopened and will permit additional time for investigation.
>
> "Mr. Murphy (Defense Counsel): Your Honor, I appreciate the Court's consideration but this accident happened way back in 1947 (the accident happened October 30, 1948) and the trial took place in March, 1950 and the six weeks' period (the admitted period of the wife's total disability) has long since passed and any investigation

that I would make now would be unavailing."

In further discussion, it was pointed out by plaintiffs' counsel that the action was not filed until some months after the six weeks' period had elapsed, and had the amendment been made earlier the defense would be in no better position than it was now. The trial court permitted the amendment "for the reason that it believes that the matter alleged in the proposed amendment or amendments is not substantially different than that which has already heretofore been alleged under general damages to the wife and that if any investigation were to be made by the defendant, as I presume it was, the Court believes that most of the investigation would have covered the facts pertaining to loss of services as well as to the general damages to the wife."

[1] The reasons given by the trial court for allowing the amendment, whether such allowance may be regarded as technically erroneous or not, are persuasive that no miscarriage of justice resulted. The original complaint contained the allegation, among others, of impairment of the wife's ability to perform usual household duties or to be employed at gainful employment, and general damages of $25,000 were sought. Further, it was alleged that the husband was obliged to remain home from work for one week to act as housekeeper. The prayer was for damages both general and special in behalf of both plaintiffs. The jury made no segregation of damages, but awarded a lump sum of $2,500. The jury was instructed to bring in one verdict for an aggregate amount, without allocating any portion to either plaintiff. The record discloses no request by defendant for a special verdict or verdicts with respect to damages sustained by the husband, nor any objection to the bringing in of a single verdict. In view of all the circumstances above set forth, it must be concluded that no miscarriage of justice is manifest.

[2] The court admitted, over objection, testimony by plaintiff wife that her sister-in-law, who took care of her for one week, was a substitute teacher earning $12 per day and that she lost five days' pay in taking care of her sister. The court further admitted, without objection, testimony that the husband also took a week off from work to care for his wife, at a loss in wages of $75. It is urged that since the jury was instructed that damages, if awarded, should include a reasonable amount for nursing services and that their decision thereon must be founded upon the evidence before them, and that since no evidence of the reasonable value of such services was offered, and no claim was asserted or could have been asserted for the actual loss of earnings, that such evidence, which had no bearing on the issues, was nevertheless the only evidence before the jury, and that prejudice resulted.

Contrary to appellant's contentions, the jury were entitled to consider the nature of the services rendered as shown by the evidence and draw upon their own judgment and experience in determining the reasonable value thereof, see Seib v. Mitchell, 10 Cal.App.2d 91, 95, 52 P.2d 281; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374; Lundberg v. Katz, 44 Cal.App.2d 38, 46, 111 P.2d 917, and cases cited; but even assuming the jury considered the evidence complained of in determining such value, the result is a conclusion that the value of such services was the sum of $135 for two full weeks' services; and if such amount be excessive, it is so in such a small degree as not to warrant appellate interference by way of reversal or modification of the judgment. The error, if any, was too slight to justify the claim of prejudice, the entire circumstances being considered.

[3] It is next claimed that the court erred in instructing the jury in part as follows: "It has been established that the sign board involved in the accident was the property of the defendant Lakewood Gardens Civic Association, a corporation, and that it was in charge of an agent of that defendant, acting within the scope of her authority. Thus, her conduct shall be deemed by you to have been the conduct of the corporation, * * *." This contention requires but little comment. No evidence was presented by the defendant to refute the testimony of Mrs. Worley (the agent) and Mr. Griswold, vice-president of the defendant corporation, that Mrs. Worley was the duly authorized

chairman of entertainment for the Halloween party and was authorized to use any portion of the grounds or equipment, including the sign, that she might need. It is further undisputed that the removal of the sign from its place of safety and its setting up as a backdrop for the dart board were done pursuant to the directions of Mrs. Worley. Failure to produce minutes of the meeting of the board of directors to show the authority conferred upon Mrs. Worley is hardly a dereliction of which appellant may complain, since it was in the more ready position to produce such records, and it may be assumed that such records would have been produced could they have aided appellant's cause. There being no evidence whatever to rebut the showing of agency on the part of Mrs. Worley, error cannot be predicated upon the instruction complained of.

[4, 5] The court instructed the jury that "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." Prejudicial error is predicated upon the asserted conflict between the foregoing instruction and an instruction upon the subject of res ipsa loquitur, and further upon the giving by the court of its own motion another instruction upon the subject of res ipsa loquitur. The asserted conflict is more apparent than real. Clearly, under the evidence, instructions on the subject of res ipsa loquitur were proper. Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406; Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574; Welch v. Sears, Roebuck & Co., 96 Cal.App.2d 553, 215 P.2d 796. By the instruction given upon the court's own motion (BAJI 206–C), the jury were advised that the previous instruction on res ipsa loquitur, while it might appear "to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence," is based "on a special doctrine of the law which may be applied only under special circumstances." The remainder of the instruction clearly sets forth the circumstances which must appear to justify the application of the doctrine, and the nature of the evidentiary problem is further set forth in another instruction given by the court (BAJI 206–D). No real conflict appears in the instructions, and there is no basis for assuming that the jury were confused or misled.

[6] The trial court declined to give two instructions submitted by defendant to the general effect that the liability of an owner to an injured invitee must be based on actual or constructive knowledge of a dangerous condition, or evidence that the condition had existed long enough for the owner, in the exercise of reasonable care, to have discovered the condition and remedied it. The refusal to give these instructions was not error. As noted by the trial court in refusing the proffered instructions: "Covered by BAJI 213–C and the owner, through its agent, Mrs. Worley, knew of the condition and could have remedied it for one-half hour before the accident." The undisputed evidence supports the trial court's view and leaves no issue of whether the owner had a reasonable time in which to discover and remedy the dangerous condition. See Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841. The cases of Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 184 P.2d 708, and Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 206 P.2d 6, have theretofore no application to the virtually conceded facts of the instant case.

In addition, by the instructions given, considered in their entirety the court fully and fairly advised the jury as to the law applicable to the situation presented, and no error or conflict therein appears which would warrant a reversal.

[7] It is urged that the verdict is not supported by the evidence. There is substantial evidence to support a conclusion that an agent of defendant caused the sign to be placed in a position where it was likely to be blown over by a slight gust of wind (there was no evidence of excessive winds on the day of the accident, or that an unusually strong breeze, not reasonably to be anticipated, arose at the time of the accident). This contention requires no further consideration.

[8] It is argued that the damages are excessive. It is true that plaintiff Mrs. Seedborg suffered no broken bones, but from a consideration of the evidence it

does appear that she suffered painful, extensive and prolonged injuries. At the time of the trial, some fourteen months after the accident, she was still nervous, found it difficult to ride in elevators, was yet having difficulty with her neck, and in other ways had not fully recovered. The physician who examined her on behalf of the defense testified that in his opinion she was totally disabled for a period of six weeks. Considering the testimony concerning the pain, suffering, disability and inconvenience suffered by the plaintiff Mrs. Seedborg, as well as the diminished purchasing power of the dollar, O'Meara v. Haiden, 204 Cal. 354, 366, 367, 368, 268 P. 334, 60 A.L.R. 1381, we find no reasonable foundation for holding that the verdict was the result of passion or prejudice.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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105 Cal.App.2d 708

PEOPLE v. HOPKINS.

Cr. 2263.

District Court of Appeal, Third District, California.

July 27, 1951.

Rehearing Denied Aug. 10, 1951.

Hearing Denied Aug. 23, 1951.

Louis Hopkins was convicted in Superior Court, San Joaquin County, George F. Buck, J., of obtaining money by feloniously threatening another with injury at hands of third parties, and defendant appealed. The District Court of Appeal, Adams, P. J., held that extortion was proved notwithstanding the fact that defendant did not threaten to inflict injury himself.

Affirmed.

1. Threats 🔑1(1)

Obtaining money from another who was put in fear for bodily safety by defendant's threats of injury at hands of third parties constituted "extortion". Pen.Code, § 518.

See publication Words and Phrases, for other judicial constructions and definitions of "Extortion".

2. Criminal law 🔑785(16)

It was jury's duty to disregard entire testimony of any witness who had wilfully sworn falsely to any material matter and instruction to that effect was proper.

3. Criminal law 🔑829(3)

In extortion prosecution, refusal to give requested instruction on use of fear was not error where instruction given adequately covered subject. Pen.Code, § 518.

Alfred Nelson, Piedmont, for appellant.

Gail A. Strader, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant has appealed from a judgment rendered after his conviction by a jury which found him guilty of the charge that he obtained $4002.82 from Alfred Francis by feloniously threatening that unless Francis paid said money to defendant certain third persons, designated as "gangsters," would do unlawful injury to his person and take his life. He also appeals from an order denying a new trial.

Defendant operated a shoe shining parlor in Manteca. He also worked as a janitor. Francis worked at odd jobs and from his earnings saved some $4000.00 which money he deposited in a bank. He was shown by the testimony of a psychiatrist to be a mentally deficient person who was extremely suggestible and credulous. He testified that defendant told him that if he did not get money for "gangsters from Chicago" he would be "bumped off"; and that on one occasion, when there was an automobile in front of the shoe shining parlor, defendant told him that the occupant of same was a gangster who had come for money, and that if he did not get it anything could happen to Francis. He also testified that, being fearful of his life, he drew money from his bank account from time to time and gave it to defendant until all of his money had been given to him. Records of the bank tended to corrroborate this testimony. Also, after information was given to police officers, they marked bills to be given to defendant by Francis, and upon observing the acceptance of same by defendant the officers arrested him. There was also evidence which indicated that defendant and his wife had recently engaged in transactions involving the expenditures of cash in amounts which were in excess of his earnings.

[1] On this appeal Hopkins contends that he cannot be held guilty of extortion since the evidence does not show that he took the moneys from Francis under threats that he, himself, would do harm to Francis if the amounts requested were not paid; and that extortion by means of threats that third persons would do harm to the victim do not constitute a violation of section 518 of the Penal Code. That section provides that: "Extortion is the obtaining of property from another, with his consent, * * * induced by a wrongful use of force or fear, * * *." Said section does not state that the fear which induces the obtaining of property must be fear induced by threats that the person extorting it will, himself, do bodily harm to his victim; and no authority is cited for such construction of the statute nor has any been found. We conclude that if, as the jury has found, the money was secured by threats which caused Francis to fear for his bodily safety, the statute was violated.

[2] Appellant next asserts that the trial court committed reversible error in instructing the jury that "If any witness examined before you has wilfully sworn falsely to any material matter, it is your duty to distrust his entire testimony." However, this identical instruction was given in People v. Kennedy, 21 Cal.App.2d 185, 201, 69 P.2d 224, was approved by this court and a hearing in the Supreme Court denied.

[3] It is appellant's third contention that the trial court erred in refusing his requested instruction that "In order that a wrongful use of fear may constitute extortion, it must be the operating or controlling cause producing the consent to deliver the money and resulting in the obtaining of the money by the defendant." The court did instruct that, "To constitute extortion the force or fear employed by a person must be the operating or inducing cause which produces the consent and results in the property being obtained by him. If some other cause is the primary and controlling cause for the consent to the property being delivered over to him, he does not commit extortion." That adequately covered the subject, and is in the form prescribed in CALJIC, Form 275, Alternate.

The order denying a new trial and the judgment are affirmed.

PEEK and VAN DYKE, JJ., concur.

105 Cal.App.2d 758

ONA v. REACHI.

Civ. 18128.

District Court of Appeal, Second District,
Division 3, California.

July 31, 1951.

Action by Ray Ona against Luis Reachi to recover for injuries sustained in an automobile accident. The Superior Court, Los Angeles County, J. F. Moroney, J., after a jury verdict and judgment for plaintiff in amount of $11,000, entered an order granting defendant a new trial, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that judge did not abuse discretion when he granted a new trial on the ground that the evidence was insufficient to sustain the damage award.

Order modified and new trial directed to be had upon sole issue of damages.

1. Appeal and error 🔑994(2)
Damages 🔑208(1)
Trial 🔑140(1)

Where symptoms indicative of plaintiff's injured condition as result of automobile collision, were almost entirely subjective, credibility of plaintiff and soundness of opinions of experts presented questions which were exclusively for triers of facts, jury in first instance, and upon motion for new trial the trial judge.

2. Appeal and error ⚷994(1)

Where symptoms indicative of plaintiff's physical condition were almost entirely subjective, credibility of plaintiff and soundness of opinions of experts relating to his injuries, were not questions for the reviewing court.

3. New trial ⚷72

Where trial judge was of opinion that damage award was contrary to weight of evidence, it was his duty to either reduce damages as condition to denying a motion for new trial or to grant a new trial.

4. Appeal and error ⚷994(3), 1015(3)

It is not within the jurisdiction of District Court of Appeal to decide that trial judge arrived at an erroneous conclusion as to credibility of witnesses and weight of evidence when he ordered a new trial on grounds of insufficiency of evidence to sustain damage award, but rather question before reviewing court was whether a verdict for an amount considerably less than that awarded would have had reasonable and substantial support in the evidence.

5. Appeal and error ⚷979(2)

A ruling upon a motion for new trial will not be disturbed except upon a clear showing of abuse of discretion.

6. New trial ⚷76(1), 162(1)

It is not only proper for trial judge to weigh evidence on motion for new trial, but it is his duty to do so and to reduce amount of verdict by conditional order or to grant a new trial if he is satisfied that verdict is unreasonably large.

7. New trial ⚷76(4)

It was not an abuse of discretion for trial judge to grant defendant a new trial after a jury verdict award of $11,000 damages to plaintiff, who sustained $400 damage to automobile, incurred debts of $385 in medical bills, paid $750 for an assistant while he was partially disabled, paid $14.30 in taxicab fares for visits to doctor, when symptoms indicative of plaintiff's injured condition were almost entirely subjective.

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Walleck & Olstyn, Van Nuys, for appellant.

Bauder, Gilbert, Thompson & Kelly, and W. I. Gilbert, Jr., all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeal by plaintiff from an order granting a new trial after a verdict and judgment for plaintiff in the amount of $11,000 for damages sustained as the result of an automobile accident admittedly caused by defendant.

Defendant, both at the trial and on appeal, substantially admitted liability for the accident. He moved for, and was granted, a new trial by order which specified insufficiency of the evidence to sustain the damage award. Plaintiff assails the order as an abuse of discretion.

The accident occurred at 7 a. m. December 26, 1948, on Ventura Boulevard in Los Angeles. Plaintiff, a chef and short order cook, had just parked his car in front of his own place of business, a restaurant, and was preparing to leave the car. Defendant was driving along Ventura Boulevard, went to sleep, and his car collided with the rear of plaintiff's, moving it ahead a distance of 250 feet. Plaintiff was thrown into the rear seat of his car and rendered unconscious by the impact.

The evidence is unconflicting that plaintiff sustained $400 damage to his car, incurred debts of $385 in medical bills, $750 for an assistant in the restaurant while he was partially disabled, and $14.30 in taxicab fares for visits to the doctor. He claimed that as additional special damages he should receive $3,450 for lost earnings at the rate of $10 per day up to the date of trial. Defendant does not seriously question that plaintiff is entitled to $653.40 as special damages as the net loss in the business from the date of the accident until it was sold. These conflicting claims of special damages would be $2,202.70 (defendant's figure) and $4,999.30 (plaintiff's figure). In granting the new trial the court no doubt believed that the award of general damages was between $6,000 and $9,000.

The major injury and principal element of plaintiff's general damage was a concussion received in the accident which his physicians described as a mild concussion.

There was evidence of a cut on the back of his head, but otherwise no objective evidence of the concussion or its consequences. According to his testimony and his complaints to the physicians he suffered some headaches, was subject to dizzy spells, impairment of memory, impairment of hearing, and tiredness. According to his principal physician, between the accident and the time of trial plaintiff underwent a change of personality from one who was optimistic and aggressive to one who was in a depressed and fearful mental state, and in need of psychiatric treatment which probably would remove the causes of his trouble. This physician was certain that the complaints were genuine, but he testified that he found nothing medically speaking to cause the condition and that while the condition was actual, it was purely mental. He did not testify that plaintiff's injuries were permanent. Another physician, testifying for plaintiff, was of the opinion that plaintiff appeared in a stupid, dense mental state, and that litigation neurosis, or a state of suspense due to the uncertainty of the outcome of pending litigation was applicable to the plaintiff's case. An opinion was expressed by one of plaintiff's experts that while plaintiff's hearing was poor there was no impairment due to the accident.

A physician for defendant testified that neurosis is a definite psychological condition, and that in his opinion plaintiff's was not a true neurosis but a litigation neurosis which will end with the litigation. Another physician reporting on the case for defendant, after an examination, described plaintiff as a "potbellied, smiling, exceedingly cheerful and wary dark haired Spaniard" whose statements show "a definite factor of simulation and malingering." This coldly skeptical appraisal of plaintiff's motives was not shared by any other expert on either side, by any of the jurors, or by the trial judge.

It would serve no useful purpose to elaborate upon the evidence, opinion and otherwise, as to the extent of plaintiff's injuries. If, as plaintiff contended, his ability to efficiently pursue his occupation as a chef and short order cook was seriously and permanently impaired as a result of the accident, and if the evidence of his alleged business loss and his physical suffering and mental distress should be given full effect, a verdict of $11,000 would not be unreasonable. On the other hand, there was ample evidence that his condition was not permanent but was due to nervous tension caused by worry and concern over the outcome of his litigation, and if it was believed to be merely a temporary condition, a considerably smaller verdict would have been within reason. It is evident that the jurors took the former view of the case, the trial judge the latter.

[1-4] The expert witnesses were in sharp disagreement. Inasmuch as the symptoms indicative of plaintiff's condition were almost entirely subjective, the credibility of plaintiff and the soundness of the opinions of the experts presented questions which were exclusively for the triers of the facts, the jury in the first instance and upon motion for a new trial the trial judge. These are not questions for a reviewing court. The trial judge was of the opinion that the verdict was contrary to the weight of the evidence. So believing, it was his duty to either reduce the damages as a condition to denying the motion, or to grant a new trial. It is not within our jurisdiction to decide that the trial judge arrived at an erroneous conclusion as to the credibility of the witnesses and the weight of the evidence. Much less may we go further and hold that his conclusions upon the factual aspects of the case were so palpably erroneous as to render the order an abuse of discretion. Our question is whether a verdict for an amount considerably less than that awarded would have had reasonable and substantial support in the evidence. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Williams v. Field Transportation Co., 28 Cal.2d 696, 171 P.2d 722. A smaller verdict would not have been inadequate as a matter of law.

[5–7] While the brief of the appellant contains a lengthy discussion of the evidence in justifying the amount of the verdict, it does not recognize the limitations of the powers of a reviewing court in considering an appeal from an order granting a new trial upon the ground of insufficiency of the evidence. It is elementary that a ruling upon a motion for new trial will not be disturbed except upon a clear showing of abuse of discretion. The brief erroneously assumes that this court has the same authority as the trial judge had in ruling on the motion. It is not contended that a verdict in a smaller amount would have been unreasonable, but only that the verdict was not unreasonably large, which of course is not the question before us. However, any argument that might have been made to the contrary of the views we have expressed would have been unavailing. It was not only proper for the trial judge to weigh the evidence on the motion for new trial but it was his duty to do so and to reduce the amount of the verdict by conditional order or to grant a new trial if he was satisfied that the verdict was unreasonably large.

It is equally clear, however, that a new trial should be limited to the issue of damages. There is no doubt whatever that the negligence of the defendant was the sole cause of the accident. There was evidence that he had been drinking but was not intoxicated, and that he had been working for 48 hours with very little sleep. Defendant testified that he relaxed a little "and just dozed off," and remembers nothing after that until the collision occurred. Upon the motion for a new trial defendant's argument was limited to the ground of excessive damages. No other ground is discussed in the briefs. The evidence of negligence is so clear as to render it improper to submit that issue again to a court or jury.

The order is modified and a new trial is directed to be had upon the sole issue of damages.

WOOD and VALLÉE, JJ., concur.

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37 Cal.2d 614

PEOPLE v. CULLEN.

Cr. 5172.

Supreme Court of California.
July 27, 1951.

Rehearing Denied Aug. 23, 1951.

Ray Cullen was convicted in the Superior Court for Riverside County, O. K. Morton, J., of murder in the first degree and an automatic appeal was taken. The Supreme Court, Shenk, J., held that the evidence sustained the conviction though the bodies of the victims were never found that the alleged trial errors were not prejudicial to defendant and that the motion for change of place of trial and disallowing challenge to the jury panel because of local prejudice were properly denied.

Judgment affirmed.
Carter, J., dissented.

1. Homicide ⇨228(1, 2)

In murder prosecution the "corpus delicti" consisted of the death of the alleged victims and the existence of some criminal agency as the cause, either or both of which could be proved circumstantially or inferentially.

See publication Words and Phrases, for other judicial constructions and definitions of "Corpus Delicti".

2. Homicide ⇨228(3)

In murder prosecution it is not necessary to support the conviction that bodies of the victims actually be found.

3. Homicide ⇨228(1)

In murder prosecution proof of the corpus delicti does not require identity of the perpetrators and it is not necessary that it connect the defendant with the commission of the crime though it may do so nor does motive form any part of the corpus delicti.

4. Criminal law ⇨406(1), 409, 535(1)

The corpus delicti must be established independently of the admissions of defendant and conviction cannot be had on his extra-judicial admissions or confessions without proof aliunde of the corpus delicti but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before admissions may be received.

5. Criminal law ⇨406(1), 409, 680(2)

In murder prosecution a prima facie showing that alleged victims met death by a criminal agency is all that is required and defendant's extra-judicial admissions are then admissible, the order of proof being discretionary, and together with prima facie showing, must satisfy the jury beyond a reasonable doubt.

6. Criminal law ⇨409

The purpose of the rule that the corpus delicti must be established independently of admissions of the defendant is to protect defendant against possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.

7. Criminal law ⇨1159(2)

It is the function of the jury to draw the proper inferences from the proof of the circumstances and it is not the province of the reviewing court to overturn the jury's verdict when it is supported by substantial evidence including reasonable inferences to be drawn therefrom.

8. Criminal law ⇨409

In murder prosecution where bodies of victims were never found circumstantial evidence established a prima facie showing of the corpus delicti sufficient to allow the case with the defendant's admissions, to go to the jury.

9. Homicide ⚷228(3)

In murder prosecution where the bodies of the victims were never found evidence sustained conviction.

10. Criminal law ⚷1166½(12)

In murder prosecution where court stated in jury's presence previous conclusion made in their absence that prosecution had produced prima facie proof of the corpus delicti alleged error was cured by immediate withdrawal instruction and subsequent full and proper instructions.

11. Criminal law ⚷1166½(12)

In murder prosecution alleged error because court stated in jury's presence previous conclusion stated in their absence that the prosecution had produced prima facie proof of the corpus delicti did not result in a miscarriage of justice where the evidence was amply sufficient to sustain conviction.

12. Criminal law ⚷404(4), 741(1)

In murder prosecution evidence of similarity to rings and other objects concededly owned and worn by deceased was sufficient to justify their admission in evidence the questions of weight and credibility being for the jury.

13. Witnesses ⚷16, 270(2)

In murder prosecution refusing a subpoena to defendant to produce bank records regarding disposition of proceeds from the sale of decedent's property, or to permit extended cross-examination of witness on the subject, on ground of absence of an inference in the evidence that defendant had benefitted from a sale of the property was not error.

14. Criminal law ⚷650

In murder prosecution request of defendant to appoint a psychiatrist to examine him while under influence of sodium pentathol was properly denied since evidence would be hearsay, self-serving, and conjectural.

15. Criminal law ⚷126(2)
Jury ⚷120

In murder prosecution denying motion for change of place of trial because of local prejudice and disallowing a challenge to the jury panel for such prejudice was not error under the evidence.

16. Jury ⚷120

In murder prosecution evidence did not support challenge to the jury panel on the ground that its members did not represent a true cross-section of the citizens of the county, and that the jury list was not compiled in accordance with the law but was permanent in character except for incidental deletions and additions.

17. Criminal law ⚷1166½(6)

In murder prosecution that one of the two alternates had served on the grand jury the previous year without disclosing such fact was not prejudicial where they did not participate in the verdict rendered against defendant.

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J. David Hennigan, Riverside, and Robert M. Wiley, Hemet, for appellant.

Fred N. Howser and Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., William O. Mackey, District Atty., and Ray T. Sullivan, Jr. Asst. District Atty., Riverside, for respondent.

SHENK, Justice.

The defendant was tried by a jury and found guilty on two counts of murder in the first degree without recommendation. The death penalty was imposed and this automatic appeal followed. There was no motion for a new trial.

By indictment the defendant was charged with the murder of his wife, Mary Cullen, and of her father, Daniel T. Boyer, on or about January 3, 1949, in Riverside county. The indictment also alleged two prior convictions, assault with a deadly weapon and counterfeiting. The indictment was returned on March 1, 1950, and the defendant was arraigned on March 6th. He was then present without counsel and the public defender was appointed to represent him. A motion to dismiss the indictment on the ground that the defendant was denied a speedy trial was denied. The defendant pleaded not guilty and admitted the alleged prior convictions. April 25, 1950, was designated as the date when the trial should commence. In the interim the defendant moved for a change of place of trial to the county of Fresno on the ground that the people of Riverside County were so prejudiced against him that a fair and impartial trial could not be had in that county. The motion was denied. At the defendant's request another attorney was associated in his behalf with the public defender.

On May 2, 1950, after examination of the veniremen, the defendant challenged the entire panel and renewed his motion for change of venue. The challenge was disallowed and the motion denied. After a protracted trial the case was submitted to the jury on the instructions of the court at 6:51 p. m. of July 21, 1950. The jury returned the verdicts at 12:30 a. m. of July 22nd.

The record discloses the following: On August 17, 1948, the defendant, then about 61 years of age, and Mary Cullen who was about 57, were married in Yuma, Arizona. They lived in the defendant's cabin on the west bank of the Colorado River in a sparsely settled region of Riverside county about three miles from the town of Blythe. Mary had been previously married and owned a home in Colton which she rented after her marriage to the defendant. She owned real property in San Bernardino and owned but had sold real property in Yucaipa. She took with her to the home near Blythe rather complete household furniture, furnishings and appliances. She had three grown sons, Frank, Al, and William Patton, who lived in Southern California. She had three sisters including Sophie Patton and Bessie Hart. These relatives visited and corresponded with her frequently. In December, 1948, Mary's father, Daniel T. Boyer, about 81 years of age, went to live with the Cullens. He was a War Veteran and received a monthly pension check of $120.

Sometime in December 1948 Mary Cullen began preparations for leaving Blythe and returning to her Colton residence. She made arrangements for a furniture dealer to buy some and to remove other appliances and items of furniture to Colton. She packed her belongings preparatory to hauling them in her car which she had reconditioned for the journey. She wrote to her son William about December 29th saying she did not "want anything from him only to get away", and again on the 31st that as soon as she could sell she was "coming down", and that she had asked the tenants for possession of her house in Colton by February 1st. Her son Al and sister Sophie also received letters written the same day. They did not hear from or see her thereafter. Mary Cullen and her father were seen the last times at the Cullen home on January 2, 1949, at 12:30 p. m. by a neighbor who called after she had observed the defendant depart for Blythe, and in the afternoon about three. Their disappearance was complete and there has been no trace of them either alive or dead.

The defendant was employed at a cafe in Blythe and his shift commenced about noon. He usually drove to town with Mary and her father about ten in the morning, and returned before departing for work. He was not observed to make his customary morning trip on Monday, January 3, 1949, but departed for his employment as usual. On that day he presented to the bank in Blythe for payment and collected the proceeds of Boyer's pension check of $120 endorsed with the names "Daniel T. Boyer" and "Ray Cullen."

At 10:30 a. m. on Tuesday, January 4th, men from the sheriff's office took a boat on a routine patrol of the river. They passed the Cullen place and saw no activity, but about a quarter of a mile below they observed an unoccupied boat near the California bank right side up and stopped by a piece of driftwood, but they did not examine it further. About that time the defendant entered the office of a real estate broker whom he had previously consulted about selling his place on the river. The defendant told the broker that his wife and her father had drowned when they were out in a boat trying to get a duck which they had shot that morning while the defendant was working around the place; that he had heard the motor sputter and after a few minutes looked to see what they were doing and that he didn't see them any more. He said he had been trying to locate them and offered $100 to anyone who found them. The broker said it was not necessary, that all he had to do was to call the sheriff's office. About noon the defendant appeared at the sheriff's office and asked where he could get a boat to look for his wife and her father who had disappeared that morning; that the last he had seen of them they were drifting down the river and he was certain they would drown if he could not get help at once. He was told that a boat had gone downstream and would probably overtake them and tow them to a landing. On his return to Blythe he reported to a neighbor that Mary Cullen had shot a duck and with her father had gone out in a boat and he was afraid something had happened to them. About six o'clock on the morning of either Tuesday or Wednesday the defendant appeared in his red "pick-up" truck at a service station. His shoes and the bottom of his trousers were muddied. He said he guessed his wife had drowned; that she had shot a couple of ducks the evening before and had gone with her father in a boat to pick them up; that he had not been able to find the deputy sheriff. About three o'clock on the afternoon of January 4th two men who were looking for the missing people found the Cullen boat a quarter mile downstream ten feet from the bank with sixteen feet of chain attached partly tangled in a fallen mesquite tree. There were twenty or thirty gallons of water in the boat and an old hat belonging to Boyer. The gas valve was shut off. The boat was of a light but safe type with a motor which with the gas shut off would run about thirty seconds on the gasoline in the carburetor. Mary Cullen was a good swimmer.

On the night of January 4th the defendant telephoned William Patton in San Bernardino and reported that his mother and Boyer were lost in the river and that the sheriff's office had boats out looking for them. Six relatives and friends arrived that night. There was a light in the house but the defendant delayed a few minutes before answering their call. Everything in the house was neat and clean. Mary Cullen's and Boyer's possessions were packed, but not the defendant's. A .22–410 over and-under gun that William had given to his mother was standing in a corner. He broke the gun and saw that the .410 barrel was loaded and that the .22 barrel was empty. William took off his shoes to lie on the davenport and stepped on a rug which wet the sole of his foot. Al Patton noticed another wet rug. The defendant explained that Mary had washed the rugs and they had frozen. Boyer's watch, which he usually wore, was on the buffet. The next morning they opened the ice-box and saw only some mildewed food and eggs. During the night the defendant was busy at intervals outside the house, and just before daybreak for about a half hour. On being questioned he reported that he had picked up Boyer's pension check at the general delivery window and that Boyer had cashed the check himself when the defendant took him into town on Monday. Later, on the 6th, he said that Boyer was too sick to go to town but had endorsed the check and that he (the defendant) had cashed it. The evidence justifies the conclusion that the defendant forged Boyer's name by the endorsement. That fact was established on the conviction of the defendant of such forgery as hereinafter related.

After daylight on the 5th the visiting party examined the boat and used it to search the river. They also hired an airplane to view the territory. The defendant aided in these searches. The party left the Cullen home on the sixth at the suggestion of the sheriff's office after complaint by the defendant that they were stealing his papers, but they continued to search the area. On January 27th fresh footprints were found after a rain. They led from the house to some brush and returned. About 150 yards from the house a freshly dug hole about three feet in diameter had been filled in, and the tracks led to another similar recently filled in hole about 50 feet distant. On the 29th with the aid of a deputy sheriff they dug into the holes for about four feet finding the earth mixed with twigs, leaves and recently severed roots. On that day Mr. Boyhtari, a neighbor who had been hired by the defendant as a watchman during this period, handed to the deputy an Eastern Star ring and another ring which resembled rings owned by Mary Cullen. The defendant had said that Mary was wearing her rings at the time of her disappearnce. Some other articles of her jewelry were later found in her button box in the attic. She was supposed to have had about $700 in cash which was never found.

Tests showed traces of blood in the washed rugs in the living room, in the davenport which also had been washed, and in the woodwork above the davenport. A spot in the floor had been sandpapered and blood particles were found between the floorboards. Blood was found on the door jamb of the back door. Mary's raincoat and Boyer's hat showed traces of blood. A pair of cotton gloves purchased for the defendant by the Pattons was later found with blood and sand on the outside. Blood was also found from the knee downward on the right leg and on the upper part of the left leg of a nearly new pair of jeans. A small clot of previously semi-coagulated blood was found on the ribbon band of a hat. Blood was also found on the left shoe of a pair of black shoes, on a pair of brown slippers which had been washed, and on an outing flannel sheet.

The officers conducted a continuous river search for the bodies for about a month, and after that at intervals. Evidence as to the probability of recovery from the Colorado River would justify the inference that if Mary and her father had drowned, their bodies would have been recovered.

The defendant was arrested on February 11th, 1949, on a charge of forging the endorsement on Boyer's pension check. He was convicted, and the judgment was affirmed on appeal. People v. Cullen, 1950, 99 Cal.App.2d 468, 221 P.2d 1016. On him at that time were found photographs of Mary Cullen. On the back of each of two was written in his handwriting: "In Memoriam. My dearly beloved and precious Mary. Departed from this life January 4, 1949. Rest in peace, Dear One. Born July 17, 1891." The writing was in ink except that the figure 4 in "January 4" was in pencil. A possible murder charge was mentioned to the defendant. He said they couldn't try him on a murder charge because they didn't have any corpus delicti. Asked what he meant he said: "You can't prove a man guilty of murder without producing the bodies, which is the corpus delicti." Later, told of the futile river search for the bodies and asked his advice about continuing, he said: "Well, I wouldn't look for them there anymore. It is just a waste of time because you won't find them there * * * I am not saying they are not in there. I just told you you won't find them there."

After he was in jail members of the family told him that Mrs. Cullen could not have unlocked the boat because they had found the keys to the boat behind the door where they belonged. He replied, "Well, Sophie, I will tell you. There is a different story about this whole thing than I have told, but I think I might take it to my grave with me." In a conversation between Sophie and Bessie in his presence it was mentioned that a chemist found some blood in the house. The defendant said: "They did not, because I cleaned that house up good four or five times." After Sophie left, he said to Bessie: "Mary, I have got a secret that I might take to my grave." She said, "Ray, I am not Mary. My name is Bessie." The next day he told Bessie, "Mary was prepared to die * * * I baptized her. She was not satisfied with her baptism she had when a girl, and she asked me to baptize her. She was prepared to die Monday." Bessie said, "Ray did you baptize Dad?" He said, "You cannot baptize anybody that is dead." Asked what he meant, he said: "Dad was stone dead on the kitchen floor." And then, "Now, if I tell you any more, I am going to jeopardize my defense." Asked why Mary did not get a priest for the baptism he replied that she went but the priest was not there; that she didn't go back because she didn't have time. The next day when she brought his rosaries, he asked her not to tell the priest that he had baptized Mary, nor to tell anybody what he would tell her, but that "Dad and Mary died in the house"; that he was outside and heard two shots; that he found Dad lying dead on the floor and Mary dying in the bathroom with a gun nearby and she asked him to baptize her quick; that nothing could have been done by calling a doctor who would find one with the skull bashed in, one with the arm broken, shot through the stomach, and the spine mashed in. He said it would look bad for him with his record and they would file a murder charge against him "but they woudn't get anywhere, because they had no corpus delicti." Numerous tests from the bathroom area showed no blood reaction. Asked where the bodies were he said that the sheriff's officers and Al and Billy walked right over the evidence of bloody rags and a butcher knife; that if they had gone into the house when they first investigated they would have seen Boyer and Mary lying in there. Asked if Boyer or Mary did the killing he replied that neither of them ever harmed anybody, adding "I can't tell you any more. They have no corpus delicti and if I say anything more to you, I am going to jeopardize my defense." He told them that he buried a jar with Mary's watch, $700 and some papers and that a monk was keeping several thousand dollars for him.

It is unnecessary to detail other inconsistent matters:—The defendant's repetition to the officers that the deaths had occurred in the house; his statement that he hired a man and truck to take the bodies away for $125 and told the boat and river story because of his record; his attempts to bargain for a manslaughter sentence if he told where the bodies were; his statements that he knew where they were, that it would not take long to find them; that he would not plead guilty to a murder charge because he was afraid he would get the death penalty but would consider pleading to second degree; that his only hope was that they had no corpus delicti; that if he told where the bodies were they could hang him for it; "I could have put them in oil drums and hauled them away. I didn't say I did. I said I could have. They can dig up the desert; they can blow up the river, and they will never find them." Toward the end of February 1950, when an officer sought to serve a subpoena, Boyhtari the neighbor was found dead in his cabin with a suicide note beside him dated January 17th.

The defendant took the stand and told the story first related by him and explained or attempted to explain the incriminating details in the foregoing evidence. He testified that he had signed the pension check with Boyer's name at the latter's request and with his authority—a version suggested to him by one of the sheriff's officers. He claimed that he was put through a brutal third degree and that his arms and legs were twisted in an effort to get him to tell where the bodies were. He did not divulge the location of the bodies nor did he confess guilt.

The principal contention is that the corpus delicti, outside of the extra-judicial statements and declarations of the defendant, has not been established; and that the circumstantial evidence is insufficient to prove that Mary Cullen and Daniel Boyer were dead and that their deaths resulted from some criminal agency.

A somewhat similar contention was made by the defendant on his appeal from the forgery conviction and the question was correctly resolved adversely to him. People v. Cullen, supra, 99 Cal.App.2d at pages 472–473, 221 P.2d 1016.

[1] Here the corpus delicti consists of two elements, the death of the alleged victims and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially. People v. Alviso, 55 Cal. 230; People v. Ives, 17 Cal.2d 459, 463–464, 110 P.2d 408 and cases cited; People v. Clark, 70 Cal.App. 531, 544, 233 P. 980.

[2] It is not necessary in order to support the conviction that the bodies actually be found. In People v. Wilkins, 158 Cal. 530, 536, 111 P. 612, quoting from 3 Rice on Evidence, 465–466, it was said that to require direct and positive proof of the corpus delicti would be most unreasonable; that the worst crimes are naturally committed at chosen times, in darkness and secrecy; that human tribunals must act upon such indications as the circumstances ad-

mit; that more often than not the attendant and surrounding facts remove all mystery and supply that degree of certainty men are daily accustomed to regard as sufficient in the most important concerns of life.

[3] Proof of the corpus delicti does not require identity of the perpetrators. It is not necessary that it connect the defendant with the commission of the crime although it may do so. People v. Leary, 28 Cal.2d 740 and 745, 172 P.2d 41 and cases cited. Nor does motive form any part of the corpus delicti. People v. Wilson, 61 Cal.App. 611, 615, 215 P. 565.

[4–6] It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof aliunde of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing that the alleged victims met death by a criminal agency is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt. People v. Jones, 123 Cal. 65, 55 P. 698; People v. Selby, 198 Cal. 426, 434–439, 245 P. 426; People v. McMonigle, 29 Cal.2d 730, 738–740, 177 P.2d 745; People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Corrales, 34 Cal.2d 426, 429, 210 P.2d 843. The purpose of the rule is to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator. People v. Vertrees, 169 Cal. 404, 409, 146 P. 890; see also People v. De Martini, 50 Cal.App. 109, 113, 194 P. 506.

[7–9] The foregoing summary of the essential facts in the light of the stated principles fully answers the defendant's contentions. That the circumstantial evidence must be consistent with guilt and inconsistent with an hypothesis of innocence, and that the proof of the corpus delicti and the identity of the perpetrator must resolve the guilt of the defendant beyond a reasonable doubt, are rules of instruction for the guidance of the jury. It is the function of the jury to draw the proper inferences from the proof of the circumstances. It is not the province of the reviewing court to overturn the jury's verdict when it is supported by substantial evidence including the reasonable inferences to be drawn therefrom. People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631; People v. Newland, 15 Cal.2d 678, 682, 104 P.2d 778. The circumstances in evidence established a prima facie showing of the corpus delicti sufficient to allow the case, with the defendant's admissions, to go to the jury. The circumstances also pointed to the defendant as the perpetrator and, together with the admissions, unquestionably support the verdicts.

[10, 11] There is no merit in the contention that in ruling on the admissibility of the defendant's declarations and statements the court withdrew from the jury the determination as to whether the evidence established the corpus delicti. The objection when first made was argued in the absence of the jury and a ruling then indicated. In ruling on the repeated objection the court stated in the jury's presence the previous conclusion that the prosecution had produced prima facie proof of the corpus delicti to satisfy the legal requirements for admissibility of the defendant's declarations. The court immediately stated that the weight of the evidence and the ultimate determination was for the jury. It was for the court to determine whether the prima facie showing had been made. If there was error in stating its determination in the jury's presence, the effect was cured by the immediate instruction and subsequent full and proper instructions. In view of the conclusion herein as to the sufficiency of the evidence, no miscarriage of justice resulted even if error on this point be assumed. Cf. People v. Pokrajac, 206 Cal. 259, 274 P. 63; People v. Wilson, 61 Cal.App. 611, 622–623, 215 P. 565.

[12] Prejudice is asserted from the ruling which permitted in evidence the rings handed to the sheriff by Boyhtari in accordance with testimony that they were similar to rings concededly owned and worn by Mary Cullen. It is contended that the evidence fails to establish that they were the identical rings which belonged to her. Similar complaint is made as to other exhibits. Certain and positive identification was not required. The evidence of similarity was sufficient to justify the admission in evidence of the rings and the other objects, the questions of weight and credibility being for the jury. People v. Ferdinand, 194 Cal. 555, 563–565, 229 P. 341.

[13] Objection is made to the court's ruling refusing a subpoena to produce the bank records regarding the disposition of the proceeds from the sale of Mary's Yucaipa property, or to permit extended cross-examination of William Patton on that subject. The ruling was grounded on the absence of an inference in the evidence that the defendant had benefitted from the sale of the property; therefore that the evidence sought would not relate to a material fact or issue. The defendant does not refer to any testimony in the record and none is discovered which would disclose that the court was mistaken or was in error in its ruling.

[14] The defendant requested the trial court to appoint a psychiatrist to examine him while under the influence of sodium pentathol and offered proof as to the reliability of the result. The request was denied and an offer of proof rejected. Prejudicial error is asserted. The contention is without merit. It is questionable whether the results of such an examination would be admissible in evidence. See People v. McNichol, 100 Cal.App.2d 554, 558, 559, 224 P.2d 21. And the offer of proof indicated that the statements to be produced would be hearsay, self-serving, and conjectural since the truth thereof would depend entirely on the psychiatrist's opinion which conceivably might conflict with the opinion of another psychiatrist.

[15] There was no abuse of discretion in denying the motion for change of place of trial or in disallowing the challenge to the jury panel. The motion was submitted on conflicting affidavits from which the court could justifiably conclude that at the time of the ruling and the trial the clamor and prejudice, if any existed, had subsided and that there was no reason why the defendant could not be tried impartially and fairly by the jury selected. It is also to be assumed that the court had some knowledge of conditions existing in the county.

From the defendant's statement at the time of sentence it appeared that prior to August 1949 he had been tried in the county on the murder charge and that the jury had disagreed. The present trial commenced about a year and four months after the disappearance of Mary and her father. There is no showing that people in numbers attended the trial or that a great deal of interest was manifested. In selecting the jury 31 veniremen were examined. Two alternates were selected from eight additional. The defendant did not exhaust his peremptory challenges, having eleven remaining, and declined the court's offer to order a special venire if needed.

[16] The challenge to the jury panel appears to have been based on the assertion that the members did not represent a true cross-section of the citizens of Riverside county, but were taken from a class of substantial citizens eager to serve; also that the jury list was not compiled in accordance with law but was permanent in character except for incidental deletions and additions. No evidence is referred to except the examination of the prospective jurors. That examination does not support the contentions advanced. Some of those drawn were men and women in business and other active work; others were retired; some were wives and others were widows of husbands shown to have been in various walks of life. Fifteen of those examined had had no previous jury experience in California.

[17] It is claimed that one of the two alternates, neither of whom became an active member of the jury, had served on the

Grand Jury the previous year and been discharged in January 1950 without disclosing the fact. Without participation in the verdict no prejudice resulted.

In People v. Yeager, 194 Cal. 452, 481–482, 229 P. 40, it was stated that a court may not be required to grant a motion for change of venue because there was some excitement in the county regarding the matter, or that the press had expressed hostility; and that a denial of a change of venue might well be predicated on the fact that the excitement had subsided before the application was made. In that case a much shorter period had intervened between the events and the trial. In People v. Wallace, 6 Cal.2d 759, 59 P.2d 115, the chief of police of North Sacramento was the victim. The denial of the motion and the renewed motion and the challenge to the jury panel was based upon the trial court's fair appraisal of the jury selected about five weeks after the homicide occurred. As declared in those cases the matters were addressed to the sound discretion of the trial court. Here there is no justification for a conclusion that the court committed an abuse of discretion in denying the motion for a change of venue or in disallowing the challenge to the jury panel.

The record discloses that the defendant had a fair and impartial trial and that the evidence fully supports the verdicts of the jury.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion the evidence was insufficient to establish the corpus delicti, and the trial court committed prejudicial error in stating in the presence of the jury that the corpus delicti had been established.

I would, therefore, reverse the judgment and remand the case for a new trial.

Rehearing denied; CARTER, J., dissenting.

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37 Cal.2d 499

LEE ON et al. v. LONG et al.

S. F. 18026.

Supreme Court of California, in Bank.

June 29, 1951.

Rehearing Denied July 26, 1951.

Lee On and others brought action against James Long, individually and as sheriff, etc., and others to recover money seized from gambling tables, by the named defendant in a gambling raid. The action was consolidated for trial with a petition filed by the County of Contra Costa for an order authorizing forfeiture of the money to the county. The Superior Court of Contra Costa County, Homer W. Patterson, J., entered an order denying the county's prayer for forfeiture of the money and denied plaintiffs recovery, and the plaintiffs appealed. The Supreme Court, Spence, J., held that courts would not lend assistance to plaintiffs whose claim for relief rests on an illegal transaction.

Affirmed.

Carter, Shauer, and Traynor, JJ., dissented.

Prior opinion, 223 P.2d 894.

1. Action 🔑4

Where sheriff and deputies on gambling raid seized gambling paraphernalia and money from gambling tables, and the money was deposited with county treasurer, and owners of gambling paraphernalia and money pleaded guilty to gambling charges and were fined, court would not lend assistance to owners of the money in suit against the sheriff and others to recover the money, since the owners claim for relief rested on illegal transaction. Pen. Code, § 330.

2. Gaming 🔑58

Where sheriff and deputies on gambling raid seized gambling paraphernalia and money from gambling tables, and the money was deposited with county treasurer, and owners of gambling paraphernalia and money pleaded guilty to gambling charges and were fined, county was not entitled to have the money forfeited to county, notwithstanding that owners of money could not prevail in suit to recover the money. Pen. Code, § 330; Government Code, § 29704.

3. Contracts ⚷138(1)

A party to an illegal contract cannot come into court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.

4. Contracts ⚷138(7)

Rule that a party to an illegal contract cannot come into a court of law to have the contract enforced, is not limited in its application to parties to the illegal transaction, as distinguished from an attempt to set up a claim against a third party, based on the law's violation.

5. Contracts ⚷138(1)

The test of the application of the rule that a party to an illegal contract cannot come into court of law and ask to have the illegal contract enforced, is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party.

6. Action ⚷4

If plaintiff cannot open his case, based on an illegal transaction, without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be on the defendant.

7. Trover and conversion ⚷16

In an action for conversion, the plaintiff must recover, if at all, on the strength of his own title and not on the weakness of the title of his adversary.

◆

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J. F. Coakley, Dist. Atty. (Alameda), R. Robert Hunter, Asst. Dist. Atty., Richard H. Klippert, Deputy Dist. Atty., William E. Simpson, Dist. Atty. (Los Angeles), J. Francis O'Shea, Dist. Atty. (Sacramento), J. D. Keller, Dist. Atty. (San Diego), Thomas C. Lynch, Dist. Atty. (San Francisco), Chester Watson, Dist. Atty. (San Joaquin), Louis De Matteis, Dist. Atty. (San Mateo), and N. J. Menard, Dist. Atty. (Santa Clara), as amici curiae on behalf of respondents.

SPENCE, Justice.

[1] The question to be determined is whether the trial court erred in its judgment denying plaintiffs the right to recover money seized while in use in gambling games, which games were being conducted in violation of law. Consistent with the settled principle that the courts will not lend assistance to persons whose claim for relief rests on an illegal transaction, it is our conclusion that plaintiffs cannot prevail.

In August, 1945, plaintiffs were arrested in a gambling raid made on certain premises in El Cerrito. Thereafter plaintiffs were charged with the violation of section 330 of the Penal Code (gaming); and upon arraignment, they pleaded guilty to the charges and paid the fines imposed.

In the course of the raid, the sheriff and his deputies seized from the tables at which plaintiffs were seated certain dice, dominoes, playing cards, lottery tickets, and money in the amount of $6,248.35. The county of Contra Costa filed a petition in the superior court praying for an order authorizing destruction of the gambling paraphernalia and forfeiture of the money. Plaintiffs in turn brought suit against the sheriff, Long, and the district attorney, Collins, for the return of the money. The two cases were tried upon the same evidence. The court ordered confiscation of the gambling paraphernalia but with respect to the money, it denied both the county's petition for forfeiture and also plaintiffs' prayer for its return.

In the disposition of plaintiffs' action, the trial court found, in accord with the undisputed testimony of the sheriff, defendant Long, that the money was seized from gambling tables where it was "in use in gambling games"; that plaintiffs had pleaded guilty to the violation of section 330 of the Penal Code and each had paid a fine of $250; that the money had been deposited by defendant Long with the county treasurer, and that plaintiffs had failed to file a claim "against defendants in their official capacity . . . pursuant to the requirements of Section 29704 of the Government Code." Upon these findings, the court concluded that plaintiffs' claim was barred by their failure to comply with said section 29704; that the money "at the time of [its] seizure" was being "used in violation of the [state] gaming laws"; and that "the law will not lend its support to a claim founded on its own violation." From the adverse judgment accordingly entered, plaintiffs have appealed.

[2] The principal question on this appeal, the answer to which appears to be determinative, is whether plaintiffs, despite their claim of ownership and right to possession of the money in question, are nevertheless barred from its recovery by the trial court's findings that the money was "at the time of its seizure in use in gambling games," which games were being conducted in violation of law. Plaintiffs do not contest the propriety of these findings, but they argue that the trial court's refusal to return the money to them is contrary to the statutory provisions limiting the scope of forfeitures. To this point, plaintiffs cite section 2604 of the Penal Code, declaring that "No conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law". The Legislature has provided in two instances for the forfeiture of money used in gambling, neither of which is applicable here: Penal Code, § 335a, having to do with gambling devices other than those here involved; and section 325, dealing with lottery activities, as to which the seized money was in nowise connected under the evidence or the court's findings. Consistent with the general rule governing the construction of statutes involving forfeitures (12 Cal.Jur. § 3, pp. 633–634), the trial court properly recognized the limits of its express statutory authority and denied the county's petition for forfeiture "as far as the money [was] concerned." Cf. Chapman v. Aggeler, 47 Cal.App.2d 848, 860–861, 119 P.2d 204. However, the present case on appeal does not concern the law of forfeitures, but rather relates to the question of whether plaintiffs, admittedly engaged in illegal gambling activities at the time of the raid and their arrest, are in a position to assert their ownership and right to possession of the money that was then in actual use in such activities, and to enlist the aid of the court in seeking to have it restored to them.

[3–6] "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim." 17 C.J.S., Contracts, § 272, p. 656.

Nor is this established rule limited in its application to parties to the illegal transaction as distinguished from an attempt to set up a claim against a third party based on the law's violation. Schur v. Johnson, 2 Cal.App.2d 680, 683, 38 P.2d 844; Asher v. Johnson, 26 Cal.App.2d 403, 413, 79 P.2d 457. As was said in the Schur case, 2 Cal.App.2d at pages 683–684, 38 P.2d at page 846, "'the test of its [the rule's] application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party.'" Likewise illustrative of the courts' attitude towards the enforcement of a demand "connected with an illegal transaction" is the statement in the Asher case, 26 Cal. App.2d at page 416, 79 P.2d at page 464: "'If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'" In such cases, the illegal nature of the transaction creates a "disability in [the] plaintiff." 17 C.J.S. Contracts, § 272, p. 659.

Here it is manifest that plaintiffs could not, and did not prove their right to possession of the seized money without disclosing that it was in use in their illegal gambling activities at the time of the raid and their arrest in the gambling establishment. Moreover, plaintiffs pleaded guilty to the violation of the gaming law as charged following their arrest and paid the fines imposed. Shall the courts then lend their aid to enable persons such as plaintiffs, who have committed a criminal offense, to recover the money which was in actual use in the perpetration thereof? Such question must be answered in the negative under the principles enunciated in Schur v. Johnson, supra, 2 Cal.App.2d 680, 38 P.2d 844, and Asher v. Johnson, supra, 26 Cal.App.2d 403, 79 P.2d 457, where the operators of illegal tango establishments sought to recover sales taxes which they paid to the state under protest that such levies had been improperly made on their gambling games. In the last cited cases, plaintiffs were denied recovery on the ground that they had to rely on their unlawful business to establish their right to recover the money wrongfully collected. In so holding, the court in the Asher case pertinently said, 26 Cal.App.2d at page 408, 79 P.2d at page 460: "We cannot afford to temporize on principles which vitally affect the public welfare." As involving fundamentally similar legal considerations, the court there cited and quoted at length 26 Cal.App.2d 410–411, 79 P.2d 457, from the leading case of Dorrell v. Clark, 90 Mont. 585, 4 P.2d 712, 79 A.L.R. 1000, holding that the owner or possessor of a slot machine, which is lawfully seized by a sheriff or a police officer, is not entitled to the return of the money found therein. The same general reasoning has been followed by courts in other jurisdictions in refusing to restore to alleged owners money earmarked or segregated as part of gambling operations and lawfully seized along with gambling paraphernalia in the course of a gambling raid. Hofferman v. Simmons, 290 N.Y. 449, 49 N.E.2d 523, 527; Germania Club v. City of Chicago, 332 Ill. App. 112, 74 N.E.2d 29, 30; State v. McNichols, 63 Idaho 100, 117 P.2d 468, 469–470; State v. Johnson, 52 N.M. 229, 195 P.2d 1017, 1020; see, also, Fairmount Engine Co. v. Montgomery Co., 135 Pa. Super. 367, 5 A.2d 419, 420–421; Krug v. Board of Chosen Freeholders, 3 N.J. Super. 22, 65 A.2d 542, 544.

[7] Equally applicable here as in the Asher case is the fundamental legal principle of the Dorrell decision in precluding plaintiffs, "admitting the violation of the law," which they must disclose as "'the groundwork of [their] claim'", from recovery of the money which was in actual use in their illegal gambling activities. Dorrell v. Clark, supra, 90 Mont. 585, 4 P.2d 712, 714. It is not a question of the ultimate disposition of the seized money, but rather application of a "salutary rule invoked to uphold law and order." Asher v. Johnson, supra, 26 Cal.App.2d 403, 414, 79 P.2d 462. This principle of the law, grounded on public policy, is not affected by the independent considerations entering into the statutory declaration limiting forfeitures to those "expressly imposed by law". (Pen. Code, § 2604.) As pointed out in the Dorrell case, 4 P.2d 713, in an action for conversion, the "plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary * * *." (See, also, 22 Cal.Jur. § 42, p. 167.) Under these circumstances, the trial court did not undertake to declare a forfeiture but properly held that plaintiffs were not entitled to prevail in their suit for recovery of the seized gambling funds. See Dorrell v. Clark, supra, 90 Mont. 585, 4 P.2d 712, 714.

In view of the conclusion reached on the question heretofore discussed, it is unnecessary to determine whether plaintiffs would be barred in any event because of their failure to present a claim in the manner provided in section 29704 of the Government Code (formerly Pol. Code, § 4075).

The judgment is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

CARTER, Justice.

I dissent.

The majority opinion holds, contrary to the statutes, that a person convicted of gambling (Pen. Code, § 330) may be subjected to two penalties, fine or imprisonment and the loss of the money that was used in the gambling enterprise and seized by the arresting officers. It arrives at that astonishing conclusion by equally astonishing reasoning. It concedes that the state *could not declare a forfeiture of the mon-*

ey—that it is not contraband. Yet it concludes that if the state does seize it and is *unlawfully* holding it, the owners cannot recover it. If the result of that conclusion is not confiscation or forfeiture, then the law is indeed an "ass," for it forsakes logic and reason for sophistry—a mere play on words resulting in a legal paradox—the state cannot acquire title—the owner cannot recover possession from the state.

The majority announces the broad rule that where any property is used in the commission of any unlawful act and the officers seize it while making an arrest (I assume it was lawfully seized and could be held as evidence for the trial), then the state may retain it although it cannot declare it forfeited. The implications of that rule are far reaching and inimical to our concept of justice. It may even go so far that any time a traffic officer has the notion, he may seize a car which he claims is being used in violation of any of the innumerable traffic laws. A pertinent illustration is suggested by what is done under the ordinances which authorize the towing away of cars when parked in prohibited areas. If the city should decide that it would like to use those cars for carrying on its business, it may do so. According to the majority opinion they could not be confiscated but the owners could not recover them from the city. The same would be true of a horse run in an illegal race.

The statutes in this state leave no room for doubt that property used in the commission of an unlawful act cannot be confiscated by the state unless the statute *expressly* so provides. It is conceded by the majority that there is no statute authorizing or permitting the forfeiture of money used in a gambling game. The Penal Code provides: "No conviction of any person for a crime works *any forfeiture of any property,* except in cases in which a forfeiture is *expressly* imposed by law; * * *." (Pen. Code, § 2604.) (Italics added.) A conviction of gambling cannot, therefore, "work" a forfeiture; that is, the *law* cannot "work" a forfeiture. But this court, by refusing to allow recovery of the money seized, puts itself above the law and "works" a forfeiture. This section has been applied as not defeating an action to protect a homestead on property used for prostitution. In Harlan v. Schulze, 7 Cal.App. 287, 294–295, 94 P. 379, 382, the court stated: "If residing in a house of prostitution is a crime, as suggested by respondent in view of section 315 of the Penal Code, we must not overlook section 677 [the predecessor of § 2604] of the same Code, which declares: 'No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this state, in the nature of a deodand, or where any person shall flee from justice, are abolished.'" In Chapman v. Aggeler, 47 Cal.App.2d 848, 119 P.2d 204, the owner of slot machines seized by the police in a raid, brought an action to recover them. Losing in the trial court, the owner appealed. The appellate court reversed and directed the trial court to order return of the machines. The court proceeded in part on the ground that there was no finding that the machines were used for gambling, *but also,* said 47 Cal.App.2d at pages 860–861, 119 P.2d at page 210: "We first call attention to the fact that this appellant was convicted of no crime, and then cite the restrictive *rule which obtains even when a defendant is found guilty.* It is found in section 677 of the Penal Code providing that 'No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law'. In all of chapter X of the Penal Code, which is entitled 'Gaming', and where section 330a appears, there was, prior to this year, no provision for forfeiture. This can hardly be considered accidental since the preceding chapter dealing with lotteries contains a provision for forfeiture in section 325, an instance where forfeiture is 'expressly imposed by law'. But even there, in order to make forfeiture effective, an action must be brought or an information filed 'by the attorney-general, or by any district attorney, in the name of the state'. And by this procedure no lottery or gambling machine may be taken by the state, but only the 'moneys and property, offered for sale or distribution * * *'. * * * In short, there is no statute in California that has been called to our attention or that we have been able to find that vests in the court authority to declare a forfeiture in a case such as we are considering. In the absence of express statutory authority, the order requiring the destruction of the property in question is without legal sanction and void.

"It follows from this that the portion of the judgment, by which the court ordered the seized property to be destroyed and a record entry made of its destruction, cannot be sustained.

"Judgment reversed, without costs to either party, and the cause remanded *with instructions that judgment be entered for plaintiff entitling him to the return, forthwith of the* seized property." (Italics added.) That case stands, therefore, for the proposition that if property, seized while being used unlawfully, may not be confiscated by the state, the owner may recover it.

Furthermore, it should be observed that the Legislature has provided that the *maximum* penalty for the violation of section 330 of the Penal Code, of which plaintiffs were convicted, is a *$500* fine. (Pen. Code, § 330.) Yet this court, by refusing to allow recovery of the money, levies a fine of over $6,000.

It has been held that the owner may recover money when it is used in gaming and seized by the state where there is no statute providing for a forfeiture. Chappell v. Stapleton, 58 Ga.App. 138, 198 S.E. 109; Kearney v. Webb, 278 Ill. 17, 115 N.E. 844, 3 A.L.R. 1631; 23 Minn.L.Rev. 976. Schur v. Johnson, 2 Cal.App.2d 680, 38 P.2d 844 and Asher v. Johnson, 26 Cal.App.2d 403, 79 P.2d 457, relied upon by the majority are not in point, for they did not involve or consider the lack of right in the state to declare a forfeiture unless expressly authorized by statute. (Pen. Code, § 2604, supra.) Moreover those cases ignored the rule, later discussed, that a stranger to the gambling game—the state here—cannot rely upon the illegality of the use being made of the money.

The majority opinion rests its conclusion in part upon the proposition that a third party, the state here, may raise the claim of the illegality of the transaction between the participants in the game and cite Schur v. Johnson, supra, and Asher v. Johnson, supra. That is not the law in California or elsewhere. For illustration, it is said in Kyne v. Kyne, 16 Cal.2d 436, 440, 106 P.2d 620, 622: "For example, a bank will not be permitted to invoke the illegality of a contract between two individuals and thereby retain money which was the fruit of the illegal transaction and which was deposited by one of them for the account of the other." (See cases collected 50 A.L.R. 293.) Here, the state was not a party to the unlawful game and it can make no claim to the money through the participants. It is in no different position than a thief who seized the money from the table, and, as said in 29 California Law Review 422, in commenting on the Schur and Asher cases, supra: "It is difficult to see how the state's wrongful collection of taxes can in any way be said to make the state claim through the tango proprietors. The state would be just as much a stranger to the illegal business as would a thief, or as was the bank in the case put by the court, supra, note 18. The court's refusal to aid the parties to recover their money seems to be no more than a judicially created and imposed penalty for carrying on the unlawful business." As we have seen, the Legislature has fixed the penalty for gambling, and stated that there could be no forfeiture. This court, therefore, has no authority to increase it or impose a forfeiture. To do so is to usurp the power of the Legislature in violation of the Constitution (art. III, § 1).

Closely related to the last discussed proposition is the majority's conclusion that plaintiffs could not recover if they had to rely upon the illegal gambling transaction to prevail. It is conceded that if they do not so have to place their reliance on such transaction they may prevail, and that is the law. Guerin v. Kirst, 33 Cal.2d 402, 410, 202 P.2d 10, 7 A.L.R.2d 922. All they would need to show is that it was their money that was on the table and the sheriff seized it and that he or one of the defendants still retains it. For what purpose the money was there or what use was being made of it would be wholly immaterial. It is no different than the illustration given in Kyne v. Kyne, 16 Cal.2d 436, 440, 106 P.2d 620, supra, of the bank holding funds involved in an illegal transaction in which it was not a participant.

The majority opinion speaks of public policy as the basis for its conclusion. The question arises: Who is supreme in that field, the Legislature or the courts? The Legislature, by failing to provide for a forfeiture, and further stating, that when it does not so provide, there shall be none (Pen. Code, § 2604, supra), has unequivocally announced the policy that persons engaged in gambling shall not be penalized by losing the money used. The majority opinion *nullifies* this policy, for it will not permit the owners of the money to recover it. To say that that does not amount to a forfeiture is to deny the obvious. It cannot be denied that by such a holding the owners lose their property. The state has it and intends to keep it. It cannot obtain title to it by forfeiture proceedings, but no doubt it will eventually make use of it. It cannot be left in limbo. It was said by Judge Augustus N. Hand, that recovery of property involved in an illegal transaction will *not* be barred "where the res sought to be recovered is held in escrow under what is in effect an order of interpleader so that a refusal to act in favor of the complainant will amount to affirmative action in favor of the other party." Judson v. Buckley, 2 Cir., 130 F.2d 174, 180. That is precisely the situation here. The state does not have title and cannot have it declared forfeited. It thus has mere possession, such as in escrow, and to deny recovery by the owners amounts to an "affirmative action in favor" of the state, that is, forfeiture. *No one can prevent the state from using it as the only interested parties are the owners* and they can do nothing. Hence it follows that the state may and will appropriate it to its own use with impunity and a forfeiture is effected in violation of the express statutory provision to the contrary—another legal paradox.

I would therefore reverse the judgment.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice Carter. This is not a case in which relief tenably can be denied upon the ground that title is claimed through an illegal transaction. The claimants' title here does not appear to have been derived from gaming; on the contrary, it is asserted and proved to exist entirely independent of the gaming.

The action of this court does not strike down but, rather, puts a premium on lawlessness. It accomplishes that which could properly be ordained, if at all, only on a forfeiture statute clear and unmistakable in terms. There is no such statute; the decision, therefore, invades the province of the Legislature.

The mischievous results which may follow are legion. Among other things it purports to give judicial protection to hijacking. Anyone may appropriate any object used directly or indirectly in an unlawful activity. A hostess entertaining at bridge or gin rummy or similar diversion may well find her furniture (card tables, chairs, etc.) appropriated and removed from her premises; she cannot recover them. A player may find his eyeglasses taken from him; he cannot recover them. It could not be burglary to unvitedly and surreptitiously enter a private home for the purpose of appropriating such objects.

All of this is enacted by this court to no worthy end. The holding will not have the slightest deterrent effect on organized or professional gambling; it can be used to embarrass and injure inoffensive and substantial citizens in their homes.

The judgment should be reversed.

TRAYNOR, Justice (dissenting).

I concur in the conclusion reached by Justices CARTER and SCHAUER.

37 Cal.2d 592

POTTER v. PACIFIC COAST LUMBER CO. OF CALIFORNIA et al.

L. A. 21779.

Supreme Court of California, in Bank.
July 27, 1951.

G. E. Potter brought an action against Pacific Coast Lumber Company of California, and others, to recover alleged balance due on sale of carloads of lumber to defendant. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., 222 P.2d 54, entered a judgment for plaintiff and defendants appealed. The Supreme Court, Spence, J., held that an accord and satisfaction was established as a matter of law.

Judgment reversed with directions.

Carter, J., dissenting.

1. Accord and satisfaction ⚷11(3)
Compromise and settlement ⚷5(2)

Where a claim is disputed or unliquidated and tender of a check or draft in settlement thereof is of such character as to give creditor notice that it must be accepted "in full discharge of his claim" or not at all, retention and use of such check or draft constitutes an "accord and satisfaction", notwithstanding creditor protests against accepting tender in full payment.

See publication Words and Phrases, for other judicial constructions and definitions of "Accord and Satisfaction".

2. Accord and satisfaction ⚷10(1)

For principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a bona fide dispute between the parties but it does not matter that there was no solid foundation for the dispute as the test is whether the dispute was honest or fraudulent.

3. Accord and satisfaction ⚷10(1)

For principle of accord and satisfaction to apply in disposition of an unliquidated claim, debtor must make it clear that acceptance of what he tenders in satisfaction of claim is subject to condition that it shall be in full satisfaction.

4. Appeal and error ⚷1011(1)

A finding of trial court, upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports judgment.

5. Appeal and error ⚷996

Conclusions of a trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal.

6. Appeal and error ⚷1010(1)

The principle that a finding of trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports judgment, and principle that conclusions of trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal, do not relieve an appellate court of its duty of analyzing record to determine whether there is any evidence of substantial character which reasonably supports judgment as applied to peculiar facts of case.

7. Accord and satisfaction ⚷11(2)
Compromise and settlement ⚷5(2)

Where defendant bought carloads of lumber from plaintiff and defendant mailed to plaintiff sight draft, attached to which were vouchers identifying shipment for which payment was intended and setting forth amount of corresponding invoice, with deductions noted, and vouchers contained statements that payment of draft was accepted in full settlement of account, and plaintiff cashed drafts knowing of dispute as to deductions taken by defendant, and defendant did not regard accounts as open for further adjustment and settlement, cashing of checks constituted as matter of law an accord and satisfaction.

8. Compromise and settlement ⚷2

Compromises are favored in law and a man is allowed to negotiate for purchase of his peace without prejudice to his rights.

9. Appeal and error ⚷1011(1)

In cases of conflicting evidence, or where contrary inferences can be drawn from uncontradicted proof, whether a dispute exists concerning amounts due, and whether tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for trial court in determination of issue as to whether there has been an accord and satisfaction.

10. Appeal and error 🔑1001(1), 1010(1)

Unless there is a lack of evidence to support jury finding or decision of trial court as to whether there has been an accord and satisfaction, their determination of that issue will not be disturbed on appeal.

11. Compromise and settlement 🔑6(2)

Where there is a real and genuine contest between the parties as to amount due, and a settlement is had without fraud or misrepresentation, for an amount determined upon as a compromise between conflicting claims, settlement should be upheld, although such amount is materially less than amount claimed by person to whom it is paid.

◆

Buck & O'Reilly and John F. Runner, all of San Luis Obispo, for appellants.

Renetzky & Davis, Paul W. Davis, all of San Luis Obispo, and Laura O. Coffield, Napa, for respondent.

SPENCE, Justice.

Plaintiff sought to recover the alleged balance due under contracts for the sale of three carloads of lumber. Defendants pleaded an accord and satisfaction as an affirmative defense. The trial court made findings rejecting said defense and entered judgment in favor of plaintiff for the sum of $1,011.96. From such judgment, defendants appeal.

Defendants argue the single proposition that the findings against the existence of an accord and satisfaction are contrary to the undisputed facts. An examination of the record sustains defendants' position.

Plaintiff, a lumber broker in Oregon, contracted to sell three carloads of Oregon lumber to defendant company, a California corporation with offices in San Luis Obispo. Defendants C. V. Wilson and S. G. Truitt, as vice-president and purchasing agent, respectively, of defendant company, negotiated the contracts. The terms of sale specified grade, widths, and surfacing of the lumber and a stated price per 1,000 board feet "F.O.B. mill," with 2 per cent discount for cash. At the trial defendants claimed that under business custom with respect to such sales of Oregon lumber "F.O.B. mill," the freight charge would be at the "Portland rate"—that is, the buyer would be obligated to pay the shipping cost as computed from Portland to the point of destination—unless a different zone or rate was specified; that such uniform practice prevails so that the buyer may know what his "laid down cost is" for lumber as supplied from various small mills located in different parts of the state, and any freight cost that the seller "may have to get the lumber into the [applicable] zone is reflected in the mill price"; and that on such basis, the buyer would regularly charge back to the seller any "excess freight" paid to the carrier. Plaintiff denied having any knowledge of such applicable "zone system" and the existence of such business custom. In none of the three contracts in question was there anything said concerning freight or the shipping rate chargeable except the bare term "F.O.B. mill."

The first order called for shipment from Oregon to San Luis Obispo. That carload arrived with a freight bill from Spokane, Washington, to San Luis Obispo, as the result of an erroneous routing. Defendant company paid the carrier's freight bill. It then remitted $2,930.14 by check to plaintiff, this sum representing the amount of plaintiff's invoice, less the 2 per cent cash discount and $86.40 as "freight overcharge"—being the difference between the freight actually paid to the carrier and the freight from Portland, Oregon.

The other two orders called for shipment, respectively, to Grover City, California, and Santa Barbara. The lumber in each of these carloads was rough-milled at Seneca, in eastern Oregon; one carload was then shipped to Brewster, Oregon, for "remanufacture," and from there transported to Grover City, while the other carload was shipped to Portland for "re-manufacture," and thence to Santa Barbara. On these two shipments defendant company remitted to plaintiff by check the respective amounts of $2,594.76 and $1,772.89, having deducted in each instance the 2 per cent cash discount and the freight rate chargeable from eastern to western Oregon, respectively $500.35 and $361.49. In addition, with respect to the Santa Barbara car, these further deductions were made: $35.71 for "scant loading," an extra charge exacted by the carrier because the car had not been fully loaded; $111.81 or $5 per thousand board feet, for improper surfacing of the lumber; and $223.61, or $10 per thousand board feet, for "random widths." With regard to these latter two items on the Santa Barbara car, it is undisputed that the contract called for twelve-inch stock exclusively, surfaced four sides; and that the lumber actually shipped consisted of "random widths," all of it less than twelve-inch, and was surfaced on two sides only. According to defendants, the basis of the deduction for improper surfacing was the cost, at Santa Barbara, of having the lumber surfaced as ordered; and the basis for the deduction for "random widths" was the difference in retail price between the lumber ordered and that actually received.

In remitting for each of the three shipments, defendant company mailed a check or draft, attached to which was a voucher identifying the shipment for which payment was intended and setting forth the amount of the corresponding invoice, with deductions noted. Printed at the top of each such voucher was the following notation: "Payee will please detach and keep this statement. Payment of sight draft attached hereto is accepted in full settlement of account stated below, and endorsement thereof will constitute payee's receipt to the Pacific Coast Lumber Company of California." Plaintiff cashed each of the three remittance checks or drafts, and then later wrote to defendant company seeking additional payments.

The trial court found that defendants were indebted to plaintiff in the sum of $1,011.96 (apparently allowing defendants with respect to the San Luis Obispo car the deduction of $86.40 for the "freight overcharge"; and with respect to the Santa Barbara car the deductions for "scant loading," improper surfacing, and "random widths"). With respect to defendants' special plea of an accord and satisfaction, the court found that the allegations thereof (except that the checks were actually sent to plaintiff and cashed by him) were untrue, thereby finding that it was not true that by the voucher attached to each check defendant company "informed plaintiff that it intended the check as full payment of a certain disputed claim," or that the vouchers "informed plaintiff that the said checks were intended as full payment," or that "plaintiff, by the acceptance, endorsement and/or depositing for collection of said drafts, or in any other manner, agreed to any settlement of the amount[s] due plaintiff." Defendants properly contest the propriety of these findings relating to the alleged accord and satisfaction as without support in the record.

[1-3] The great weight of authority undoubtedly supports the rule that where a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted "in full discharge of his claim" or not at all, the retention and use of such check or draft constitutes an accord and satisfaction (1 C.J.S., Accord and Satisfaction § 34, page 528); and it is immaterial that the "creditor protests against accepting the tender in full payment" (1 Am.Jur. § 26, p. 228), for in such case "the law permits but two alternatives, either reject or accept in accordance with the condition" (Williston on Contracts, Rev.Ed., Vol. VI, § 1856, p. 5220; see, also, 1 Cal.Jur. § 10, p. 134; annos. 34 A.L.R. 1035, 1044; 75 A.L.R. 905, 916; Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989; Berger v. Lane, 190 Cal. 443, 447, 213 P. 45; Sierra and San Francisco Power Co. v. Universal Electric & Gas Co., 197 Cal. 376, 387, 241 P. 76; Johnston v. Burnett, 17 Cal.App. 497, 501, 120 P. 436; Russell v. Riley & Peterson, 82 Cal.App. 728, 737-738, 256 P. 557; Robertson v. Robertson, 34 Cal.App.2d 113, 118, 93 P.2d 175. Of course, for the principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a "bona fide dispute" between the parties (Stub v. Belmont, 20 Cal.2d 208, 218, 124 P. 2d 826, but "it matters not that there was no solid foundation for the dispute" as the test is whether "the dispute was honest or fraudulent". B. & W. Engineering Co. v.

Beam, 23 Cal.App. 164, 171, 137 P. 624; see 1 C.J.S., Accord and Satisfaction § 32 (b), pages 515–517; 1 Cal.Jur. § 7, p. 131; Berger v. Lane, supra, 190 Cal. 443, 450–451, 213 P. 45; Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 663, 277 P. 519; Everhardy v. Union Finance Co., 115 Cal. App. 460, 465, 1 P.2d 1024. Also, the debtor must make it clear that acceptance of what he tenders is subject to the condition that it shall be in full satisfaction. 1 Am.Jur. § 22, p. 223; Ann.Cas.1915A, 954; Lapp-Gifford Co. v. Muscoy Water Co., supra, 166 Cal. 25, 27–28, 134 P. 989; Biaggi v. Sawyer, 75 Cal.App.2d 105, 113–114, 170 P.2d 678.

[4–7] In the application of these settled rules to the present case, defendants properly recognize that "A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment." Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650. Likewise it must be said that the conclusions of a trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. But these principles do not relieve an appellate court of its duty of analyzing the record for the purpose of determining whether or not there is any evidence of substantial character which reasonably supports the judgment as applied to the peculiar facts of the case. See 1 C.J.S., Accord and Satisfaction, § 49(b), pages 565–567. Upon such review, the conclusion is inescapable that the record here does not justify the finding that no accord and satisfaction was effected by the parties in settlement of plaintiff's claim, and that the trial court erred, as a matter of law, in adjudicating this issue contrary to defendants' position. 2 Cal.Jur. § 542, p. 918.

Here the check or draft in each instance remitted to plaintiff in payment for the respective carloads of lumber had attached a voucher with a printed statement thereon declaring, in clear and unequivocal terms, that the tender was made "in full settlement of account stated below" and calling for acceptance upon that precise condition. Plaintiff clearly understood, according to his own admissions at the trial, that defendant company intended such remittances to constitute payment in full of the particular claim as plainly identified on the voucher. Thus, plaintiff, in response to the question of whether he had talked to defendant Wilson before cashing the draft tendered in payment for the first shipment, stated: "Yes, I think I did; and then I felt, if they were going to be that way about it, the best thing for me to do was to cash the draft so they couldn't stop payment on the draft. This was not a check, it was a draft. I knew that, with a dispute of that type, that there would be a question as to my accepting that as final payment, but I figured that a bird in the hand was better than nothing." Plaintiff further testified that "at the time [he] cashed [the] checks, [he] knew there was a dispute as to the amounts"; that he checked "the deductions" that were taken, knew the "freight" amounts to be "so much" and had "notice" of the other items as shown "from the attached statement[s]." From this testimony it plainly appears that there was a bona fide dispute between the parties, not only as to the assessable freight charges, but also as to the other matters listed by defendant company as deductible items upon tender of the checks or drafts in full settlement, and that plaintiff so understood the explicit terms of the proffered settlement. In such circumstances, plaintiff's acceptance, endorsement, and cashing of the checks or drafts amounted in legal effect to an agreement that the claims be thereby compromised and settled. Russell v. Riley & Peterson, supra, 82 Cal.App. 728, 737–738, 256 P. 557; he "could not accept the benefit of the checks by cashing them, without consenting to the conditions endorsed thereon" Robertson v. Robertson, supra, 34 Cal.App.2d 113, 118, 93 P.2d 175, 178; and such uncommunicated mental reservations as plaintiff may have had that he and defendants "would be able to settle it [the dispute] one way or the other later" could not militate against the validity of the accord and satisfaction. Creighton v. Gregory, 142 Cal. 34, 41, 75 P. 569. So pertinent is the statement in Johnston v. Burnett, supra, 17 Cal.App. 497, at page 501, 120 P. 436, 438: "He [plaintiff] was bound either to reject the check, or by accepting it, accede to the defendant's terms. * * * He could not accept the benefit, and reject the condition. * * * The use of the check was *ipso facto* an acceptance of the condition. The minds of the parties then met, so as to constitute an accord."

[8] Plaintiff argues that "the conduct of both parties after the receipt and cashing of the drafts" indicates that "neither of them intended that the prior acceptance by [plaintiff] of the drafts was in full settlement of his claim[s]." To this point he cites these evidentiary considerations: that until he received the respective drafts, he did not know that defendants were disputing the amounts allegedly due on the respective shipments; that after receiving the first of the three drafts but before cashing it, he spoke to defendant Wilson by telephone and protested the deductions taken; that after cashing the three drafts, he went to defendant company's Seattle office and discussed the factors in dispute; that there then followed an exchange of correspondence between him and defendant Wilson as to the propriety of the deductions; and finally, the whole subject was dicussed at a meeting in Santa Barbara between himself and defendant Wilson, culminating in the latter's offer of a settlement but that he would not agree to it. However, these matters do not strengthen plaintiff's position. Reasonably viewed, they simply show that plaintiff did not willingly assent to the condition of "full settlement" accompanying the three remittances; that after cashing the three drafts tendered for acceptance on the prescribed express terms, he nevertheless persisted in his efforts to collect additional amounts which he claimed to be still due under the original contracts of sale; and that defendants remained firm in the position that they had taken at the time the checks or drafts were tendered, until finally, for reasons which do not appear, defendant Wilson at the Santa Barbara meeting made an offer of compromise, which was in turn rejected by plaintiff. As to the latter factor, it is code law that "An offer of compromise is not an admission that anything is due" (Code Civ.Proc. § 2078), it constitutes no proof of liability, and its admission into evidence without objection cannot affect the disposition of this case. As was said in Estate of Johanson, 62 Cal.App.2d 41, at page 56, 144 P.2d 72, at page 80: "Compromises are favored in law and a man is allowed to negotiate for the purchase of his peace without prejudice to his rights." Accordingly, none of these factors, either singly or in combination, can be said to have deflected from the positive position taken by defendant company in tendering the respective checks or drafts for acceptance in full discharge of the respective accounts, or from the consequences of plaintiff's cashing such checks and drafts upon that basis in establishment of an accord and satisfaction. Johnston v. Burnett, supra, 17 Cal.App. 497, 501, 120 P. 436.

[9, 10] Plaintiff unavailingly cites cases where accompanying correspondence failed to state that the remittance was "intended or offered as in full of all demands" Lapp-Gifford Co. v. Muscoy Water Co., supra, 166 Cal. 25, 32, 134 P. 989, 992, and the parties' continued uncertainty as to the extent of their differences called for further checking on the matter of an adjustment, conduct clearly showing that "they did not consider the [prior] check a final settlement of the debt" (Work v. Associated Almond Growers, 102 Cal.App. 232, 236, 282 P. 965, 967); where evidence of "constructive fraud, or at least mistake", operated to impeach the "conclusiveness of the asserted stated account" despite the notation of the words "full receipt" on the check (Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 115, 146 P.2d 8, 14); where the debtor "at the time the check was tendered * * * himself conceded that it did not represent the full amount due" and not only was there a failure to plead an "accord and satisfaction," but it was expressly "pleaded that there never had been an accounting". Owens v. Noble, 77 Cal.App.2d 209, 215, 175 P.2d 241, 244. Under such distinguishable circumstances, it is not open to dispute that the trial court's finding that no accord and satisfaction had been effected by the parties was supported by substantial evidence. But that is not the record in

this case. Here the condition imposed upon plaintiff's acceptance of the checks or drafts was clear and unequivocal that payment was "intended as full satisfaction of the disputed account". Biaggi v. Sawyer, supra, 75 Cal.App.2d 105, 114, 170 P.2d 678, 683; there was no question of mistake or fraud to impeach the conclusiveness of the stated account; and there were no admissions by any of defendants that they regarded the accounts as still open for further adjustment and payment. While it is true that in cases of conflicting evidence or where contrary inferences can be drawn from uncontradicted proof, whether "a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court" Owens v. Noble, supra, 77 Cal.App.2d 209, 215, 175 P.2d 241, 244, and "unless there is a lack of evidence to support the finding of the jury or the decision of the trial court in that regard, their determination of that issue [the existence of an accord and satisfaction] will not be disturbed on appeal" Moore v. Satir, 92 Cal.App.2d 809, 812, 207 P.2d 835, 836; also D. E. Sanford Co. v. Cory Glass Coffee Brewer Co., 85 Cal.App.2d 724, 730, 194 P.2d 127, just such lack of evidence prevails here. The record conclusively shows from plaintiff's own testimony that he knowingly accepted the remittances from defendants on the terms definitely stated on the accompanying vouchers in unequivocal expression of their intent as "full settlement," for he "figured that a bird in the hand was better than nothing." This state of the evidence cannot be reasonably held to give rise to conflicting inferences as to the intention of the parties to consummate an accord and satisfaction upon the tender and acceptance of the checks or drafts in question, but rather they irresistibly point to the conclusion that plaintiff is estopped to deny the effect of his deliberate act in full settlement of the disputed accounts between the parties. See Creighton v. Gregory, supra, 142 Cal. 34, 41–42, 75 P. 569.

Nor is it of legal significance that the freight charges were computed as separable items for deduction and constituted a major point of difference between the parties. While the freight items were listed as definite amounts on each of the vouchers accompanying the remittances, the total freight (only a part of which was disputed) was for all practical purposes integrated into the entire contract to which it related. To this point is defendant Wilson's undisputed testimony that defendant company, as the buyer of goods f. o. b. point of manufacture, must have "the mill price and the freight rate"—the "delivered price"—at hand so as to "know what [the] laid down cost is." In such circumstances it would be unrealistic to isolate the freight items and regard such items as severable undertakings in the consummation of the parties' dealings. Moreover, in the case of one disputed shipment—the Santa Barbara car—there were also included, as deductible items, amounts for "scant loading," improper surfacing, and "random widths," so that it cannot reasonably be said that the parties considered, at the time of the tender and acceptance of the checks or drafts, that the only matters in controversy were the freight charges. Rather, as defendants maintain, the record clearly shows that in each instance plaintiff's entire demand was in dispute and the respective checks were intended and accepted in full discharge of the entire disputed obligation.

It is further suggested that defendant company, by the respective remittances in the reduced sums, paid only the conceded amount of indebtedness on each shipment. But that circumstance would not prevent an accord and satisfaction arising from acceptance of the conditionally offered remittances applicable to the entire demand. While there is some conflict in the authorities on whether the payment of the conceded part of the claim is a good accord and satisfaction if received in discharge of the whole (anno. 112 A.L.R. 1219), it is the majority view, as well as the "tendency of the later cases," to "sustain the discharge where there is a dispute as to any part of the claim made by the creditor, although the payment is only the smaller amount which was conceded by the debtor to be due." (1 Am.Jur. § 64, p. 251; also Williston on Contracts, Rev.Ed., Vol. I, § 129, p. 439, and cases there cited.) Consistent with this "tendency" in the rationale of "the later cases" is the decision in Robertson v. Robertson, supra, 34 Cal.App.2d 113, 93 P.2d 175, 177, where concededly due payments of support money were made by checks marked "in full payment to [date]" and the only dispute between the parties involved the question of whether a greater amount was due pursuant to the terms of a property settlement agreement. In sustaining the defense of an accord and satisfaction, the court aptly stated, 34 Cal.App.2d at page 118, 93 P.2d at page 178: "The consideration for the tender and acceptance of each check in a less amount was the determination of dispute, and the extinction of obligation in relation to each monthly payment so made."

[11] "The law wisely favors settlements, and where there is a real and genuine contest between the parties, and a settlement is had without fraud or misrepresentation, for an amount determined upon as a compromise between the conflicting claims, such settlement should be upheld, although such amount is materially less than the amount claimed by the person to whom it is paid." Post v. Thomas, 212 N.Y. 264, 106 N.E. 69, 72; in accord, B. & W. Engineering Co. v. Beam, supra, 23 Cal.App. 164, 171, 137 P. 624. It is difficult to see here how defendant company could have been more explicit in stating to plaintiff the conditional tender of the checks or drafts in question, and we therefore conclude that the latter's acceptance and cashing of such checks and drafts pursuant to their unequivocal terms of "full settlement" constituted, as a matter of law, an accord and satisfaction.

The judgment is reversed, with directions to the trial court to make findings of fact and conclusions of law and to enter judgment thereon in favor of defendants in accordance with the views herein expressed.

SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

While the factual situation disclosed by the record may have presented a problem difficult of solution by the trier of fact, I can not say that there was not sufficient evidence to support the finding that defendant corporation was indebted to the plaintiff in the amount found, and for which judgment was rendered. This judgment was affirmed by the District Court of Appeal, Second Appellate District, Division One, and I adopt, as my dissent, the opinion of that court prepared by Mr. Presiding Justice White, which is as follows:

"Defendants appeal from a judgment in favor of plaintiff, a lumber broker, in an action for a balance claimed to be due under contracts for the sale of three carloads of lumber to the defendant corporation, Pacific Coast Lumber Company. Defendants C. V. Wilson and S. G. Truitt, as vice-president and purchasing agent, respectively, of defendant corporation, negotiated the contracts. The complaint was in the form of common counts. The answer, in addition to denials, set forth an affirmative defense of accord and satisfaction, the substance of the allegations in this respect being that three checks in stated amounts had been mailed to plaintiff by defendant corporation; that attached to each of said checks was a voucher in which said defendant informed plaintiff that it intended the check as full payment of a certain disputed claim; that the vouchers so attached to the three checks informed plaintiff that the checks were intended as full payment; that the plaintiff indorsed and cashed each check, and thereby agreed to the settlement intended by the defendant corporation; that at the time of making said payments the defendants in good faith disputed the amounts due the plaintiff.

"The first transaction involved a carload of pine, of specified grade, widths, surfacing, and price per thousand board feet, 'F.O.B. mill,' with 2 per cent discount for cash. The lumber was to be shipped from Oregon to San Luis Obispo. Upon arrival of the shipment, defendant corporation paid the carrier's freight bill which covered freight from Spokane, Washington, to San Luis Obispo. The corporation then remitted $2,930.14 by check to the plaintiff, this sum representing the amount of the plaintiff's invoice less the cash discount and less $86.40 claimed as 'freight overcharge'—being the difference between the freight actually paid the carrier and the freight from Portland, Oregon.

"Subsequently defendant corporation ordered two more carloads of pine, one to be shipped to Grover City, California, and the other to Santa Barbara. Again, it was understood that the lumber was to come from Oregon, although the plaintiff testified that he informed defendants it would come from eastern Oregon. The lumber in these two carloads was rough-milled at Seneca, in eastern Oregon. One carload was then shipped to Brewster, Oregon, for 're-manufacture,' and from there transported to Grover City, while the other carload was shipped to Portland for 're-manufacture' and thence to Santa Barbara. On each of these shipments defendant corporation remitted to the plaintiff by check, deducting the 2 per cent cash discount and also deducting the items representing freight charges from eastern to western Oregon. In the case of the Santa Barbara car defendant also made certain deductions for 'scant loading,' 'improper surfacing,' and 'random widths.'

"Defendant C. V. Wilson testified that by 'F.O.B. mill' he understood to mean F.O.B. the 're-manufacturing' mill where the lumber was finished and from whence it was finally shipped; he and other witnesses also testified to a custom of the lumber trade that where Oregon lumber is sold 'F.O.B. mill' a zone freight rate is often specified, but if nothing is said about the zone, then the 'Portland rate,' from Portland, Oregon, to destination, will apply; in such case the custom is for the purchaser to charge back to the seller any excess freight paid to the carrier. In none of the transactions here in question was there anything said concerning freight or the freight rate applicable except the bare phrase 'F.O.B. mill.' Plaintiff denied the existence of any such custom.

"In remitting for each of the three shipments, defendant corporation mailed to the plaintiff a check or draft, attached to which was a voucher identifying the shipment for which payment was intended and setting forth the amount of the corresponding invoice, with deductions noted. Printed at the top of each such voucher was the notation:

"'Payee will please detach and keep this statement. Payment of sight draft attached hereto is accepted in full settlement of account stated below, and endorsement thereof will constitute payee's receipt to the Pacific Coast Lumber Company of California.'

"The trial court found that defendants were indebted to plaintiff in the sum of $1,011.96; and with respect to the special defense found that the allegations thereof (except, of course, that the checks were actually sent) were untrue, thereby finding that it was not true that by the voucher attached to each check defendant corporation 'informed plaintiff that it intended the check as full payment of a certain disputed claim,' or that the vouchers 'informed plaintiff that the said checks were intended as full payment.' The court further found that 'it is not true that plaintiff, by the acceptance, endorsement and/or depositing for collection of said drafts, or in any other manner, agreed to any settlement of the amount due plaintiff.'

"Appellants contend that the trial court's findings relating to the alleged accord and satisfaction were contrary to undisputed facts in evidence. With respect to the finding (implied) that plaintiff was not informed that the checks he received were intended by defendant corporation as payment in full, attention is directed to testimony of the plaintiff, as follows:

"'Q. Did you talk to him (Mr. Wilson) before you cashed it? Did you call him up before you cashed it? (Referring to the payment on the first shipment.) A. Yes, I think I did; and then I felt, if they were going to be that way about it, the best thing for me to do was to cash the draft so they couldn't stop payment on the draft. This was not a check, it was a draft. I knew that, with a dispute of that type, that there would be a question as to my accepting that as final payment, but I figured that a bird in the hand was better than nothing.

* * * * * *

" Q. Well, Mr. Potter, at the time you cashed those checks, you knew there was a dispute as to the amounts? A. Yes, because the amount was short on the draft. I figured we would be able to settle it one way or the other later.

"'Q. Did you know the basis for the dispute? A. No, only from checking the deductions that I figured that they took. I knew that the freight amounted to so much.

"'Q. Then you surmised, at least, that the deduction on one item was for freight? A. That's right.

"'Q. And on the other item, you had notice of what the deductions were from the attached statement with the check, did you not? A. Yes, sir.'

"Appellants argue that 'on the basis of the foregoing testimony the ultimate fact irresistibly following is that the defendant corporation informed the plaintiff * * * that the check or draft tendered therewith was offered in full payment of a certain fully identified, disputed claim.' Appellants' remaining two contentions with respect to the findings are that there is no support in the evidence for the finding that by his acceptance of the checks or drafts plaintiff did not agree to a settlement, or for the finding that there was no bona fide dispute concerning the amount due.

"As conceded by appellants, 'A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment.' (Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650.) It is also well settled that the conclusions of a trier of fact from evidence or testimony that is susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal. (Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.)

"Conceding the force of appellants' argument that the evidence clearly shows the existence of a dispute as to the amount due, and further that plaintiff was informed, by the fact that the checks were for less than the amount of his invoice, by the notations appearing on the attached vouchers, and through telephone conversations with defendants, that defendant corporation contested the particular freight items in question—it does not follow that the trial court erred, as a matter of law, in concluding that no accord and satisfaction was consummated.

"It was an essential element of defendants' proof of an accord and satisfaction that their tender of a check for less than the amount due be expressly conditioned that if the money be accepted, it is to be in full satisfaction. (1 Am.Jur. 222, 223.) As said in the cited authority, at page 223:

"'As pointed out in the preceding section, in order that the acceptance of an offer of payment of a lesser sum in discharge of a greater shall result in the discharge, it is a necessary element that the offer be made upon condition that the creditor accept the offered sum in full satisfaction of the indebtedness. This principle finds frequent application in the case of checks and other remittances. In order that the acceptance of the check or remittance shall operate as a full discharge, the condition that it is to be accepted in full satisfaction of the pending claim or obligation must be expressly made or the circumstances must be such as to indicate clearly to the creditor that it is so sent.

"'When the assent of the creditor is sought to be inferred from the acceptance of a less sum than that claimed to be due, the fact that such amount is offered in full discharge of the whole claim must have been communicated to the creditor in some unmistakable manner. Consequently, where a check is tendered, even though it accompanies an account, if there is no expression of the condition that it must be accepted in full payment, the acceptance of the check does not constitute an accord and satisfaction, as no agreement to that effect can be implied from the transaction. * * *'

"Under the particular facts of the case at bar, it would appear that the trier of fact was justified in concluding, despite the printed statement on the voucher, that the tender of each check or draft was not unequivocally stated to be on condition that it be accepted in full settlement. The language of Owens v. Noble, 77 Cal.App.2d 209, 215, 175 P.2d 241, quoting from Biaggi v. Sawyer, 75 Cal.App.2d 105, 114, 170 P.2d 678, is here pertinent: '"Whether there was a dispute concerning the amount due and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court." In the case of Work v. Associated Almond Growers, 102 Cal.App. 232, 236, 282 P. 965, this court quoted from cited authorities as follows: "It is an essential element of accord and satisfaction by tender of a check, that the tender is subject to the condition that the acceptance of the check is satisfaction in full. This condition is not shown by the mere fact that the debtor accompanies the check with an account showing a balance equal to the amount of the check, and *it is disproved where the giving and acceptance of the check is followed by such conduct of both parties as clearly shows that they did not consider the check a final settlement of the debt.*" (Italics added.) Also see 1 Cal.Jur. p. 134, par. 10; Lapp-Gifford Co. v. Muscoy Water Co., supra [166 Cal. 25, 134 P. 989]; Duncan v. F. A. Hihn Co., 27 Cal.App. 152, 155, 148 P. 971; Wallace v. Crawford, 21 Cal.App.2d 394, 404, 69 P.2d 455.'

"The record does not disclose conclusive evidence that the plaintiff was *explicitly* advised that his acceptance of the checks or drafts in any of the three transactions would be considered as an agreement to an accord and satisfaction. On the contrary, the actions of the parties indicate simply that the defendant corporation asserted that it was not liable for certain freight charges and refused to pay them. It is significant in this respect that the disputed freight charge was a separable item. The amount tendered by defendant corporation was an amount admittedly due. The trier of fact could well conclude that the amount tendered was not offered in settlement of a disputed claim, but, as above stated, in payment of a conceded indebtedness, leaving at large the question of from which point freight should be charged to the buyer. Upon analysis, the facts herein show that an acknowledged debtor has made a remittance of an amount admittedly due, and now seeks to have declared an accord and satisfaction because the creditor accepted what was concededly justly due him. The trier of fact was warranted in concluding that there was lacking an essential element of an accord and satisfaction, to wit, that the payment was offered and accepted in settlement of a disputed demand. Here no payment whatever was made on the 'disputed' demand.

"The situation here presented is one in which an acknowledged debtor, disputing one small separable item of an invoice received in the regular course of business, deducts from his remittance the amount he disputes and remits in the regular course of business an amount admittedly owed, accompanying his check with a voucher in customary form containing printed words to the effect that the remittance is accepted 'in full settlement of account stated below.' It cannot be held that as a matter of law in such circumstances there has been an accord and satisfaction or account stated.

"'* * * to hold otherwise would put in the power of a sharp, shrewd business man frequently to take advantage of the ignorant, uneducated, or unwary, and open the way, in the business and commercial world, to the perpetration of frauds rather than the honest settlement of disputes.' (Sanders v. Standard Wheel Co., 151 Ky. 257, 151 S.W. 674, Ann.Cas. 1915A, 954.)

"Appellants state that they make no point of the fact that the judgment runs against Mr. Wilson and Mr. Truitt, agents of defendant corporation, 'unless the suggestion is met with that the judgment ought to stand against the defendant individuals even though it be reversed as to their principal.' No such problem arising, the question need not receive further consideration.

"The attempted appeal from the order denying defendants' motion for new trial is dismissed. The judgment is affirmed."

37 Cal.2d 485

KNUDSEN CREAMERY CO. OF CALIFORNIA v. BROCK.

L. A. 21422.

Supreme Court of California, in Bank.
June 29, 1951.

Rehearing Denied July 26, 1951.

The Knudsen Creamery Company of California, a corporation, brought an action against A. A. Brock, as Director of Agriculture, etc., for declaratory relief for purpose of testing the validity of an order issued by the named defendant, affecting the minimum price schedule for fluid milk distributed in the San Diego Marketing Area. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The Supreme Court, Spence, J., held that the order was not unconstitutional.

Judgment affirmed.

Prior opinion, 221 P.2d 306.

Edmonds and Schauer, JJ., dissented.

1. Food 🔑2

One of the purposes of the Milk Control Act is to eliminate economic disturbances and unfair trade practices which in the milk industry threaten both the quality and adequacy of the supply of fluid milk and cream. Agricultural Code, §§ 735 et seq., 735.1(b).

2. Food 🔑2

The Milk Control Act is aimed primarily at what the producer shall receive, and not at what the dealer or consumer shall pay. Agricultural Code, §§ 735 et seq., 736.

3. Food 🔑4

The Milk Control Act fixes delivery of raw milk to the distributor as a marketing cost affecting the price payable, but any costs incurred beyond that point are allocable as a distribution rather than a production factor. Agricultural Code, § 735 et seq.

4. Food 🔑4

Though ordinarily both milk producer's market and distributor's market are within the same area, choice of the distributor's market is a matter wholly within selection of the distributor, and in event he chooses to ship the finished product to another area for sale, the freight expense would properly appear to be a charge that he should bear as a marketing cost over which the producer would have no control. Agricultural Code, § 735 et seq.

5. Food 🔑4

A milk distributor cannot choose a distant market for ultimate disposition of the finished product and at the same time charge the added transportation cost to the producer as an item of marketing expense, for purpose of establishing minimum price payable to producer. Agricultural Code, § 735 et seq.

6. Administrative law and procedure 🔑508
Food 🔑4

Order of Director of Agriculture establishing minimum price to be paid by distributors in San Diego Marketing Area for fluid milk purchased "f. o. b. distributor's plant" and providing that any distributor who receives milk for sale or distribution within area may deduct from minimum price specified an amount not in excess of lowest rate for transportation to distributor's plant within area, and defining a distributor's plant as any building in which milk is received, weighed, tested, and processed for distribution to consumer, does not affect the status of a licensed distributor of milk in the state, and does not transcend the scope of the Milk Control Act by adding a qualification to the statutory definition of a distributor. Agricultural Code, §§ 735 et seq., 735.3(f).

7. Constitutional law 🔑77

To promote purposes of legislation and carry it into effect, authorized administrative or ministerial officer may fill up the details by prescribing administrative rules and regulations, but he may not vary or enlarge the terms or condition of the legislation or compel that to be done which lies without the scope of the legislation, since it is the function of legislature to declare the policy and fix the primary standard.

8. Administrative law and procedure 🔑508
Food 🔑4

Order of Director of Agriculture establishing minimum price to be paid by distributors in San Diego Marketing Area for fluid milk purchased "f. o. b. distributor's plant" and providing that any distributor who receives milk for sale or distribution within area may deduct from minimum price specified an amount not in excess of lowest rate for transportation to distributor's plant within area, and defining a distributor's plant as any building in which milk is received, weighed, tested, and processed for distribution to consumer, is not invalid on ground that it is promotive of "creeping" monopoly. Agricultural Code, §§ 735 et seq., 736.

9. Administrative law and procedure ⚷508
Constitutional law ⚷240(1), 298(1)

Order of Director of Agriculture establishing minimum price to be paid by distributors in San Diego Marketing Area for fluid milk purchased "f. o. b. distributor's plant" and providing that any distributor who receives milk for sale or distribution within area may deduct from minimum price specified an amount not in excess of lowest rate for transportation to distributor's plant within area, and defining a distributor's plant as any building in which milk is received, weighed, tested, and processed for distribution to consumer, does not violate the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution or provisions of the state Constitution, on ground of an alleged discrimination in competitive opportunity in the field of milk distribution. Agricultural Code, § 735 et seq.; Const. art. 1, §§ 1, 11, 13, 21; U.S.C.A.Const.Amend. 14.

10. Administrative law and procedure ⚷489
Constitutional law ⚷38

An administrative order, legislative in character, is subject to the same tests as to validity as an act of the legislature.

11. Constitutional law ⚷81

Economic losses as such are not a barrier to the validity of an administrative regulation, issued in pursuance of legislation, enacted in the exercise of the police power.

12. Administrative law and procedure ⚷508
Food ⚷4

Order of Director of Agriculture establishing minimum price to be paid by distributors in San Diego Marketing Area for fluid milk purchased "f. o. b. distributor's plant" and providing that any distributor who receives milk for sale or distribution within area may deduct from minimum price specified an amount not in excess of lowest rate for transportation to distributor's plant within area, and defining a distributor's plant as any building in which milk is received, weighed, tested, and processed for distribution to consumer, is sustainable as a reasonable stipulation in implementing the marketing program on a minimum price schedule assuring security producers of milk in protection of the public welfare. Agricultural Code, § 735 et seq.

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Vaughan, Bradlin & Wehrle, J. R. Vaughan and Pat B. Trapp, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Walter L. Bowers, Asst. Atty. Gen., for respondent.

SPENCE, Justice.

Plaintiff sought declaratory relief for the purpose of testing the validity of an order issued by defendant, as Director of Agriculture, affecting the minimum price schedule for fluid milk distributed under the Stabilization and Marketing Plan governing the San Diego County Marketing Area. The trial court determined that the order was within the power and jurisdiction of defendant, and that its enforcement was not open to constitutional objection. For the reasons hereinafter stated, we are of the opinion that the trial court properly adjudicated the problem presented and that the judgment in favor of defendant should be affirmed.

Plaintiff is a creamery company distributing fluid milk and fluid cream. It maintains a plant in the city of Los Angeles, where it processes, pasteurizes and packages, in containers for resale, milk which it purchases from various producers. It also maintains in the city of San Diego a plant where it handles and distributes, but does not process or package milk. In supplying this area, plaintiff follows this procedure:

milk is purchased from producers in Los Angeles and adjoining counties, delivered to plaintiff's Los Angeles plant for processing and packaging, and then loaded on refrigerated vans in Los Angeles for transportation to the San Diego plant. Approximately 5 per cent of the fluid milk so handled at the Los Angeles plant is transported to the plant in San Diego for distribution in that county. The San Diego County Marketing Area is not self-sufficient in its milk production and approximately 20 per cent of the milk consumed there must be brought from producers' dairies located elsewhere.

The Milk Control Act, Agr.Code, div. 4, ch. 10, authorizes the Director of Agriculture to designate marketing areas "wherein he finds the conditions affecting the production, distribution and sale of fluid milk * * * are reasonably uniform." Agr. Code, § 736. The counties of Los Angeles and San Diego have been designated respectively as marketing areas, and stabilization and marketing plans have been formulated establishing minimum prices which distributors must pay producers. Agr. Code, § 736.1. The minimum price to the producer is governed by the price fixed in the particular marketing area wherein the milk is sold and delivered to the consumer. Agr.Code, § 736.3.

Pursuant to proceedings had as required by the act, the Stabilization and Marketing Plan for the San Diego County Marketing Area was amended and Order No. 26 was issued by defendant effective April 1, 1949. As so amended, the plan establishes a minimum price to be paid by distributors for fluid milk purchased "f. o. b. distributor's plant" and provides that "any distributor who purchases, receives or otherwise handles * * * fluid milk at producer's dairy location * * * for sale or distribution within the San Diego County Marketing Area may deduct from the minimum price specified * * * an amount * * * not in excess of the lowest rate for transportation of said commodity then in effect for public carrier * * * from point or points of shipment to such distributor's plant within the Marketing Area." A distributor's plant is defined in the order as "any building in which milk is received, weighed, tested, and processed for distribution to consumer."

Plaintiff's plant in San Diego is used solely for storage and distribution, a so-called "milk depot" or "relay station." By reason of the fact that no milk is processed for distribution in its San Diego plant, plaintiff has no "distributor's plant" in the San Diego County Marketing Area, as the term is defined in Order No. 26. Therefore in computing the minimum price payable to producers for the milk sold in that area, plaintiff is permitted to deduct only the freight charges to its "distributor's plant" in Los Angeles, where the milk is halted for processing, rather than to its San Diego plant, where the milk is sent finally for storage and ultimate distribution.

Plaintiff's attack upon Order No. 26 is based upon the claim that it is arbitrary and unreasonable, in contravention of its constitutional rights, and is in conflict with the state law on the subject, the Milk Control Act. In this connection plaintiff contends that the order is unconstitutional class legislation in that its effect is to prescribe one minimum producer's price for a marketing area applicable to distributors whose processing facilities are located within the marketing area and another, higher minimum producer's price for the same marketing area, applicable to distributors whose processing facilities are located outside the marketing area; that this price differential creates a condition of competitive inequality, with higher cost factors resulting in its distribution of milk at a loss, forcing it to choose between two alternative courses—(1) cease distribution in the area because of inequality of competitive opportunity and so promote local monopoly, or (2) incur the unnecessary expense of building a processing plant within the marketing area; and that the added consideration of processing facilities, in qualification of a "distributor's plant," transcends the scope of the act in the field of price regulations for milk distribution. The trial court found, in substance, that Order No. 26 was a valid and authorized stipulation in the practical classification of a "distributor's plant" for price-fixing purposes; that plaintiff's San

Diego plant is in effect a "milk depot" and the Los Angeles plant, where the bulk milk is processed en route to the San Diego County Marketing Area, is the "distributor's plant" fixing the limit of freight allowance for plaintiff in its cost computation for milk distribution in that area; and that no constitutional rights of plaintiff are violated in the enforcement of the regulatory order as part of the Stabilization and Marketing Plan for the San Diego County Marketing Area. From the judgment thereupon rendered in favor of defendant, plaintiff appeals.

[1] The purposes of the Milk Control Act are, among others, to "authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State, provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality *under like terms and conditions*", Agr.Code, § 735.1(b); emphasis added, and to "eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of fluid milk and cream." In re Willing, 12 Cal.2d 591, 594, 86 P.2d 663, 664.

[2] The act is aimed primarily at what the producer shall receive, and not at what the dealer or consumer shall pay. United Milk Producers v. Cecil, 47 Cal.App.2d 758, 768–769, 118 P.2d 830. In prescribing minimum prices to be paid by distributors the director must take into consideration "for the marketing area involved * * * the additional costs incurred in producing and *marketing* fluid milk over and above such costs incurred in producing and marketing manufacturing milk." Agr.Code, § 735.4 (b) (4); § 736.3(b); emphasis added. A distributor is defined as "any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations." Agr.Code, § 735.3(f).

[3, 4] It is manifest from these provisions that *marketing* costs are part of the formula establishing the minimum price payable to the producer, but such costs, as correlated with the producer, would reasonably extend no further than the point of delivery to the distributor. In other words, the act appears to fix delivery of the raw milk to the distributor as a marketing cost affecting the price payable, but any costs incurred beyond that point would be allocable as a distribution rather than a production factor. This is a reasonable distinction in recognition of the distributor as constituting the "market" for the producer, and the "distributor's plant" would be the normal place where the distributor would take delivery. At such plant the raw milk passes entirely under the control of the distributor, and thereafter, following processing and packaging, it is transported to the area for sale to the consumer. While ordinarily both (1) the producer's market—that is, the distributor—and (2) the distributor's market—that is, the consumer—would be within the same area, the choice of the latter market is a matter wholly within the selection of the distributor and in the event he chooses to ship the finished product to another area for sale, the freight expense would properly appear to be a charge that he should bear, a "marketing cost" over which the producer would have no control.

[5] The act's designation of "marketing areas" wherein the "conditions of production, distribution and sale are reasonably uniform" is in recognition of the fact that there is no general statewide movement of fluid milk, which would permit prices and related conditions of production and distribution to be uniform throughout the state rather than to be uniform only within particular marketing areas. While the producer is free to deliver his milk to any distributor in the state that he selects, and by his contract with the distributor he can provide for delivery at a designated plant, the marketing expense incurred beyond that point is at the option of the dis-

tributor in disposing of the finished product in any ultimate marketing area or areas. Accordingly, in the establishment of a minimum price payable to the *producer* in a given marketing area, the director must take into account the reasonable cost of transportation by the producer to the distributor as a production factor. But if after delivery of the milk to the distributor at his plant, the latter could choose a distant market for ultimate disposition and at the same time charge the added transportation cost to the producer as an item of marketing expense, though related wholly to the finished product, then the producer would be entirely at the mercy of the distributor, and there again would prevail the destructive competitive practices which the adoption of the act was intended to eliminate in protection of the producer in the measure of his financial return for his raw product. United Milk Producers v. Cecil, supra, 47 Cal.App.2d 758, 762, 118 P.2d 830.

[6] The status of plaintiff as a licensed "distributor" of milk in this state, according to the terms of the act, Agr.Code, § 735.3(f), is in nowise affected by Order No. 26 issued by the director in definition of a "distributor's plant." In fact, under the act a broker or agent may be a distributor without having any processing plant or being a processor. Whether plaintiff maintains as part of its distribution system in respective marketing areas a "milk depot" for storage purposes as distinguished from a "distributor's plant," where processing of the raw milk is performed, is immaterial insofar as concerns its classification as a "distributor." Unquestionably as a "distributor" under the act's definition, it is entitled to all the benefits that accompany that status, but it is likewise subject to the attending burdens. To this point plaintiff argues that the act's requirement that cost to the distributor must be uniform with that of all other distributors in the same area purchasing milk under like terms and conditions, Agr.Code, § 735.1(b), sustains plaintiff's deduction of the cost of transporting the milk in bulk form from the producers' dairies to its San Diego distributing point; that otherwise its cost is not uniform with that of other distributors in the San Diego County Marketing Area. But in this contention plaintiff loses sight of the fact that its position in that marketing area is to be differentiated from that of other distributors maintaining plants there with processing facilities, and it is this fact which demonstrates that plaintiff is not purchasing milk under the same terms and conditions as these other distributors. Order No. 26 does not purport to require the maintenance of processing facilities in any marketing area as a condition for classification of a person as a "distributor" in that area. It is only as a practical matter of administrative regulation and as an independent consideration affecting the establishment of minimum prices payable to producers that the definition of a "distributor's plant" to include processing facilities comes into play.

[7] It is the function of the Legislature to declare a policy and fix the primary standard. To promote the purposes of the legislation and carry it into effect, the authorized administrative or ministerial officer may "fill up the details" by prescribing administrative rules and regulations, First Industrial Loan Co. v. Daugherty, 26 Cal.2d 545, 549, 159 P.2d 921, but as so empowered, he may not "vary or enlarge the terms or conditions of [the] legislative enactment," Boone v. Kingsbury, 206 Cal. 148, 161, 273 P. 797, 804; also Whitcomb Hotel, Inc. v. California Emp. Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405, or "compel that to be done which lies without the scope of the statute". First Industrial Loan Co. v. Daugherty, supra, 26 Cal.2d at page 550, 159 P.2d at page 923. However, Order No. 26 does not transcend the scope of the statute by adding a qualification to the statutory definition of a "distributor," for plaintiff's status thereunder remains the same regardless of the location of its plant for receiving or processing the milk. Rather, Order No. 26 wholly harmonizes with the act in fixing the terminal point of the producer's responsibility for conveyance of the milk to the place of delivery to the distributor for the latter's ultimate disposition to any marketing area of his own choice. As so envisaging the finished milk product, Order No.

26 defines a "distributor's plant" to encompass processing operations and other handling by the distributor as distribution factors, and any transportation of milk to a distant marketing area thereafter would be an expense item likewise chargeable as a distribution factor, having no bearing on the computation of minimum prices payable to the producer as a production factor.

[8] Plaintiff argues that the enforcement of Order No. 26 would tend to develop conditions of local monopoly in the marketing area contrary to the express terms of the Milk Control Act. Agr.Code, § 735.1. To this point it contends that the order operates to promote the establishment of processing facilities in the local marketing area where the milk is sold to the exclusion of distributors whose processing facilities are located in a different marketing area. In support of its position, plaintiff cites instances where municipal ordinances prohibiting the sale of pasteurized milk within the city unless the pasteurization has been done within the city limits, or within a specified distance thereof, have been declared invalid. La Franchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639; Van Gammeren v. City of Fresno, 51 Cal.App.2d 235, 124 P.2d 621; Meridian, Ltd. v. Sippy, 54 Cal.App.2d 214, 128 P.2d 884. But the cited cases are clearly distinguishable on the premise that they involved an absolute prohibition in the sale of milk within the particular area unless the terms of the ordinance were satisfied in reference to the place of pasteurization. See Natural Milk Producers Ass'n of California v. City and County of San Francisco, 20 Cal.2d 101, 112, 124 P.2d 25. Here there is no like element of complete exclusion of plaintiff from the San Diego County Marketing Area, for plaintiff is not required to process its milk within that area in order to distribute its milk there. No trade barrier has been erected by Order No. 26 in restriction of plaintiff's exercise of its choice in operating in whatever marketing area it deems profitable, and the return from its enterprise remains dependent on its own "industry and efficiency" in the distribution field. Ray v. Parker, 15 Cal.2d 275, 284, 101 P.2d 665; also Pacific States Box & Basket Co. v. White, 296 U.S. 176, 183–184, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853. Likewise, Order No. 26 is not promotive of a "creeping" monopoly, International Salt Co., Inc., v. United States, 332 U.S. 392, 396, 68 S.Ct. 12, 92 L.Ed. 20; also, Carter Carburetor Corp. v. Federal Trade Comm., 8 Cir., 112 F.2d 722, 733, for plaintiff is free to operate on the same basis and under the same conditions as other distributors in the marketing area, having its processing facilities a part of its "distributor's plant" there and accordingly entitled to require the producer from whom it purchases the milk for delivery there to pay the cost of conveying it to such plant within that marketing area.

[9–11] Nor, as plaintiff claims, does Order No. 26 violate the due process and equal protection clauses of the Fourteenth Amendment of the federal Constitution, or sections 1, 11, 13 and 21 of article I of the state Constitution, because of an alleged discrimination in competitive opportunity in the field of milk distribution. An administrative order, legislative in character, is subject to the same tests as to validity as an act of the Legislature. 42 Am.Jur. § 98, p. 427; Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, 388, 52 S.Ct. 183, 76 L.Ed. 348; Pacific States Box & Basket Co. v. White, supra, 296 U.S. 176, 185–186, 56 S.Ct. 159, 80 L.Ed. 138. The fallacy in plaintiff's argument lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity that is offered to all. Order No. 26 is applicable alike to all distributors in the state in the regulation of milk distribution, conferring equal rights and imposing equal burdens coincident with the location of the "distributor's plant" where the processing facilities are maintained. So long as such order "does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances," there is no inequality or objectionable discrimination in a constitutional sense. Watson v. Division of Motor Vehicles, 212 Cal. 279, 284, 298 P. 481, 483. It apparently is true that in not being allowed to deduct the transportation charge from the producer's dairy to its plant in San Diego, where the milk is ultimately sold and for which plaintiff must pay the minimum price scheduled for that marketing area, plaintiff is operating at a competitive disadvantage attributable to the added freight cost. But plaintiff's method of operation with its milk processing performed at its Los Angeles plant is at plaintiff's choice, and economic losses as such are not a barrier to the validity of an administrative regulation issued in pursuance of legislation enacted in the exercise of the police power. United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 565–567, 59 S.Ct. 993, 83 L.Ed. 1446. So pertinent is the case of Wawa Dairy Farms v. Wickard, 3 Cir., 149 F.2d 860, where the validity of a "milk order" issued by the Secretary of Agriculture was sustained in the face of plaintiff's claim that it was confiscatory in that it authorized certain deductions from the fixed minimum price payable by handlers (distributors) to producers of milk according to the location of milk receiving facilities in the defined area, putting plaintiff handler at a competitive disadvantage and depriving him of a profit in the operation of his business. The court there aptly said at page 863 of 149 F.2d: "The Fourteenth Amendment does not protect a business against the hazards of competition."

[12] Plaintiff cites instances where classifications in milk laws have been held unconstitutional because they were without "reasonable and substantial basis." Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675; Challenge Cream & Butter Ass'n v. Parker, 23 Cal. 2d 137, 142 P.2d 737, 149 A.L.R. 1203. Such objection does not prevail here, for Order No. 26, in its transportation allowance according to the location of the "distributor's plant," is a reasonable regulation in effecting the economic marketing of milk throughout the state pursuant to recognized standards of expense in relation to production and distribution factors. The enforcement of the order is therefore constitutionally unobjectionable. See Del Mar Canning Co. v. Payne, 29 Cal.2d 380, 382–383, 175 P.2d 231. Considering the complexities of the administration of the Milk Control Act and the plain intent of the Legislature to give to the director a wide discretion in formulating regulations for the effective production and distribution of milk throughout the state, Order No. 26 must be sustained as a reasonable stipulation in implementing the marketing program on a minimum price schedule assuring security to producers of this essential product in protection of the public welfare. Queensboro Farms Products, Inc., v. Wickard, 2 Cir., 137 F.2d 969, 980; In re Willing, supra, 12 Cal.2d 591, 594, 86 P.2d 663; Natural Milk Producers Ass'n of California v. City and County of San Francisco, supra, 20 Cal.2d 101, 114–115, 124 P.2d 25; United Milk Producers v. Cecil, supra, 47 Cal.App.2d 758, 769, 118 P.2d 830.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, Justice (dissenting).

For the purposes of the Milk Control Act, the Legislature has defined a distributor as "any person * * * who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations." Agr.Code, § 735.3. There is no requirement that a distributor must maintain a plant of any kind; indeed, the inclusion of a broker or an agent within the definition shows a contrary intention. The Director of Agriculture has changed the statutory plan by restricting the right to do business as a distributor to one who maintains a building "in which milk is received, weighed, tested and processed for distribution to consumer." Order No. 26. I find no legal basis to support a modification of the statute by the director placing a greater restriction upon the manner in which a distributor may conduct his business than the Legislature has authorized or intended.

The opinion of Mr. Justice Wilson upon which this case was decided by the District Court of Appeal, 221 P.2d 306, 308, clearly and succinctly states the reasoning which underlies my conclusions. I quote from it as follows:

"It is the function of the Legislature to declare a policy and fix the primary standard. To promote the purposes of the legislation and carry it into effect it may authorize an administrative or ministerial officer to 'fill up the details' by prescribing administrative rules and regulations. First Industrial Loan Co. v. Daugherty, 26 Cal. 2d 545, 549, 159 P.2d 921. The rule is established, however, that a ministerial officer may not, under the guise of a rule or regulation thought necessary to carry out the purpose of an act, vary or enlarge the terms or conditions of the legislative enactment nor compel that to be done which lies without the scope of the statute. First Industrial Loan Co. v. Daugherty, supra; Whitcomb Hotel, Inc. v. California Emp. Com[m.], 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405; Boone v. Kingsbury, 206 Cal. 148, 161, 273 P. 797.

"The Legislature in defining a distributor has not included in the definition any requirement that he process the milk. Any person 'who purchases or handles fluid milk or fluid cream for sale, including brokers, agents * * *' is a distributor. Sec. 735.3(f). Thus a broker or an agent may be a distributor without having any processing plant or being a processor. Section 735.3 containing definitions, including that of distributor, was added to the code in 1935. Stats. 1935, Ch. 241, p. 922. That section has been amended six times, Stats.1937, Ch. 3, p. 44; Ch. 57, p. 151; Stats.1939, Ch. 941, p. 2641; Stats. 1941, Ch. 1214, p. 3008; Stats.1945, Ch. 1001, p. 1930; Stats.1949, Ch. 1400, p. 2444, but in none of the amendments has the Legislature changed the definition of distributor so as to require him to maintain a processing plant in the marketing area in which he distributes fluid milk nor has it indicated any such intent or authorized the Director to make any such requirement.

"Neither the place of receiving the milk nor the place of processing is recognized by the Legislature in setting the standards under which the Director must operate. Under section 736.3 every producer is entitled to the price established for the marketing area in which his milk is finally sold and distributed and he must bear the cost of conveying his product to that area. The cost to the distributor must be uniform with that of all other distributors in the same area purchasing milk under like terms and conditions. Sec. 735.1(b). The Director in defining a distributor's plant has added a requirement that the milk be processed in the plant in order that the distributor may deduct the cost of transportation from the producer's dairy to his plant. He has thereby established a separate classification of processor-distributor and the cost to the distributor is not uniform with that of other distributors in the area unless he falls within such classification. If the Director can define a distributor's plant as a building where milk is received, weighed, tested and processed for distribution he could as well enlarge the definition to include other functions not required by statute. He is without authority or jurisdiction so to vary the terms of the Milk Control Act.

"Respondent asserts that since appellant does not have a processing plant in the San Diego Marketing Area it is not purchasing milk 'under the same terms and conditions' as other distributors. That appellant has a different operating procedure from other distributors in that it chooses to process its milk at a place other than where it is distributed does not affect the terms and conditions under which it *purchases* milk. Respondent has not pointed out any substantial difference in the terms or condiitions under which appellant purchases its milk from producers from the terms and conditions under which those distributors having processing plants in the area purchase milk. Appellant purchases quantities of milk for distribution in San Diego County for which it must pay the minimum producer price. The point at which milk is received does not in any way affect that minimum price, nor does the place of processing the product affect the conditions of purchase, since the only transportation charge which appellant is permitted to deduct from the minimum price to the producer is the cost of transporting the milk in bulk form from the dairy to its plant within the marketing area of sale and distribution to the consumer. Contrary to respondent's contention, appellant is not seeking to deduct the cost of transporting the milk in packaged form to its San Diego plant. The fact that it stops the milk en route for the purpose of processing it should in nowise affect the rights to which it is entitled by statute.

"Respondent's contention that the producer might be compelled to pay the cost of transportation of his product to any point in the state is without merit. The evidence is clear that there is not sufficient milk produced in the San Diego County Marketing Area to supply the requirements of that area and that about twenty per cent of the milk distributed there must be brought in from other areas. The producer need not contract to sell his product in the San Diego area if the cost of transportation would make it unprofitable. Upon the other hand, the producer might find it more profitable to pay the cost of transportation if he can thereby obtain the price for class 1 or class 2 milk which has a higher minimum price than that of class 3 or 4."

For these reasons, I would reverse the judgment with directions to the trial court to make findings and conclusions and enter judgment as follows: That Knudsen Creamery Company is a distributor within the San Diego County Marketing Area; that the definition of "distributor's plant" in Order 26 is void; and that Knudsen Creamery Company may deduct from the amounts paid to producers for milk purchased for sale or distribution within the San Diego County Marketing Area the minimum cost of transportation by public carrier from the point of shipment to the Knudsen plant at San Diego.

SCHAUER, J., concurred.

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37 Cal.2d 465

HUFFMAN v. LINDQUIST et al.

L. A. 21416.

Supreme Court of California, in Bank.

June 29, 1951.

Rehearing Denied July 26, 1951.

Action by Hilda Huffman against Dr. C. A. Lindquist and others, for malpractice and negligence in treatment and care of plaintiff's son after son had been injured in automobile accident. The Superior Court, Los Angeles County, Paul Vallee, J., granted nonsuits to defendants, judgments were entered thereon, and the plaintiff appealed. The Supreme Court, Spence, J., held that evidence was insufficient to establish that named defendant was negligent or unskillful in his diagnosis and adoption of conservative, nonsurgical treatment of son's brain injury, or that want of skill or care on his part caused son's death, and that evidence was insufficient to establish causal connection between alleged negligent conduct of defendant hospital and son's death from pulmonary embolism.

Judgments affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion 213 P.2d 106.

1. Appeal and error ⚷927(3)

On appeal from judgment granting defendants' motion for nonsuit, evidence must be viewed in light most favorable to plaintiff.

2. Physicians and surgeons ⚷14(1), 15(1)

Law does not hold a physician or surgeon liable for every untoward result which may occur in medical practice, but demands only that physician or surgeon have degree of learning and skill ordinarily possessed by practitioners of medical profession in same locality, and that he exercise ordinary care in applying such learning and skill to treatment of his patient.

3. Physicians and surgeons ⚷15(7)

No different or higher degree of responsibility is imposed on physicians in making a diagnosis than in prescribing treatment.

4. Physicians and surgeons ⚷18(8)

A doctor's failure to possess or exercise requisite learning or skill in a particular case is generally a question for experts and can be established only by their testimony, which expert evidence is conclusive where it appears that matter in issue is one within knowledge of experts only and is not within common knowledge of laymen.

5. Physicians and surgeons ⚷18(8)

In action against doctor for malpractice in treatment of patient's brain injury, following his injury in an automobile accident, evidence was insufficient to support plaintiff's charge of malpractice.

6. Physicians and surgeons ⚷18(6)

Negligence on part of a physician or surgeon will not be presumed but must be affirmatively proved.

7. Physicians and surgeons ⚷18(6)

Even though, in a restricted class of malpractice cases, courts have applied the doctrine of res ipsa loquitur, that has been done only when negligence on part of doctor is demonstrated by facts which can be evaluated by resort to common knowledge.

8. Physicians and surgeons ⚷18(8)

In action against doctor for malpractice in treatment of patient's brain injury, evidence was sufficient to establish at most a case of mistaken diagnosis by doctor.

9. Physicians and surgeons ⚷15(1)

Mere error of judgment, in absence of a want of reasonable care and skill in application of his medical learning to case presented, will not render a doctor responsible for untoward consequences in treatment of his patient.

10. Physicians and surgeons ⚷14(3)

A doctor is not a warrantor of cures or required to guarantee results.

11. Physicians and surgeons ⚷18(8)

In action against doctor for malpractice, in absence of any evidence from which it could reasonably be inferred that doctor was guilty of any breach of proper practice in his diagnosis or treatment of patient's brain injury according to symptoms revealed, record would have to be held lacking in any evidence to establish negligence on doctor's part.

12. Physicians and surgeons ⚷18(8)

In action against doctor for malpractice, evidence was insufficient to establish that any act or omission on part of doctor was proximate cause of patient's death from pulmonary embolism.

13. Evidence ⚷258(2)

In action against doctor for malpractice, testimony, offered by plaintiff, of special nurse in care of patient concerning a statement made to nurse by intern as to advisability of an operation in relief of patient's condition, was properly excluded, when doctor had not been present at time of statement, nor had statement been communicated to him, and in view of fact that intern was in employ of hospital and there was no evidence of any authority on part of intern to speak for doctor in matter.

14. Evidence ⚷536

A medical expert is not qualified as a witness unless it is shown that he is familiar with standards required of physicians under similar circumstances.

15. Appeal and error ⚷971(2)
Evidence ⚷546

It is for trial court to determine in exercise of sound discretion competency and qualification of an expert witness to give his opinion in evidence, and its ruling thereon will not be disturbed unless a manifest abuse of that discretion is shown.

16. Evidence ⚷546

Competency of an expert is in every case a relative one, that is, relative to topic about which person is asked to make his statement.

17. Evidence ⚷546

The definitive criteria in guidance of trial court's determination of qualifications of an expert witness rest primarily on occupational experience.

18. Physicians and surgeons ⚷18(8)

In malpractice suit, proof of standard, that is, reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of medical profession under similar circumstances, is made by testimony of a physician qualified to speak as an expert and having in addition kind of experience which is obtained casually and incidentally, yet steadily and adequately in course of some occupation or livelihood.

19. Evidence ⚷536

For purposes of determining qualifications of an expert witness in a malpractice suit, such witness must have had basic educational and professional training as general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted defendant charged with malpractice that is of controlling importance in determining competency of such expert to testify to degree of care against which treatment given is to be measured.

20. Evidence ⚷537

In action against doctor for malpractice, trial court did not abuse its discretion in holding a doctor unqualified to testify as an expert with regard to question whether defendant doctor had exercised power and requisite degree of skill and care, in view of doctor's lack of active practice in state within last 25 years, and his lack of occupational experience in treatment of living patients suffering comparable brain injuries and complications resulting in pulmonary embolisms.

21. Physicians and surgeons ⚷18(8)

In action against a doctor for malpractice, evidence was insufficient to establish charge of doctor's alleged inadequate supervision.

22. Physicians and surgeons ⚷15(5)

In malpractice suit, in absence of evidence to establish that practicing doctor should have knowledge of operation of a pulmotor in providing artificial respiration as matter of standard practice and in exercise of required standard of care, defendant doctor's admitted failure to know how machine functioned did not constitute negligence.

23. Physicians and surgeons ⚷18(8)

In malpractice action, evidence was insufficient to establish that defendant doctor was negligent or unskillful in his diagnosis and adoption of conservative, nonsurgical treatment of brain injury sustained by patient, or that want of skill or care on his part caused patient's death from pulmonary embolism.

24. Physicians and surgeons ⚷18(8)

In malpractice action, evidence established that pulmonary embolism was cause of patient's death, and that its development was independent of anything that defendant doctor did or did not do in his treatment.

25. Hospitals ⚷8

In action against hospital for negligence in treatment and care of patient, evidence was insufficient to establish causal connection between alleged negligent conduct on part of hospital in allegedly assuring plaintiff that defendant doctor would immediately attend her son, while it was known that he would not see him until some eight or nine hours later, alleged carelessness of interns and nurses in keeping records, and alleged failure to keep pulmotors in proper functioning order, and patient's death from pulmonary embolism.

26. Hospitals ⚷7, 8

In action against hospital for negligence in treatment and care of patient, on theory that hospital was negligent in assuring plaintiff that defendant doctor would immediately attend son, while it was known that he would not see him until some eight or nine hours later, and alleged carelessness of interns and nurses in keeping records, and alleged failure to keep pulmotors in proper functioning order, even though hospital's failure to have its pulmotors in working order might constitute actionable negligence, in absence of evidence that such failure was proximate cause of patient's death from pulmonary embolism, such failure did not constitute negligence, nor was doctrine of res ipsa loquitur applicable.

◆

Martin, Hahn & Camusi and William P. Camusi, Los Angeles, for appellant.

Chase, Rotchford, Downen & Drukker, Chase, Rotchford, Downen & Chase, Hugh B. Rotchford, Richard T. Drukker, Musick, Burrell & Ingebretsen and Anson B. Jackson, Jr., Los Angeles, for respondents.

Peart, Baraty & Hassard, George A. Smith, Alan L. Bonnington, San Francisco, Reed & Kirtland and Louis J. Regan, Los Angeles, as amici curiae on behalf of respondents.

SPENCE, Justice.

Plaintiff brought this action against defendant doctor and defendant hospital for alleged malpractice and negligence in the treatment and care of her deceased son after he had been injured in an automobile collision. At the close of plaintiff's case, nonsuits were granted to defendant doctor and defendant hospital upon their separate motions therefor. Judgments were entered accordingly and from said judgments, plaintiff appeals.

[1] In challenge of the propriety of the nonsuits, plaintiff claims that she made out a prima facie case of malpractice and negligence on the part of defendants as the proximate cause of her son's death. But viewing the evidence in the light most favorable to plaintiff and disregarding conflicts, in accordance with the settled rule applicable in testing the validity of nonsuits (Lawless v. Calaway, 24 Cal.2d 81, 85, 147 P.2d 604; Lashley v. Koerber, 26 Cal.2d 83, 84–85, 156 P.2d 441; McCurdy v. Hatfield, 30 Cal.2d 492, 493, 183 P.2d 269), the conclusion appears inescapable that plaintiff's position cannot be sustained.

Plaintiff's son, 19 years old, suffered a head injury and fractured skull in an automobile collision near midnight of Saturday, March 16, 1946, and he was taken to defendant hospital for treatment. About an hour later—1 a. m. Sunday, March 17—an intern notified plaintiff that her son had been injured. In response to her inquiry if he was the doctor in charge, he said that he was an intern but that Dr. Lindquist took care of emergency cases. Approximately 15 minutes later plaintiff arrived at the hospital, where she remained in her son's room constantly, with the exception of short intervals and one two-hour period, until his death about 1 a. m. Monday, March 18.

Upon her arrival plaintiff found her son in the emergency room attended by Dr. Brothers, an intern, who, upon inquiry, told her that defendant doctor would be there shortly. At that time the boy was conscious and able to speak to plaintiff. Thereafter, about 2:30 a. m. (Sunday, March 17) he was moved to a private room, at which time he was "kind of dopey" and "drowsy," not restless, and while he seemed to understand statements made to him, he did not answer.

Defendant doctor made his first visit to plaintiff's son at 10 o'clock Sunday morning, at which time when examined by the doctor, the boy seemed "more unconscious" but was still not restless. At 12 noon the boy became restless, hot and feverish; the last time he spoke was about 1:15 p. m.; and the last sign of physical recognition was about 3 o'clock that Sunday afternoon. At 3:45 p. m. he became very restless and feverish, was not able to understand plaintiff, and although not "completely unconscious," he was "very much worse." At 7:30 o'clock Sunday evening defendant doctor visited the boy, felt his pulse and opened his eyes. Plaintiff left the hospital for a couple of hours—9 p. m. to 11 p. m.—and upon her return, she observed a serious change in his condition; he was unconscious and in a coma, not moving, and was breathing very hard and labored; had developed a rattle in his throat. At 12:45 o'clock the next morning, Monday, March 18, the boy stopped breathing, though his heart was still beating, as defendant doctor entered the room. The doctor immediately called for a respirator or pulmotor, and Dr. Schetgen, an intern, brought the pulmotor but it failed to function; it was replaced, but the second one also failed to work. Then finally, a third machine was procured and used one or two minutes, when defendant doctor pronounced the boy dead.

The boy's sister spoke to defendant doctor at 5 p. m. and at about 7:30 p. m. on Sunday, stating that she desired to have a certain brain specialist called on the case;

that she felt that her brother's condition was "very bad" and something should be done that evening. She testified that the doctor said that he would see what could be done along that line the next day.

The death certificate, introduced in evidence by plaintiff, showed the immediate cause of death to be "pulmonary embolism," due to "cerebral contusion and hemorrhage" due to "fracture of skull."

The only direct expert testimony was that of defendant doctor, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure. He testified that the emergency service of the hospital called him about 1 or 1:30 a. m. Sunday, March 17; that the reporting intern said that he thought the patient "had a possible skull fracture * * * a brain injury * * * was semi-conscious"; that he told the intern to have the patient admitted and to watch him, keep a chart of hourly recordings as to blood pressure, pulse and respiration, and report any change, and give the patient some sedative (phenobarbital or codeine) in the event that he became restless. According to the doctor, when he first saw the boy about 10 o'clock Sunday morning, the boy was "semi-conscious, rather restless * * * his blood pressure * * * pulse and temperature were within normal limits * * * his eyes were dilated but they reacted to light." The doctor stated that he did not prescribe any different care except to order a glucose injection, but he recognized then that the boy had a brain injury with "some hemorrhage"—either epidural (between the bony vault of the brain and the dura, which is the tough membrane surrounding the brain) or subdural (between the dura and the brain)—although he did not know the extent or location until he "saw the coroner's report"; and he added that he saw the boy four times on Sunday, March 17: about 10 o'clock in the morning, at noon, a little before 7:30 p. m., and around midnight.

Defendant doctor further testified that he specialized in traumatic surgery; that he had been in practice and on the staff of defendant hospital for 22 years in attending emergency cases; that he had assisted in brain operations, and when he had a brain injury case he was accustomed to calling in a specialist if he thought the condition of the patient so warranted; that a brain injury is usually accompanied by dilation of the pupils of the eyes, a condition which, when accompanied by lack of reaction to light, is one of the symptoms of an epidural hemorrhage; that when he examined plaintiff's son at 10 o'clock Sunday morning, the pupil of the boy's right eye was slightly dilated, though it still reacted to light, and he found a suggestive Babinsky, indicative of a brain injury.

The autopsy report recited that plaintiff's son had an "epidural hemorrhage 1.5 cm. thick." When questioned as to the factors considered in "determining whether or not there is epidural hemorrhage," the doctor stated: "I take into consideration whether he is getting any increased intracranial pressure, which is the usual sign, as they become gradually more unconscious, go into a deep stupor, their blood pressure usually climbs way high with a slowing of their pulse, * * * the respirations get slower, and [the] pupil then generally becomes dilated completely, right out to the rim, and it is fixed, you cannot make it contract with any amount of light you wish to put in it * * *. As a general rule, from all I can find out in talking to neurosurgeons, when a pupil will react to light, it is not serious." Then in reply to the question "All right, Doctor, let us assume that you have a case of epidural hemorrhage, * * * is it not true that if the bleeding continues and no operation is made to clean out that clot, open the brain, the patient will surely die," the doctor said: "Certainly if the hemorrhage continues to make that clot big enough to create enough pressure on your brain, you are going to die, surely."

In discussing the classical picture of an epidural hemorrhage, the doctor stated that in the majority of cases the patient is (1) unconscious; (2) lucid; (3) gradually unconscious. He described the "lucid interval" as a condition where "a patient receives some head injury, is knocked unconscious, maybe minutes, maybe seconds, he then becomes conscious, the usual thing is he gets up, walks around about his business, whatever it is, then an hour, two hours, ten hours, twelve hours that patient begins to complain of headache, the headache increases and if somebody examines his pulse, he will start to become slower, if it goes long enough, he will become unconscious." The doctor testified that the conservative (nonsurgical) rather than the radical (operative) treatment was better in the early stages of a head injury case; that pursuant to his instructions, the interns and attendants at the hospital "were giving [the boy] the conservative treatment to try to keep him quiet; they were taking his blood pressure * * * his pulse * * * his temperature, his respirations to indicate" if his intracranial pressure was increasing; that the boy's condition on the occasion of his 7:30 o'clock visit Sunday evening was about the same as it had been that morning; and that the chart readings shown for 11:30 o'clock that evening revealed the boy's condition to have become worse, that "something went wrong" in the boy's brain, but still the symptoms were "not necessarily" those indicative of an epidural hemorrhage as distinguished from some other type of brain bleeding. With regard to the death certificate's recital of "pulmonary embolism" as the immediate cause of death, the doctor stated the term meant a "foreign body, a blood clot that has lodged in a blood vessel," in this case "the lungs"; that, in his opinion, the "embolism, [the] blood clot which caused death in the lungs [could] not come from" an "epidural hemorrhage" but had to have "some other origin"; that whether "bleeding inside the brain" could "have led to an embolism," he was "not enough of a pathologist to answer that" but that "pulmonary emboli," the "nightmares of surgeons," can come from very trivial things, minor injuries, "can originate in any blood vessel in [the] body"; and that he knew of no "way in the world, with the boy with a head injury such as [he] found, that [he] could have prevented the formation of a pulmonary embolism."

With respect to her malpractice charge against the doctor, plaintiff claims that the evidence, together with reasonable inferences legitimately deducible therefrom, establishes a prima facie case of negligence against the doctor by reason of his failure to diagnose at the outset the presence of epidural hemorrhage as the brain injury suffered by her son and to recognize the need for an operation by a brain specialist to remove the intracranial pressure on her son's brain. In this regard she maintains that the pulmonary embolism was a terminal condition appearing because of the failure to perform the brain operation. Defendant doctor contends that the physical condition of plaintiff's son did not reflect the classical picture of an epidural hemorrhage or suggest the adoption of any procedure other than the conservative, nonsurgical treatment recommended and regularly followed by the medical profession in brain injury cases. He further maintains that the evidence beyond contradiction establishes that plaintiff's son died as the result of a blood clot on the lungs caused by the original fractured skull, bruising and bleeding of the brain, and that there is absent any showing of causal connection between the treatment he followed and the formation of the fatal blood clot.

[2-5] There are certain general principles to be noted in relation to malpractice cases. The "law has never held a physician or surgeon liable for every untoward result which may occur in medical practice" (Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695, 697; Lashley v. Koerber, supra, 26 Cal.2d 83, 88-89, 156 P.2d 441, 444) but it "demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient." Lawless v. Calaway, supra, 24 Cal.2d 81, 86, 147 P.2d 604, 606. No different or "higher degree of responsibility" is imposed "in making a diagnosis than in prescribing treatment." Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222, 223; see, also, Ries v. Reinard, 47 Cal.App.2d 116, 119, 117 P.2d 386. A doctor's fail-

ure to possess or exercise the requisite learning or skill "in a particular case is generally a question for experts and can be established only by their testimony" (Trindle v. Wheeler, 23 Cal.2d 330, 333, 143 P.2d 932; also Church v. Bloch, 80 Cal.App.2d 542, 547, 182 P.2d 241), which "expert evidence is conclusive" where it appears that the "matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen." Engelking v. Carlson, supra, 13 Cal.2d 216, 221, 88 P.2d 695, 697. Application of these principles in this case sustains defendant doctor's position that plaintiff's charge of malpractice is not supported by the record.

The classical symptoms of an epidural hemorrhage, as the basis for defendant doctor's diagnosis and as recited by him, did not appear according to the chart readings and observations of plaintiff's son made at the hospital. With an inconclusive record before him—failing, as it did, to exhibit the accepted pattern confirmatory of an epidural hemorrhage—defendant doctor maintains that there was nothing to indicate that the usual conservative treatment followed in brain injury cases was inappropriate in relief of plaintiff's son, or that there was need for consultation with a brain surgeon upon the premise that an epidural hemorrhage was in fact present. However, to this latter point, it might be noted that defendant doctor testified that while he did not think it necessary, nevertheless following the request of the family, he did discuss the condition of plaintiff's son with one of four specialists whom he regularly used in brain injury cases, and that after he "gave * * the symptoms," the specialist said "there was nothing to be done that was not being done." No evidence was produced in contradiction of this testimony.

[6-10] "Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved." Engelking v. Carlson, supra, 13 Cal.2d 216, 221, 88 P.2d 695, 697; Lashley v. Koerber, supra, 26 Cal.2d 83, 89, 156 P.2d 441. While in a restricted class of malpractice cases the courts have applied the doctrine of res ipsa loquitur, that has been only where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge [and], expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." Lawless v. Calaway, supra, 24 Cal.2d 81, 86, 147 P.2d 604, 606. But this is not such a case, for here what was done lay outside the realm of the layman's experience. The physical factors to be noted in the diagnosis of the brain injury, as well as the merits of such a diagnosis, were matters of medical learning, peculiarly within the knowledge of experts. An analogous situation was involved in Lawless v. Calaway, supra, where an internal abdominal ailment was erroneously diagnosed and treated as ptomaine poisoning instead of appendicitis, and the patient died of a ruptured appendix. In commenting upon the sufficiency of the evidence to withstand the granting of a nonsuit in favor of the defendant doctor, the court said, 24 Cal.2d at page 89, 147 P.2d at page 608: "It was not only necessary for plaintiff to prove a mistake in diagnosis, but also that the mistake was due to failure to exercise ordinary care in making the diagnosis (Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222), and mere proof that the treatment was unsuccessful is not sufficient to establish negligence. Nicholas v. Jacobson, 113 Cal.App. 382, 386, 298 P. 505." So here, the record presents at most a case of mistaken diagnosis, but according to the only expert evidence on the procedure followed, that of defendant doctor, the symptoms exhibited by plaintiff's son were not such as customarily accompany an epidural hemorrhage. Mere error of judgment, in the absence of a want of reasonable care and skill in the application of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient, Hesler v. California Hospital Co., 178 Cal. 764, 766-767, 174 P. 654; Perkins v. Trueblood, 180 Cal. 437, 441, 181 P. 642; Jensen v. Findley, 17 Cal.App.2d 536, 543, 62 P.2d 430, for a doctor is not a "warrantor of cures,"

Johnson v. Clarke, 98 Cal.App. 358, 361, 276 P. 1052, 1053, or "required to guarantee results," Adams v. Boyce, 37 Cal.App.2d 541, 549, 99 P.2d 1044, 1049; also Markart v. Zeimer, 67 Cal.App. 363, 371, 227 P. 683; Rising v. Veatch, 117 Cal.App. 404, 409, 3 P.2d 1023; Beni v. Abrons, 130 Cal.App. 206, 211, 19 P.2d 523; Sansom v. Ross-Loos Medical Group, 57 Cal.App.2d 549, 552–553, 134 P.2d 927.

[11] So distinguishable is the case of McCurdy v. Hatfield, supra, 30 Cal.2d 492, 183 P.2d 269, cited by plaintiff, where a judgment of nonsuit was reversed. There the plaintiff testified concerning the treatment she received from the defendant doctor, and the latter's own testimony established his negligence in view of his admission that the procedure he allegedly followed in plaintiff's case "would be bad practice." 30 Cal.2d at page 495, 183 P.2d at page 271. Such medical testimony "as to what was proper practice" was presumably "based on the standard of care used by physicians in the locality"; if the defendant doctor "failed to conform" therewith, "he did not act as a reasonable physician should under the circumstances"; and a "prima facie case of negligence" was established, for the evidence was such that "a jury could have found that defendant was negligent in departing from the standard of care required." 130 Cal.2d at pages 495–496, 183 P.2d at page 271. But the present record is devoid of any evidence from which it could reasonably be inferred that defendant doctor was guilty of any breach of proper practice in his diagnosis or treatment of the boy's brain injury according to the symptoms revealed; and under these circumstances the record must be held lacking in any evidence to establish negligence on his part.

[12] Moreover, regardless of any question of the insufficiency of the evidence to establish negligence, there is no evidence to show that any act or omission on the part of defendant doctor was the proximate cause of the boy's death. The uncontradicted evidence introduced by plaintiff showed that the "immediate cause of death" was the pulmonary embolism, and there is no evidence to show that such embolism would not have caused the death in spite of the most careful and skillful diagnosis and treatment. In short, the evidence is wholly insufficient on the issue of proximate cause, as there is no evidence to show that anything that might have been done by anyone in the diagnosis or treatment of plaintiff's son would have prevented the boy's unfortunate death, at the time and in the manner that it occurred, as the result of the pulmonary embolism following the serious injuries which he received.

[13] Plaintiff further complains of the trial court's exclusion of certain testimony of the special nurse on duty in care of plaintiff's son. This testimony concerned an intern's statement to her as to the advisability of an operation in relief of the boy's condition. The testimony was excluded as hearsay. Admittedly, defendant doctor was not present at the time of the making of the statement, nor was there any proof that such statement was ever communicated to him. The intern was in the employ of the hospital. There was no evidence of any authority on the part of the intern to speak for defendant doctor in the matter (Whitaker v. Title Ins. & Trust Co., 186 Cal. 432, 435–436, 199 P. 528) or any premise for invocation of the doctrine of *respondeat superior.* Harris v. Fall, 7 Cir., 177 F. 79, 85, 27 L.R.A.,N.S., 1174; Stewart v. Manasses, 244 Pa. 221, 90 A. 574, 575. Under these circumstances the court properly excluded the testimony in question.

[14–16] Nor is there any merit to plaintiff's challenge of the propriety of the trial court's ruling in sustaining the objection to the qualification of Dr. Frank Webb to testify as an expert with regard to the question of whether defendant doctor had exercised the proper and requisite degree of skill and care. A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances. Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757; Moore v. Belt, 34 Cal.2d 525, 532, 212 P.2d 509. It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence (Mirich v. Balsinger, 53 Cal.App.2d 103, 114, 127 P.2d 639), and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown. 2 Wigmore on Evidence [3d ed.], § 561, p. 641; Sowden v. Idaho Quartz M. Co., 55 Cal. 443, 451; Sinz v. Owens, supra, 33 Cal.2d 749, 755–756, 205 P.2d 3, 8 A.L.R.2d 757. The competency of an expert "is in every case a relative one, i. e. relative to the topic about which the person is asked to make his statement." 2 Wigmore on Evidence, 3d Ed., 555, p. 634.

Dr. Webb's qualifications were examined at considerable length. It appeared that following his graduation from the College of Physicians and Surgeons, Columbia University, in 1902, he had served on hospital staffs and engaged in general medical practice, "gradually drifting into obstetrical work and gynecology"; that in 1912 he came west in the employ of a Canadian railroad and supervised for three years a hospital which it maintained principally for the care of accident and traumatic injury cases, but also for the treatment of varied pathological diseases; and that in 1915 he located in Los Angeles, where he joined the teaching staff of a local university and for six years gave courses on anatomy in the medical and dental schools. While so acting as a college instructor and in 1917, he became associated with the county coroner's office, and remained there until his retirement from the medical field in 1946, serving first as an assistant and then for the final six years as Chief Autopsy Surgeon. Dr. Webb testified that in his 29 years with the coroner's office he performed some 35,000 to 40,000 autopsies including some 5,000 cases of head injuries; and that in the determination of the cause of death in each instance, it was his custom to obtain a complete history of the case as to diagnosis and treatment, with many of the consultations concerning brain injuries.

On cross-examination, it appeared that Dr. Webb was not a member of the county medical association; that he had never associated himself with any hospital staff during his practice in Los Angeles; and that in the performance of his duties in the coroner's office, his consultation with other doctors in reference to head injury cases consisted in their advising him, after the treatment was given, what was done but that he took "no initiative in the treatment." It further appeared that during the past 25 years he had never operated on any living patient; that in the last 10 years he had never actively participated in the treatment of any case involving a head injury or an embolism, and that his only connection in that time with the care of a patient suffering from an epidural hemorrhage was his reference of the case to another doctor. Upon this state of the record, the trial court sustained the objection to Dr. Webb's qualification to testify as an expert and refused to permit him to answer the hypothetical question proposed by plaintiff's counsel.

[17–20] The definitive criteria in guidance of the trial court's determination of the qualifications of an expert witness are recognized in Sinz v. Owens, supra, 33 Cal.2d 749, at page 753, 205 P.2d at page 5, to rest primarily on "occupational experience," as stated: "The proof of that standard (the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances) is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as 'occupational experience—the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood.' 2 Wigmore on Evidence, 3rd Ed., section 556, p. 635. He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured." By his own testimony Dr. Webb established the questionable sufficiency of his medical background and knowledge to permit his testifying on the requisite skill and care here concerned because of (1) his lack of active practice in California within the last 25 years, and (2) his lack of occupational experience in the treatment of living patients suffering comparable brain injuries and complications resulting in pulmonary embolisms. Plaintiff cites the case of Valentin v. La Societe Francaise, 76 Cal. App.2d 1, 172 P.2d 359, where this same Dr. Webb was held qualified to testify in a malpractice case involving death from a tetanus infection. But that was an action against a hospital for alleged negligence of its nurses in postoperative care of a patient coincident with their failure to recognize an obvious and growing case of tetanus, so that appropriate treatment could be administered without delay. In establishing Dr. Webb's competency to testify with respect to the requisite standard of care which the hospital was bound to exercise, his qualifications were based primarily upon his familiarity with the records of the Los Angeles County Hospital in tetanus cases and his extensive knowledge on the subject of proper antitetanic treatment as gleaned from current experience in that particular field. But each case must be judged on its own facts, and it cannot be said here that the trial court abused its discretion in holding Dr. Webb unqualified on the subject under discussion. See Moore v. Belt, supra, 34 Cal.2d 525, 531–532, 212 P.2d 509.

[21, 22] Finally, in disposition of plaintiff's charge of malpractice against defendant doctor, there remain two other points for consideration: (1) Plaintiff claims that the doctor was negligent in failing to give complete and proper instructions to the interns and nurses as to what symptoms should be observed and reported to him. However, there is no evidence to substantiate this charge of the doctor's alleged inadequate supervision. The doctor testified that he was having hourly reports and observations made of the prime factors to watch in the progressing pathology of the patient, and that he relied on such recordings and notes in making his diagnosis and prescribing treatment. There was no showing that defendant doctor's reliance on these charts was inconsistent with standard medical practice in the diagnostic and treatment field. (2) Plaintiff also contends that defendant doctor was negligent in failing to know how to operate a pulmotor in providing artificial respiration. But such machine was the property of the hospital, and the intern, as the hospital's employee, was the person who was supposed to know how it worked. Defendant doctor admitted that he did not know how the machine functioned, but there is nothing in the record to establish that a practicing doctor should have such knowledge as a matter of standard practice and in the exercise of the required standard of care.

[23, 24] As the record has been above reviewed with regard to the alleged malpractice claim against defendant doctor, it is manifest that plaintiff has failed to prove that the doctor was negligent or unskilful in his diagnosis and adoption of the conservative, nonsurgical treatment of the brain injury sustained by plaintiff's son, or that want of skill or care on his part caused the boy's death. Rather, the evidence establishes that the pulmonary embolism was the cause of death, and that its development was independent of anything that defendant doctor did or did not do in his treatment of plaintiff's son. In the face of such absence of a causal connection between the death of plaintiff's son and defendant doctor's acts, the conclusion is inescapable that a nonsuit was properly granted as to him.

[25, 26] There now remains for consideration plaintiff's charge of negligence against the hospital. In this connection plaintiff argues that the hospital was negligent in these particulars: (1) assuring her that defendant doctor would immediately attend her son while it was known that he would not see him until some eight or nine hours later; (2) carelessness of the interns and nurses in keeping records of the boy's condition so as to reflect accurately the progressively deteriorating pathology; and (3) failure to keep the pulmotors in proper functioning order. Without unduly extending the discussion

of these claims, suffice it to say that an examination of the record does not disclose any causal connection between the alleged negligent conduct and the boy's death from the pulmonary embolism. Reynolds v. Struble, 128 Cal.App. 716, 725, 18 P.2d 690; see, also, Michael v. Roberts, 91 N.H. 499, 23 A.2d 361, 362. In regard to this phase of the case, it must be conceded that the hospital's failure to have its pulmotors in working order might constitute actionable negligence under some circumstances, but there is no evidence that such failure was the proximate cause of the boy's death—that the boy would have lived if the first two pulmotors had worked—and the doctrine of res ipsa loquitur is entirely inapplicable. 65 C.J.S., Negligence, § 220(8), p. 1011; Keller v. Cushman, 104 Cal.App. 186, 189, 285 P. 399; Dunlavy v. Nead, 36 Cal.App.2d 478, 481, 97 P.2d 1003, 99 P.2d 1044. Hence, there was no error in granting the nonsuit in favor of defendant hospital.

The judgments are, and each of them is, affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

TRAYNOR, J., concurred in the judgment.

CARTER, Justice.

I dissent.

I am of the opinion that the refusal of the trial court to qualify Dr. Webb as plaintiff's expert witness constituted an abuse of discretion and reversible error. There is no doubt in my mind that his experience and training were more than ample to permit his qualification.

Dr. Webb is a graduate of Columbia Medical School. After graduation, he served for three years at Government Hospital, Washington, D. C., and there dealt specifically with head injury cases; from 1905 until 1912, he practiced general medicine, gynecology and obstetrics in New York City; from 1912 until 1915, he was in charge of a hospital for the Pacific Great Eastern Railway where the cases were largely accident or traumatic injury; from 1915 until 1918, he taught anatomy and histology at the medical school of the University of Southern California; from 1918 until 1921, he taught the same subjects and pathology in the dental school of the same university. In 1917 until 1946, Dr. Webb was associated with the county coroner's office where he was, at first, assistant autopsy surgeon, then autopsy surgeon, and finally chief autopsy surgeon for the entire county of Los Angeles. During his 29 years in the coroner's office, *Dr. Webb personally performed 35,000 to 40,000 autopsies of which at least 5,000 were on persons who had died of head injuries.* Dr. Webb testified that it was necessary to obtain for each autopsy case a complete history of the causative factors and management and treatment of the case prior to death; that such autopsies were often performed because the attending physician could not diagnose the cause of death. He further testified that he conferred with the attending physicians on brain injury cases; that among these attending physicians were Doctors Coviello and Glazier, outstanding brain specialists, and that they had given him the complete history, care and treatment of the patients; that on many occasions he was visited at these autopsy proceedings by doctors and interns from the hospitals. He also testified that he had discussed with the specialists whether or not each case was one indicating the need for an operation; *that he had conferred with doctors at the county hospital on head injury cases and was familiar with the practice and procedure at that hospital in such cases*; that he studied medical periodicals and textbooks on the subject of head injuries. *He testified that he had become familiar with the practice and procedure adopted by reputable physicians and surgeons in the treatment and care of traumatic injuries to the head and brain.*

It is interesting to contrast the qualifications of Dr. Lindquist who testified that he did not do any operative work on the skull; that in his 25 years of practice he had assisted at a *few* operations on the brain; that in the last year he had assisted at *one* brain injury operation. Dr. Lindquist was a member of the Los Angeles County Medical Association; Dr. Webb had been invited to join but had not seen fit to do so.

The majority opinion makes much of the fact that Dr. Webb had not operated, in 25 years, on any living patient. It is a matter of common knowledge that medical students, doctors taking refresher courses in surgery, and those preparing themselves to specialize in surgery acquire their knowledge and skill in performing the exact type of work in which Dr. Webb was engaged. The anatomy of the human body is the same whether the patient is living or dead. In addition to Dr. Webb's training and knowledge in the field of anatomy (particularly that of the brain on which he had performed over 5,000 autopsies) he knew the symptoms of the patient and the care and treatment which had been administered during that person's illness. It is difficult for me to see how one person could have a more complete background or be better qualified to testify. Dr. Webb knew all there was to know concerning each patient and he knew exactly what had been done for that patient by the doctor or doctors who attended him. If he knew, as he did, the diagnosis, care and treatment accorded the patients by the doctors, among whom were the leading specialists in that field of medicine, in the community, it seems to me that it must follow that he was familiar with the customary practices and medical standards prevalent in the community.

Dr. Webb was held qualified to testify in a malpractice case involving death from a tetanus infection, Valentin v. La Societe Francaise, 1946, 76 Cal.App.2d 1, 7, 8, 172 P.2d 359, and yet his qualifications at that time were the same as they are at the present. He had been in the coroner's office for some time and had treated no living patient; he was not a member of the county medical association; he was not engaged in active practice in the state. The majority opinion, in attempting to distinguish the Valentin case, states that there the action was against a hospital for malpractice and that Dr. Webb was qualified primarily because of his familiarity with the records of the county hospital in tetanus cases. The hospital there was not the county hospital nor is that hospital involved here. And yet Dr. Webb testified there that he was familiar with tetanus treatment at the county hospital; here he testified that he was thoroughly familiar with the treatment and care of brain cases at the county hospital. There, as here, he testified that he kept himself informed by reading textbooks and medical periodicals about the various ills of the human body. Aside from the fact that a tetanus infection was involved in the Valentin case, I find the two cases indistinguishable. If Dr. Webb could be said to be more qualified to testify in one of the two cases than in the other, I would say that the balance is with the case under consideration here. An injury to the skull and brain would fall more in the field of anatomy than would a tetanus infection. Dr. Webb's 29 years' experience in the coroner's office, as well as his knowledge and ability as a teacher of anatomy have undoubtedly made him an expert in that type of medicine.

"A doctor's failure to possess or exercise the requisite learning or skill 'in a particular case is generally a question for experts and can be established only by their testimony' * * * which 'expert evidence is conclusive' where it appears that the 'matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen' * * *." It is a matter of common knowledge that members of any county medical society are extremely loath to testify *against* each other in a malpractice case. It would be very difficult for a plaintiff to produce, at a moment's notice, a panel of doctors whose qualifications might satisfy the standards which apparently had to be met in this case. As a result of the disqualification of Dr. Webb, the plaintiff here was effectively precluded from producing any evidence as to the proper and customary practice and procedure in the treatment and care of an injury such as the one received by her son. The alleged negligence of Dr. Lindquist was a matter not within the common knowledge of laymen but was one which required the testimony of an expert. The disqualification of Dr. Webb had the effect of depriving plaintiff of the opportunity to put her case before the jury because no matter what other evidence she produced, she could not prove negligence on the part of Dr. Lindquist without expert testimony. The jury, having the facts before it, should have been permitted to hear Dr. Webb's testimony and to decide for itself the question of fact presented for its determination—the alleged negligence of Dr. Lindquist.

The effect of the majority holding in this case is to place in the hands of a trial judge the power to prevent a plaintiff in a malpractice case, where expert testimony is required, from presenting any evidence on the issue that defendant failed to exercise the degree of care and skill which reputable physicians in the community would have exercised, as testimony in support of such issue can be given only by a qualified expert who is a physician. If, as held by the majority, a trial judge has the power to exclude the testimony of a witness as well qualified as Dr. Webb, then whenever a malpractice case is tried before a trial judge who has a leaning against such cases, the plaintiff can never prevail regardless of the number or qualifications of the expert witnesses produced by him. Anyone familiar with cases of this character knows that the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case. This is largely due to the pressure exerted by medical societies and public liability insurance companies which issue policies of liability insurance to physicians covering malpractice claims. While court records show that some of these claims may be questionable, many have substantial merit and ethical considerations are generally with the plaintiff's side of the case. But regardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of their fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy. "The regimen I adopt shall be for the *benefit of my patients* according to my ability and judgment, *and not for their hurt or for any wrong.*" (The Hippocratic Oath.) (Italics added.)

While the foregoing considerations do not constitute a sound basis for permitting an unqualified witness to offer expert testimony, they should weigh heavily with both trial and appellate courts in passing on the qualifications of such an expert witness in a malpractice case. I submit that the majority holding, sustaining the ruling of the trial court in rejecting the expert testimony of Dr. Webb in this case, places a stamp of approval upon a vicious practice which is destined to thwart the fair and equal administration of justice.

For these reasons I would reverse the judgment.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice Carter. Dr. Webb testified that in his practice and medical experience he had "become familiar with the practice and procedure adopted by reputable physicians and surgeons in the treatment and care of traumatic injuries in general in Los Angeles and vicinity" and also that he had "become familiar with the practice and procedure adopted by reputable physicians and surgeons in the treatment and care of traumatic injuries to the head and brain." The details of his varied experience, following graduation from the College of Physicians and Surgeons at Columbia University in 1902, are reflected in his testimony through many pages of transcript. The inferences to be drawn from such details of experience in respect to the *weight* which should be accorded Dr. Webb's opinions on the questions at issue may vary, but one thing seems certain to me: he was qualified as an expert competent to form and express an opinion on those questions. Considering all of the evidence touching on his qualifications, it surely does not destroy, but rather supports, the ultimate conclusionary facts above quoted.

The two hypothetical questions addressed to Dr. Webb went directly to the heart of plaintiff's case. In my view it was, under all the circumstances, an abuse of discretion, and prejudicial error, to hold that Dr. Webb was not qualified to answer those questions.

The judgment of nonsuit should be reversed.

PANZICH et al. v. GAYLORD.

Civ. 18079.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1951.

Rehearing Denied Aug. 22, 1951.

Hearing Granted Sept. 20, 1951.*

John Panzich and Martha Panzich brought action against Henry C. Gaylord for damages for alleged fraudulent misrepresentations relating to property purchased by plaintiffs. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, White, P. J., held that finding that there was no misrepresentation was unsupported by evidence, and that purchasers could affirm contract and sue for damages.

Reversed and remanded with directions.

1. Health 🔑32

Garage constructed under garage permit but occupied by a family was a "dwelling" within State Housing Act. Health and Safety Code, §§ 15014, 15016.

See publication Words and Phrases, for other judicial constructions and definitions of "Dwelling".

2. Fraud 🔑58(2)

In purchasers' action for damages for vendor's alleged fraudulent representations based on concealing of fact that structure occupied by a family on rear of purchased premises was illegally constructed without building permit having been obtained therefor, finding that garage was legally constructed under a building permit was unsupported by evidence which disclosed that building was occupied by family and that permit was for construction of garage. Health and Safety Code, §§ 15014, 15016, 15351, 15353.

3. Fraud 🔑11(2)

Representation by vendor that building on rear of purchased premises occupied by family and used as a dwelling was income property, together with concealment of fact known to vendor that there had been no building permit or inspection obtained for use as a dwelling, was a misrepresentation of fact and was actionable. Health and Safety Code, §§ 15014, 15016, 15351, 15353.

4. Fraud 🔑22(1)

A party to a contract is under no obligation to investigate and verify statements, as to truth of which the other party to the contract, having full means of knowledge, has deliberately given his word.

5. Fraud 🔑21, 22(1)

A purchaser has right to rely on representations of vendor as to facts not within purchaser's knowledge, and responsibility of vendor cannot be evaded by showing that purchaser might have ascertained by inquiry that representations were untrue.

6. Fraud 🔑34

Where vendor represented that garage occupied by a family as a dwelling on rear of purchased premises was income property and concealed fact that no permit had been issued for construction as a dwelling, though vendor told one of the two purchasers on eve of closing of the escrow when purchasers had performed their part of sale contract in full, that garage was being occupied only temporarily, purchasers were not required to rescind contract, but could proceed in affirmance of sale and recover for fraud.

7. Fraud 🔑31

Even if a purchaser learns of vendor's fraud prior to completion of sale contract, he can either rescind or proceed in affirmance of sale and recover for fraud.

8. Fraud 🔑59(2)

Where a purchaser learns of fraud of vendor but elects to affirm sale and sues for damages, measure of damages is difference between value of property as it is and what its value would have been if its condition had been as represented.

9. Fraud 🔑35

Purchaser who affirms sale contract after learning of fraud of vendor does not affirm the fraud, nor release or waive his claim for damages arising from a fraud collateral to agreement, but only consents to be bound by provisions of the agreement.

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* Subsequent opinion 244 P.2d 3.

10. Fraud ⚷36

Where vendor represented that garage occupied by family as dwelling on rear of purchased property was income property but concealed fact that there had been no permit obtained for construction as a dwelling, fact that City Planning Commission on vendor's request for permission to rent garage as dwelling, found no violation of zoning ordinance, did not aid vendor in purchasers' action for misrepresentation, because commission merely meant that there was no violation of the zoning ordinance in so far as construction of a second building under permit for garage was concerned, and that the commission was therefore without jurisdiction in the matter.

11. Appeal and error ⚷219(2)

Where appellants did not contend that trial court failed to make findings upon all material issues, but asserted that evidence failed to support findings, they were not attacking sufficiency of findings, and were not required to object to the findings in the lower court.

12. Appeal and error ⚷294(1)

Appellants were not obligated to move for new trial as a prerequisite to an appeal from trial court to District Court of Appeal from adverse judgment.

13. Appeal and error ⚷1011(1)

An appellate tribunal will reverse conclusion of trier of fact where there is no conflict of evidence and record does not contain substantial evidence to support judgment rendered.

14. Evidence ⚷29

District Court of Appeal would take judicial notice of provisions of State Housing Act. Health and Safety Code, §§ 15014, 15016.

15. Appeal and error ⚷1178(6)

An appellate court has power to order retrial on a limited issue, if that issue can be separately tried without confusion or uncertainty as would amount to denial of fair trial.

16. Appeal and error ⚷1178(6)

Where parties to fraud action stipulated at trial to present all their evidence affecting issue of liability, deferring question of damages, District Court of Appeal, having determined that trial court was in error in deciding for defendant on issue of liability and that judgment should have been for plaintiffs, would remand cause for new trial solely upon issue of amount of damages, since that issue would not effect issue of liability.

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J. M. Sinclair, Los Angeles, for appellants.

Fleming, Robbins & Tinsman and C. S. Tinsman, all of Los Angeles, for respondent.

WHITE, Presiding Justice.

This litigation arose out of a transaction in which plaintiffs acquired certain real property from defendant in the city of Arcadia, county of Los Angeles, on or about November 15, 1948. In their complaint, they alleged representations that the property was income property and that a house on the rear of said premises had a past and present rental value of $35.00 per month. That such statements were untrue. That defendant well knew that said rear house was illegally constructed and no building permit had ever been obtained for its construction. That the defendant concealed these facts. That relying upon the aforesaid representations plaintiffs purchased the property for $11,500.00; that had they known the falsity of said statements concerning the rear building upon the property they would not have purchased the same. That the reasonable value of the property as represented was $11,500.00, but that the reasonable value of the property "as it actually existed" was the sum of $8,000.00. Judgment was sought for $3,500.00 damages as the difference between the value of the property as represented and its true and actual value by reason of the claimed representations.

By his answer defendant admitted the sale and that at the time thereof the rear house was rented for $35.00 a month. Denied that the rear building had been constructed illegally and without a permit. Affirmatively alleged that the property was zoned as income property. That the building in the rear was occupied by defendants' sister for $35.00 per month and that before the said sale was completed "plaintiffs were informed that they should investigate as to whether or not said building could be occupied by others than the relatives of the owner". Defendant generally denied making any misstatement or fraudulent representation or that he concealed any facts from plaintiffs.

Following trial before the court judgment was entered for the defendants and plaintiffs prosecute this appeal therefrom.

The trial court found "that prior to completion of said purchase plaintiffs were informed that the sister and brother-in-law of defendant were only temporarily occupying the garage in the rear and were paying $35.00 rent to Henry C. Gaylord until they could find a home of their own and that before renting the garage as housing accommodations plaintiffs should obtain the approval of the Planning Commission of the City of Arcadia and were informed that it was the plan of defendant Gaylord to attach the garage building to the main house by a covered breezeway so as to make it part of the house; that thereafter plaintiffs did request the city of Arcadia planning commission for permission to rent said garage as a dwelling unit and that said planning commission found on March 17, 1949, there was no violation and that it had no jurisdiction in the matter.

"The Court further finds that the garage building was not illegally constructed and that building permits were obtained for its construction and that such construction was inspected, passed and approved by the building inspector of the City of Arcadia."

Appellants' first contention is that the evidence is insufficient to support the findings and that the latter do not, therefore, support the judgment.

That the property was represented to plaintiffs as having an income of $35.00 a month from the building in the rear and that defendant's sister and her family were occupying the same and paying that amount is without question. The listing or sales agreement with the real estate agent, signed by defendant Gaylord and introduced into evidence specifically set forth that the property was producing an income as aforesaid. That plaintiffs did not read the document is unimportant because defendant's agent informed them of the statements therein contained as to income from the structure in the rear.

[1, 2] That portion of the court's findings aforesaid that "the garage building was not illegally constructed and that building permits were obtained for its construction and that such construction was inspected, passed and approved by the building inspector of the city of Arcadia" is totally unsupported by the evidence insofar as construction of said building for human habitation is concerned. True, a permit was obtained and inspection made, but the permit and inspection related only to the construction of a garage. The building permit issued by the city of Arcadia and introduced into evidence, issued August 13, 1947, reads in part as follows: "Permission is hereby granted to H. C. Gaylord to erect garage at 626 West Camino Real Street * * * value $1,000.00". The building in the rear however, was not used as a garage but was a "dwelling" within the meaning of the State Housing Act. Health and Safety Code, sec. 15014. It was occupied by a family. Health and Safety Code, sec. 15016. At no time was a permit obtained for a dwelling in conformity with sections 15351 and 15353 of the Health and Safety Code, and at no time was the building in question inspected or approved as a dwelling. Furthermore, the building department of the city of Arcadia notified appellant Mrs. Panzich on January 18, 1949, after the close of escrow on November 16, 1948, that the rear building could not be legally rented as a dwelling.

That defendant had knowledge of the fact that the rear structure was being occupied as a dwelling in violation of law and that no permit had been issued for the erection of such structure as a dwelling, is evidenced by his testimony that on one occasion he heard his mother warn plaintiff John Panzich "that he had better check the legality of renting that garage to anyone except to one of his own family.". With reference to any such warning being given plaintiffs prior to the consummation of the deal and closing of the escrow, defendant Gaylord testified as follows:

"Q. Well, now, during these two conversations, you did not tell them that you knew that the occupancy of the garage, we will call it, was illegal, did you? A. Mr. Holes, my agent at that time, the man who brought them over, was doing the talking. He was selling my property. I explained the breezeway because he asked me to.

"Q. Well, Mr. Holes didn't tell them that, did he, that you knew that this occupancy was illegal? A. I don't remember whether he did or not. I don't think he did, but they were told later."

[3] The misrepresentation, either positively or by concealment, concerning inspection, approval and permit by the municipal authorities, constitutes a misrepresentation of fact and is actionable, Mullin v. Rousseau, 112 Cal.App. 719, 725, 297 P. 944.

[4, 5] One party to a contract is under no obligation to investigate and verify the statements, as to the truth of which the other party to the contract, having full means of knowledge, has deliberately given his word, Jarvis v. Singleton, 129 Cal.App. 250, 254, 255, 18 P.2d 382. A purchaser has the right to rely on the representations of the vendor as to facts not within the former's knowledge, and this responsibility of the vendor cannot be evaded by showing that the buyer might have ascertained by inquiry that the representations were untrue, Sullivan v. Helbing, 66 Cal.App. 478, 483, 484, 226 P. 803.

[6–9] With reference to the court's finding that "plaintiffs were informed that the sister and brother-in-law of defendant were only temporarily occupying the garage in the rear and were paying $35.00 rent to Henry C. Gaylord (respondent) until they could find a home of their own * * *", the record reflects that such information was given to appellant John Panzich only, that appellant Mrs. Panzich was given no such information, that the date of imparting such information to appellant John Panzich was on the Saturday or Sunday prior to November 15, 1948 and while the deal was in escrow (escrow was closed November 16, 1948). Coming as it did, on the eve of the closing of the escrow and when appellants had performed their part of the contract in full, they were not required to rescind the contract. Two courses were open to them: they could restore whatever they had received and proceed in equity to rescind the contract and recover what they had parted with; or they could, as they have done in this case, proceed in affirmance of the sale and recover for deceit, fraud or misrepresentation. And this is also true if before the completion of the contract the purchaser learns of the fraud of the vendor. If the vendee elects to affirm the sale and sue for damages, the measure of such damages will ordinarily be what appellants seek to recover in the instant action—the difference between the value of the property as it is and what its value would have been if its condition had been as represented, Sullivan v. Helbing, supra, 66 Cal.App. at page 484, 226 P. 803; Williamson v. Clapper, 88 Cal.App.2d 645, 653, 199 P.2d 337. By affirming the contract the vendee does not affirm the fraud. He consents to be bound by the provisions of the agreement, but in so doing, he does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement, Williamson v. Clapper, supra, 88 Cal.App. at page 654, 199 P.2d 337.

Respondent urges and the court found that following consummation of the transaction, appellant Mrs. Panzich requested permission from the Planning Commission of the City of Arcadia to rent the rear building as a dwelling and that the commission found that there was no violation of the zoning ordinance. The minutes of said planning commission were introduced into evidence and show that at a meeting held March 3, 1949, the following occurred: "In the matter of the request of Mrs. Martha Panzi*ck*, 626 W. Camino Real, for permission to rent out a garage which had been converted into a house, Mr. Ingstad and Mr. Stoner (two members of the commission to whom the matter had theretofore been referred for investigation) reported that in their opinion that there is no violation of zoning, and that the Planning Commission has no jurisdiction. Motion by Mr. Ingstad, seconded by Mr. Sullivan and carried that the letter be filed and the applicant be advised".

[10] Respondent is not aided by the foregoing which simply means that the planning commission found no violation of the zoning ordinance insofar as the construction of a second building under the permit for a garage was concerned and therefore, the planning commission was without jurisdiction in the matter. This is manifest from a reading of section 12 of Zoning Ordinance No. 439 of the City of Arcadia which was introduced into evidence. As heretofore pointed out, appellants were advised by the inspector of the building department of the city of Arcadia that the rear building could not be used as a dwelling because it was not constructed in accordance with the provisions of the State Housing Act contained in the Health and Safety Code of California as heretofore pointed out.

[11] Respondent complains that appellants failed to object to the findings in the lower court. Where, as here, appellants do not contend that the court failed to make findings upon all material issues, but assert that the evidence fails to support the findings, and are not attacking the sufficiency of the same, they were not required to present such matters to the trial judge.

[12] Neither were appellants obligated to move for a new trial as a prerequisite to an appeal to this court from the judgment. Huber v. Walters, 114 Cal.App. 323, 325, 299 P. 803; Hoyt v. Thomas, 50 Cal.App. 329, 335, 195 P. 260; Smith v. Lightston, 182 Cal. 41, 43, 186 P. 769.

[13] We are not unmindful of the rule which inhibits an appellate tribunal from interfering with the conclusion arrived at by the duly constituted trier of facts upon a conflict of evidence and where the record contains *substantial* evidence to support the judgment rendered. In the instant case the record clearly and without contradiction shows that representations were made that the building in the rear was lawfully constructed and occupied as a dwelling, and was producing an income of $35.00 per month. That it had been inspected and approved by the municipal building authorities as such, when in truth and in fact respondent knew, as he subsequently advised appellants, such structure could not be occupied as a dwelling. The documentary evidence consisting of the building permit, viewed in the light of the hereinbefore mentioned provisions of the State Housing Act, clearly demonstrate that the construction of the rear building was authorized as a garage and not as a dwelling.

[14] The evidence of misrepresentation or concealment by respondent Gaylord to appellants as to matters of fact is abundant, and when reviewed in the light of the documentary evidence and the provisions of the above-mentioned State Housing Act, of which the court takes judicial notice, presents no substantial conflict. It therefore follows that the findings and judgment are bereft of substantial evidence to support them.

[15, 16] The question now arises whether the case should be remanded on all issues or the issue of damages alone. The appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial, Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 75 L.Ed. 1188; Robinson v. Muir, 151 Cal. 118, 125, 90 P. 521; Wilke v. Crofton, 34 Cal.2d 304, 310, 209 P.2d 790. Whether it can or not depends upon the circumstances of each case. In the instant action, all parties stipulated at the trial to present all their evidence affecting the issue of liability, deferring the question of damages until determination of the issue of liability. This court having determined that the trial court was in error in its decision upon the issue of liability, and that the judgment should have been in favor of

plaintiffs on that issue, there remains only the question of damages to be determined. Since this does not affect the other issue, a retrial of the entire case is not required, Collins v. Ramish, 182 Cal. 360, 368, 369, 188 P. 550; Gray v. Cotton, 166 Cal. 130, 139, 134 P. 1145; Pearsall v. Henry, 153 Cal. 314, 330, 95 P. 154, 159; Paul v. Williams, 64 Cal.App.2d 696, 703, 149 P.2d 284.

The judgment is reversed and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to make findings on liability in accordance with the views here expressed and the evidence already taken, and on the amount of damages in accordance with the evidence to be taken, and enter judgment for plaintiffs in that amount.

DORAN and DRAPEAU, JJ., concur.

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105 Cal.App.2d 783

BLOCK et al. v. SNYDER et al.

Civ. 4217.

District Court of Appeal, Fourth District, California.

July 31, 1951.

Rehearing Denied Aug. 27, 1951.

Hearing Denied Sept. 27, 1951.

Elizabeth A. Block and husband sued A. C. Snyder, Henry A. Wuest and Harry W. Snyder, individually and as a co-partnership doing business as the Broadway Building Company, and others, for personal injuries to plaintiff wife as the result of falling down a stairway in named defendants' office building. From a judgment of the Superior Court of San Diego County, William A. Glen, J., for defendants, plaintiffs appealed. The District Court of Appeal, Griffin, J., held that defendants were not negligent as a matter of law in violating a city building ordinance providing that a door shall not open immediately on a flight of stairs, but on a landing at least equal to the width of the door, in the absence of a showing that there was any such requirement when the building was constructed or that defendants were brought within the ordinance by virtue of their replacement of a single door at the head of the stairway with double doors or a change of occupancy.

Judgment affirmed.

1. Municipal corporations 🔑**601(27)**

The provision of San Diego city building code ordinance that if alterations exceeding half of value of existing building were made thereto within any year, entire building should be made to conform with code requirements for new buildings, was inapplicable to replacement of single door at sidewalk entrance to flight of stairs, leading down to restaurant in building basement, with double doors, as such change was not major alteration.

2. Municipal corporations 🔑**631(2)**

Owners of office building and basement tenants, substituting double doors for single door at sidewalk entrance to stairway leading down to tenants' restaurant, did not violate, as matter of law, provision of San Diego city building code ordinance that if use or occupancy of portion of existing building is changed, only such portion need be made to comply with code requirements for new buildings, and that building inspector may approve change in use or occupancy of existing building within one group of occupancy, though building is not made to conform fully to such requirements, when change obviously will not extend or increase existing nonconformity or hazard, in absence of evidence indicating group of occupancy allowable and lack of building inspector's approval of alteration.

3. Municipal corporations 🔑**601(27)**

The provision of San Diego city building code ordinance that existing building, having its floor area or number of stories increased or its use or occupancy changed, all be provided with stairways, emergency exits and fire protection facilities specified therein for buildings subsequently erected for similar uses or occupancies, does not apply to minor alterations, such as replacement of single door with double doors at sidewalk entrance to stairway leading down to restaurant in building basement.

4. Landlord and tenant ⚷169(11)
Negligence ⚷136(22)

Owners of office building and basement tenants, substituting double doors for single door at sidewalk entrance to stairway leading down to tenants' restaurant, did not violate, as matter of law, provision of San Diego city zoning ordinance requiring that alteration of portion of existing building be made to conform to code requirements for new buildings when deemed necessary in building inspector's opinion, in absence of evidence of such necessity.

5. Landlord and tenant ⚷167(8)
Negligence ⚷136(22)

Owners of office building and basement tenants, replacing single door with double doors at sidewalk entrance to stairway leading down to tenants' restaurant, were not, as matter of law, guilty of negligence, rendering them liable for injuries to owners' invitee falling down stairway after opening one of such doors from sidewalk, in violating provision of city building code ordinance that door shall not open immediately on flight of stairs, but on landing at least equal to width of door, in absence of showing that there was any such requirement when building was constructed or that defendants were brought within ordinance by virtue of such change.

6. Negligence ⚷138(3)

In action for injuries to woman falling down stairway leading to defendants' restaurant in basement of co-defendants' office building, architect's testimony produced by plaintiffs, that stairway did not conform to standard accepted construction and architectural practice because of lack of landing between entrance door and first riser, bore on question of defendants' general negligence, on which jury found for defendants, not question presented by plaintiffs' refused instruction that defendants were negligent as matter of law, if they violated city building ordinance providing that door shall not open immediately on flight of stairs, but on landing equal at least to width of door.

7. Appeal and error ⚷750(3)

Where plaintiffs' only contention, on appeal from judgment for defendants on jury's verdict, is that trial court's refusal of plaintiffs' requested instruction that defendants were negligent as matter of law, if they violated city ordinance providing that door shall not open immediately on flight of stairs, was prejudicial error, no other likely ground on which ordinance might have been admissible in evidence against defendants will be considered by appellate court.

8. Trial ⚷296(4)

In personal injury suit, oral instruction to jury that if plaintiff failed to use ordinary care for her own safety and such negligence contributed to injury in any degree, however slight, it furnished complete defense, was not prejudicial error, warranting reversal of judgment on jury's verdict for defendants, because of omission of statement that such negligence must have contributed as proximate cause to accident in order to defeat recovery, where jury was fully instructed in writing in first instance, just before it retired, and immediately before giving of final instructions, on necessity of proving that plaintiff's contributory negligence contributed proximately to cause of injury in order to defeat her claim. Const. art. 6, § 4½.

9. Trial ⚷295(1)

Instructions giving jury fair and just notion of law on point to which they are addressed, when taken together, are sufficient, if not inconsistent with each other or confusing.

10. Appeal and error ⚷977(5)

The trial court's conclusion, on motion for new trial, that oral instruction to jury on contributory negligence was not prejudicial error because of failure to state that such negligence must have contributed as proximate cause to injury sued for to defeat recovery by plaintiff, should be considered by District Court of Appeal in reviewing such question on appeal from judgment for defendants on jury's verdict.

11. Trial ⚷296(3)

In action for injuries to woman falling down stairway leading from sidewalk entrance door of defendants' office building to co-defendant tenants' basement restaurant, instruction that tenants owed no duty to alter entrance way or doors to building and were not liable to building owners' invitee for condition of stairway and entrance, if they were so constructed as to constitute nuisance to general public and such condition existed when restaurant was leased, was not prejudicially erroneous as advising jury that tenants owed their invitees or licensees no duty to correct dangerous condition on leased premises, in view of other instructions.

◆

Garfield & Garfield and Fenton Garfield, all of San Diego, for appellants.

Gray, Cary, Ames & Driscoll, Ward W. Waddell, Jr., and Henry Pitts Mack, all of San Diego, for respondent Broadway Bldg. Co.

McInnis & Hamilton, and John W. McInnis, all of San Diego, for respondents Cendali et al.

GRIFFIN, Justice.

Plaintiffs, husband and wife, sought to recover damages from defendants for injuries suffered by plaintiff Elizabeth A. Block (hereinafter referred to as plaintiff) resulting from her falling down a stairway in an office building owned by defendants A. C. Snyder, Henry A. Wuest, and Harry W. Snyder, individually and as a copartnership doing business as the Broadway Building Company (hereinafter referred to as the Company). The stairway led to and was a portion of the premises leased by defendants Armando J. Cendali, Amos Cendali, Sr., Amos Cendali, Jr., and Joseph Tricola, individually and as a copartnership doing business as Benny's Spaghetti (hereinafter referred to as Benny's Spaghetti Co.).

Plaintiffs alleged that the building was negligently constructed and maintained by the defendants in that the stairway here involved appeared to plaintiff to open into the lobby, but actually it opened directly into a steep and unlighted stairway; that she mistakenly entered this doorway believing it opened into the lobby and she fell down the stairway, fracturing her spine and receiving other serious injuries. Defendants answered, denied negligence, and set up the affirmative defenses of unavoidable accident and contributory negligence. On the issues thus framed the case was tried by a jury and resulted in a judgment for defendants.

The building was located on the east side of First Street between Broadway and C Streets. It was originally built in 1912–1913 and purchased by defendant Broadway Building Company early in 1944, which company sold it in 1948. The basement, including the stairway, was leased to defendant Benny's Spaghetti Co., the partnership herein referred to, in February, 1944. The double glass-door entrance to the building is separated from the double glass-door basement entrance by a permanent glass window somewhat similar in design. A sign reading "Broadway Building" is over the entrance to the office building and a sign reading "Benny's Spaghetti", with an arrow pointing downward, is over the other double door entrance. In addition, there is an overhead neon sign running perpendicular to that entrance reading: "Benny's" with an arrow pointing to the same entrance. In the photograph (Defendant's Exhibit A) in evidence, appears a cardboard sign stuck on the north half of the double door entering to the basement about mid-center reading: "Open —Mon. thru Fri.—4 p. m. to 12 p. m. * * ".

There is a conflict in the evidence as to whether this sign was so placed on December 8, 1947, the day of the accident. The north half of the double door was fastened shut on that day. To open the south half of the door, which was level with the sidewalk, it was necessary to press a latch and pull the door out toward the sidewalk entrance. Neither door swung inward, as distinguished from the doors entering the building lobby. The first step of the marble stairway was on a level with the sidewalk and extended from the doors eastward and in toward the stairway, approximately 10 to 12 inches, and thereafter steps followed to the basement. There were hand-rails on each side of the stairway, which was 52 inches wide.

About 1:30 p. m. on the day in question plaintiff, according to her testimony, proceeded northerly on the sidewalk for the purpose of entering the Broadway Building and purchasing Christmas cards in one of the offices upstairs. Instead of entering at the main lobby entrance, she decided she would take a "short cut" through this other entrance and save time due to the inclement weather. She testified that she pulled at the stationary door and found it would not open; that she then unlatched the other door, pulled it toward her, stepped into the passageway, which proved to be a stairway, and that she fell; that she had on dark glasses; that the hallway appeared to be dark and unlighted but she believed she was entering a passageway into the main lobby of the building. At the foot of the stairs the proprietor of the spaghetti establishment saw her, found her dark glasses on the stairway, and aided her in obtaining an ambulance. She testified that she was positive she did not slip on anything.

According to the proprietor's testimony, plaintiff said she was trying to get into the Broadway Building; that she had mistaken the door and had entered with dark glasses on; that she said "I shouldn't have worn them into the building." He then testified that there was a large single door at the head of the stairway at the time he leased the premises and that, with the consent of the owners of the building, he changed the single door, which opened only outwardly, to a double door that operated in the same manner; that these doors were left open in warm weather and closed on cold days; that the drugstore above had a kitchen in the basement which was used by it and which was taken over by him; that the premises also were previously occupied by a locker club and for storage purposes.

The main question involved on this appeal is whether the court erred in refusing to give an instruction offered by plaintiffs reading:

"You are instructed that the San Diego City Building Ordinance effective at the time of this accident provided that: 'doors shall not open immediately upon a flight of stairs but on a landing at least equal to the width of the door.'

"If you find from the evidence that the defendants, or any of them, conducted themselves in violation of said Ordinance just read, you are instructed that said conduct constituted negligence as a matter of law."

This instruction is predicated upon a certain city building ordinance, No. 8852, adopted in 1922, incorporated in San Diego Building Code ordinance No. 13375, adopted in 1932, which was admitted in evidence against defendant building company, and later, on motion, was stricken.

Section 3304 does provide that "Doors shall not open immediately on a flight of stairs but on a landing at least equal to the width of the door."

It is defendant company's position that such ordinance was not admissible against it and that such an instruction was not applicable to it for the reasons (1) that the building was erected in 1912, before the ordinance was adopted; and (2) that since the building company did not acquire the premises until 1944, and as owner, made no changes in its structure, none of the provisions of the ordinance were violated by it, and accordingly neither the ordinance nor the instruction was applicable to it. Defendant Benny's Spaghetti Co. maintains that as to the entrance to the Broadway Building it, as lessee, was under no legal obligation or duty to change or alter the entrance to the building since it belonged to its landlord and was under the landlord's exclusive control; that the sole change involving the restaurant was the change of the door from a single panel door to two panels, and nothing further; that the overall size of the door, the manner in which it was opened, the landing, and stairs, were in no way materially changed by the lessee nor by the lessor from the time of the inception of the building up to the time of the accident, and that therefore the ordinance in no manner affected the rights of these particular lessee defendants; that if there was any question about these defendants being liable under any theory of general negligence, other than a violation of the ordinance, that question was disposed of by the jury's verdict.

We must therefore examine the provisions of the Building Code to determine whether or not it was applicable to either group of defendants, insofar as it related to the proffered instruction refused. (This is the only claimed violation upon which plaintiffs rely.)

So far as the record is concerned, the building originally was constructed in accordance with all existing ordinances. The adoption of the new ordinance, by its terms (Sec. 104) recites that it applies to existing buildings under the following conditions:

"104 * * * (a) Major Alteration and Repairs: If alterations and/or repairs in excess of fifty (50) per cent of the value of an existing building are made to such existing building within any period of twelve months, the entire building shall be made to conform with the requirements given herein for new buildings; * * *."

Subdivision "(b) Changed Use: If the existing use or occupancy of an existing building is changed to a use or occupancy which would not be permitted in a similar building hereafter erected, the entire building shall be made to conform with the requirements given herein for new buildings; provided, however, that if the use or occupancy of only a portion or portions of an existing building is changed and such portion or portions are segregated as specified in Section 503 of this Code, then only such portion or portions of the building need be made to comply with said requirements; and provided, further, that the Building Inspector is hereby given authority to approve any change in the use or occupancy of any existing building within any one Group of Occupancy as specified in Part III, even though such building is not made to fully conform to the requirements of this Code, when it is obvious that such a change in the use or occupancy of the existing building will not extend or increase any existing non-conformity or hazard of the building."

Subdivision "(c) Additions. Any existing building not covered by the preceding paragraphs (a) and (b) which has its floor area or its number of stories increased or its use or occupancy changed in any way from its former or existing use or occupancy shall be provided with stairways, emergency exits and fire protection facilities as specified in this Code for buildings hereafter erected for similar uses or occupancies."

Subdivision "(d) Minor alterations and repair. Every alteration or repair to any structural part or portion of an existing building shall when deemed necessary in the opinion of the Building Inspector be made to conform to the requirements of this Code for new buildings."

Section 502 provides: "Change in Use. No change shall be made in the character of occupancy or use of any building which would place the building in a different Group of Occupancy, unless such building is made to comply with the requirements of this Code for that Group.

"Exceptions: * * * Buildings in existence at the time of the passage of this Code, may have their existing use of occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life."

Sec. 503, above mentioned, provides: "(a) When the occupancy of a building is such that different portions of the building are placed in different occupancy Groups, a 'Fire Separation' as specified in this Section shall be provided so that each Group is entirely segregated * * *."

[1–4] Subdivision (a) of section 104 is clearly not applicable as the claimed alteration could not be considered a major alteration. The first portion of subdivision (b) applies only to the use and occupancy of an existing *building*. As to the use and occupancy of a portion of the building before the latter paragraph could be applicable, it must be shown that such portion or portions were segregated as specified in section 503 relating to "Fire Separation"; that different portions of the building were placed in different "Occupancy Groups"; and even then the building inspector may approve any such change within one "Group of Occupancy", even though such building is not made to fully conform to the code, when it is obvious that such a change in the use and occupancy of the existing building would not extend or increase any "existing" nonconformity or hazard of the building. In the absence of any evidence indicating the "Group of Occupancy" allowable, and that the change indicated lacked the approval of the building inspector, it cannot be said, as a matter of law, that defendants violated this provision of the Building Code. Subdivision (c) applies to *buildings* which have their floor area or their number of stories increased or the buildings' use or occupation changed, and clearly does not apply to minor alterations. Subdivision (d) covers minor alterations to the structural part or portion of the *building when in the opinion of the building inspector* it is deemed necessary. There being no evidence of such necessity, it cannot be said, as a matter of law, that defendants violated this section.

[5] The record does not show that there was any such requirement as set forth in Section 3304 when the building was constructed. Apparently the stairway, at that time, had a large door at the head of it and in the same position as the double doors which replaced it. If this change had not occurred, that section would not be retroactive in this respect. The change made, in effect, caused no more hazardous condition than the previous method of entrance, and since there was no sufficient showing that defendants were brought within the provisions of the Building Code by virtue of the claimed change or claimed change of occupancy, it cannot be said that either group of defendants was guilty of negligence as a matter of law in this respect.

[6] There was testimony by an architect, produced by plaintiff, that the stairway, as it existed at the time of the accident, did not conform with standard and accepted construction and architectural practice because of the lack of a landing between the door and the first riser. This, of course, bore on the question of general negligence as pleaded by plaintiff and on which issue the jury found in favor of defendants. It did not bear on the question presented by the refused instruction.

[7] Since the only contention made by plaintiff is that it was prejudicial error for the trial court to refuse to give that particular instruction, we will not consider any other likely ground on which the ordinance might have been admissible against these defendants.

[8] Another ground urged for a reversal of the judgment involves an oral instruction given after the jury returned seeking a clarification of the written instructions that had been given on the subject of negligence and contributory negligence.

The trial judge who instructed the jury in the first instance was not then present by reason of illness. Another judge was called in and it was stipulated by the parties that he might take the verdict or "give further instructions in case they request same." On the return of the jury, that judge remarked to it:

"I am informed that the jury requests some additional instructions or clarification of the instructions. The Foreman: Yes, your Honor. Some of them are confused on the question of negligence and contributory negligence, and they would like to have those instructions read again. The Court: Well, it is with reference to what constitutes negligence, what constitutes contributory neglignce, as to the effect of it? Is that generally what you have in mind? The Foreman: I think that is what we had in mind, yes, sir. The Court: Well, let's sort of discuss it a minute and see if we can clear it up any for you."

Then, without re-reading the proper written instructions given on the subject and about which plaintiff makes no complaint, the judge orally attempted, in a four-page dissertation, to discuss what the law was in this respect, and started out by saying:

"Generally speaking, when we use the term 'negligence' in an action of this character, what is meant is the failure to use the degree of care which the law requires under that particular state of facts."

He then gave a fairly clear definition of negligence. In discussing contributory negligence he told the jury it was not permitted to weigh the negligence of the different parties, i. e., who was most negligent. Then followed a fair oral treatise on the subject of contributory negligence in which the trial judge stated: "As to contributory negligence, every person is required by law to use ordinary care for his own safety and protection * * *."

He then, inadvertently, no doubt, said: "If, however, he has failed to use that degree of care and has been negligent and that negligence has contributed to the injury in any degree, however slight, then it furnishes a complete defense," erroneously omitting the statement that such contributory negligence must contribute as a "proximate cause" to the accident and injury, to defeat recovery. This same omission appears in two or three other places in the instruction. In support of the claim that this omission constitutes prejudicial error plaintiff cites such cases as Fernandes v. Sacramento City Ry. Co., 52 Cal. 45; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; LaRue v. Powell, 5 Cal.App.2d 439, 42 P.2d 1063; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95; and Spear v. Leuenberger, 44 Cal.App.2d 236, 112 P.2d 43.

Defendants cite several cases to the effect that where a formula instruction is given, containing all of the essential elements of negligence and contributory negligence, an additional instruction given on the subject which omits one element is not necessarily prejudicially erroneous where the court points out to the jury, as was originally done in this case, that it was not to single out any one instruction but that it was to give consideration to all of the instructions in the case and to consider them together. See, Briscoe v. Pacific Electric Ry. Co., 89 Cal.App.2d 439, 200 P.2d 875; Weaver v. Carter, 28 Cal.App. 241, 247, 152 P. 323; and Fox v. Ravera, 122 Cal.App. 35, 9 P.2d 590, where the instruction failed to include the word "proximate" in a statement of the conditions necessary to recover. There the court said at page 39 of 122 Cal.App., at page 591 of 9 P.2d:

"Appellant's criticism of this particular instruction is technically sound, but, before the giving of an instruction justifies a reversal, it must appear that it prejudicially affected the rights of the complaining party." (Citing cases.)

There is no doubt that the jury, in the first instance, was fully instructed on the necessity of proving that any contributory negligence of plaintiff must contribute proximately to the cause of her injury in order to defeat her claim. The trial judge, before the trial, in discussing the pleadings as an outline of the issues presented, so stated, and later instructed the jury in at least five other instructions to this same effect. He then included within those instructions a definition of "proximate cause".

Counsel for plaintiffs concede familiarity with this line of cases but argue that since the foreman of the jury indicated that some of the jurors were "confused" on the question of negligence and contributory negligence, and accordingly requested that the written instructions given on the two subjects be *re-read,* it was prejudicial error for the trial judge to give an erroneous oral instruction of his own rather than re-read the proper written instruction as given.

There is considerable merit to this argument and the error mentioned might well have been avoided by so doing. The question before us which is a close one, is whether such error was prejudicially erroneous and would necessitate a reversal of the judgment.

It does appear that the jury was told many times about the necessity of establishing the fact that before plaintiff could be charged with contributory negligence barring a recovery, it must be shown to its satisfaction that such negligence contributed proximately to the cause of her injury. It does not appear to us that the jury could very well forget or be confused about the necessity of proving this element. In fact, just before the jury retired and immediately before giving the final instructions involving the forms of verdicts and damages, if any, to be assessed, the trial judge again told the jury:

"The issues, then, Members of the jury, to be determined by you in this case are these:

"First: Were the defendants negligent?

"If you answer that question in the negative, you will return a verdict for the defendants. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence a proximate cause of any injury to the plaintiff, Elizabeth A. Block?

"If you answer that question in the negative plaintiffs are not entitled to recover; but if you answer it in the affirmative, you then must find on a third question:

"Was the plaintiff, Elizabeth A. Block, negligent?

"If you find that she was not, after having found in plaintiff Elizabeth A. Block's favor on the other two issues, you then must fix the amount of plaintiffs' damages and return a verdict in their favor.

"If you find that plaintiff Elizabeth A. Block was negligent, you then must determine a fourth issue, namely:

"Did that negligence contribute in any degree as a *proximate cause* of the accident?

"If you find that it did, your verdict must be for the defendants; but if you find that it did not, and you previously have found that it was negligence on defendants' part, or some of them, which proximately caused plaintiff Elizabeth A. Block's injury, you then must fix the amount of plaintiffs' damages and return a verdict in their favor."

It is difficult for us to hold that all of the written instructions given to the jury were forgotten by it, and the "omission" to restate to the jury the element of "proximate cause" in the oral instruction resulted in a miscarriage of justice or that a different judgment would have resulted if that term had been therein expressed.

[9] In Weaver v. Carter, 28 Cal.App. 241, 247, 152 P. 323, 326 it is said: "* * * if all the instructions, taken together, and *not being inconsistent with each other or confusing,* give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient."

The distinction between this line of cases and cases where a *conflict* in instructions constitutes reversible error, is pointed out in Parkin v. Grayson-Owen Co., 157 Cal. 41, 49, 106 P. 210; and Rathbun v. White, 157 Cal. 248, 253, 107 P. 309.

Since there was ample evidence indicating contributory negligence on the part of plaintiff which, if true, would have been a proximate cause of her injury, we conclude that Sec. 4½ of Article VI of the Constitution is applicable and the judgment should be affirmed. Briscoe v. Pacific Electric Ry. Co., 89 Cal.App.2d 439, 200 P. 2d 875; Briggs v. Jess Mead, Inc., 93 Cal. App. 666, 270 P. 263; Wirthman v. Isenstein, 182 Cal. 108, 187 P. 12; Mahoney v. Murray, 140 Cal.App. 206, 35 P.2d 612; Jackson v. Lactein Co., 209 Cal. 520, 288 P. 781; Bee v. Tungstar Corp., 65 Cal.App.2d 729, 151 P.2d 537.

[10] The trial court reviewed this same question on the motion for new trial and made a similar conclusion. That fact should be considered by this court. Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774.

[11] Lastly, the plaintiffs contend that the court erred in giving defendant Benny's Spaghetti Co's instruction, as follows:

"As to the entrance and premises of the Broadway Building which was under control of the landlord and defendant Broadway Building Company, you are instructed that there was no duty at the time of the happening of this accident upon the defendant Benny's Spaghetti Restaurant to alter, change or modify in any manner whatsoever the entranceway or doors to the Broadway Building Company. This is for the legal reason that they did not control that portion of the building.

"If you find that the stairway here in consideration and the entrance thereto were so constructed as to constitute a nuisance to the general public and that condition was present at the time of the leasing of the Broadway Building Company to Benny's Spaghetti Restaurant, then I instruct you that the defendant Benny's Spaghetti Restaurant is not legally liable for such condition to an invitee of the Broadway Building Company."

This instruction followed the giving of several other instructions predicated upon the relationship of landlord and tenant and their respective duties to licensees and invitees. It is plaintiff's argument that the instruction is confusing because it cannot be determined what was meant by the words: "As to the entrance and premises of the Broadway Building which was under control of the landlord and defendant Broadway Building Company". It is also charged that it may have confused the jury and led it to believe that it was being instructed that Benny's Spaghetti Co. had no duty to repair a defective, hazardous and negligent condition of the doorway in question in this case. It is further contended that the second portion of the instruction is erroneous because it directs a verdict in favor of Benny's Spaghetti Co. and states that that company was not responsible to invitees of the Broadway Building Company; and that it was a factual question to be drawn from all the circumstances as to whether or not plaintiff was an invitee of all defendants to enter the particular doorway in question, citing 19 Cal.Jur. sec. 55, page 621; Grant v. Sunset Telephone etc. Company, 7 Cal.App. 267, 94 P. 368; and Stewart v. Lido Cafe, 13 Cal.App.2d 46, 56 P.2d 553.

When the court instructed the jury in the challenged instruction that the entrance to the premises of the "Broadway Building" was under the control of the landlord, it was stating to the jury the admitted facts in evidence, as to which there is no dispute. Defendant Benny's Spaghetti Co. was entitled to have the jury instructed as to that defendant, that there was no legal obligation to alter or change the entrance to the *Broadway Building,* which was at all times under the exclusive control of the landlord. Plaintiff therefore cannot take issue with that portion of the instruction which states that Benny's Spaghetti was not in the control of the Broadway Building entrance. The instruction did not advise the jury that there was no duty upon Benny's Spaghetti Co. to correct a dangerous or defective condition upon its own premises pertaining to its invitees or licensees. Concededly, the stairway and door through which plaintiff entered was not a portion of the entranceway into the Broadway Building. The converse is also factually true.

In Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 170 P.2d 5, the court held that a tenant is ordinarily not liable for injuries to his invitees incurred outside the leased premises on common passageways over which he has no control. Responsibility in such cases rests upon the owner who has the right of control and the duty to maintain that part of the premises in a good and safe condition. Benny's Spaghetti Co. had no control over the premises or entranceway except to its own business. The effect of the last paragraph of the instructions was to advise the jury that if the stairway and entrance under consideration were so constructed as to constitute a nuisance and that condition was present at the time of the leasing by the Broadway Building Company to Benny's Spaghetti Co., then Benny's Spaghetti Co. was not liable for such condition to *an invitee of the Broadway Building Company.* This entire instruction, when considered in connection with the other instructions given on the question of the liability of the owner and the lessee to a licensee and to an invitee cannot be said to be prejudicially erroneous. Dennis v. City of Orange, 110 Cal. App. 16, 293 P. 865; Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 164 P.2d 897; King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559; 15 Cal. Jur., p. 737, sec. 150.

Defendant owners contend that whether or not these instructions embody correct principles of law, the giving of them would not justify a reversal of the judgment as to them, since there is no way that these instructions could have affected the verdict of the jury in their favor.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

106 Cal.App.2d 19

PEOPLE v. DANDY.

Cr. 4661.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1951.

Willie Dandy, Jr., was convicted in the Superior Court of Los Angeles County, H. J. Borde, J., of grand theft and he appealed. The District Court of Appeal, Drapeau, J., held that the trial court did not abuse discretion in denying probation to the defendant.

Judgment affirmed.

1. Criminal law ⚿982

Granting of probation is not a matter of right but is a matter of grace and clemency and is committed to sound discretion of trial court.

2. Criminal law ⚿982

Trial court did not abuse discretion in denying probation to a defendant who was convicted of grand theft and who had committed two burglaries and had admitted committing other minor offenses.

3. Criminal law ⚿982

Report of probation officer relative to a defendant convicted of grand theft was not improper as going beyond statutory duty of probation officer to make an investigation of circumstances surrounding crime and prior record and history of defendant, to make a written report to court of facts found upon such investigation, and to accompany report with his written recommendations as to granting or withholding of probation to defendant. Pen.Code, § 1203.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Two colored men engaged the attention of a girl cashier-checker in a market. One of the men bought some candy from her; then he asked her for more. When she turned to the candy boxes behind her she left the drawer of her cash register standing open.

Then the other man, the defendant, reached into the drawer and grabbed a handful of currency. The cashier saw what he was doing, and said, "Give it to me." Defendant threw down some of the bills and left the store. When the register was checked $221.55 was found to be gone.

Defendant was charged with grand theft, waived jury trial, and was convicted following trial before the court. His application for probation was denied, and he was sent to state's prison. He now appeals from the judgment.

Defendant's brief admits the crime, but argues that the probation officer's report should not have contained a long record of roust arrests; also that statements derogatory to him and recommendatory of what the court's action should be had no place in the probation officer's report.

In defendant's brief it is said: "We feel sure that had the probation report been properly submitted to the court, and had there not been half-truths and misrepresentations therein, that the court would not have felt that a man who paid a ten dollar fine in 1944 for crap shooting, served thirty days in the same year for petty theft, paid a twenty five dollar fine on a petty theft in 1946 and a year for escape in the same year, paid a ten dollar fine for crap shooting in 1948, and in the same year was sentenced for failure to provide, paid a twenty dollar fine for driving without a license in 1950 and committed two burglaries in the spring of 1950, after which he was sentenced to jail for ninety days as a narcotics addict had 'done everything.' To make such a remark the court must certainly have been influenced by the included record of twenty-seven arrests which came to naught and by the ill founded remarks of the probation officer."

[1] Granting of probation is committed to the sound discretion of the trial court. People v. Jackson, 89 Cal.App.2d 181, 200 P.2d 204; People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907. Probation is not a

matter of right but one of grace and clemency. People v. Hainline, 219 Cal. 532, 28 P.2d 16; People v. Jackson, supra.

[2] It can hardly be said to have been an abuse of discretion for the court to have denied probation to one who had "committed two burglaries in the spring of 1950," not to mention the other minor offenses admitted.

[3] Section 1203 of the Penal Code directs the probation officer to make "an investigation of circumstances surrounding the crime and the prior record and history of the defendant", to make "a written report to the court of the facts found upon such investigation", and to accompany said report "with his written recommendations as to the granting or withholding of probation to the defendant". Nothing in the probation officer's report in this case goes beyond the broad scope of his duties as stated in the Code.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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106 Cal.App.2d 162

ESQUIVEL et al. v. RANEY.

Civ. 18200.

District Court of Appeal, Second District,
Division 3, California.

Aug. 17, 1951.

Jess Esquivel, and others, brought an action against Dr. Rupert B. Raney. The Superior Court of Los Angeles County, Arnold Praeger, J., set aside the entry of default of defendant and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that such order was not appealable.

Appeal dismissed.

Appeal and error 🔑113(3)

An order setting aside a default before judgment was entered was not an appealable order. Code Civ.Proc. § 963.

Orloff & Pollack and Ruthe Jacobson, Los Angeles, for appellants.

Ralph N. Highsmith, Henry E. Kappler, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiffs appealed from an order setting aside the entry of the default of defendant Rupert B. Raney. No judgment has been entered in the action.

Section 963 of the Code of Civil Procedure enumerates the various orders from which appeals may be taken. An order setting aside a default before judgment is entered is not one of the orders enumerated. It is therefore not appealable. See cases cited in 5 West's Cal.Dig. (1951), Appeal and Error, 🔑113(3), page 152.

Appeal dismissed.

SHINN, P. J., and WOOD, J., concur.

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105 Cal.App.2d 844

LYONS v. THRIFTY DRUG STORES CO., Inc.

Civ. 18107.

District Court of Appeal, Second District,
Division 1, California.

Aug. 7, 1951.

Action by Paula L. Lyons against Thrifty Drug Stores Company, Inc., to recover damages for injuries sustained in a fall in defendant's store. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment for defendant on issue of liability and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that whether avocado on which plaintiff slipped had been on floor of drugstore long enough for defendant to have been actually or constructively aware of its presence and consequently liable for plaintiff's injuries was a question of fact for trial judge as trier of the facts.

Judgment affirmed.

1. Negligence 🔑48, 50

Proprietor of store is liable for injuries to customer caused by dangerous condition on floor of store if proprietor had actual or constructive knowledge of such condition and failed to use ordinary care to remedy the condition.

2. Negligence 🔑136(6, 16)

That customer slipped on an avocado on floor of drugstore did not compel a finding of negligence and consequent liability of drugstore proprietor for injuries sustained by customer, unless avocado had been on floor long enough for proprietor to have been actually or constructively aware of its presence.

3. Negligence 🔑136(16)

Whether avocado on which customer slipped had been on floor of drugstore long enough for proprietor to have been actually or constructively aware of its presence and consequently liable for injuries sustained by customer in fall was a question of fact for trial judge as trier of the facts.

4. Appeal and error 🔑1010(1)

Trial court's finding of fact supported by substantial evidence is binding on appellate court.

Wood, Crump, Rogers, Arndt & Evans, Stanley M. Arndt and Dale J. Herian, all of Los Angeles, for appellant.

Eugene S. Ives, Los Angeles, for respondent.

DRAPEAU, Justice.

After having lunch at a counter in defendant's drug store plaintiff got down from a stool, walked three or four steps, slipped and fell. She struck the floor in a sitting position, was helped up, and then fell again to her knees. From the pleadings it would appear that she suffered serious injuries.

Plaintiff saw a piece of greasy avocado, dark green or black, on the floor where she had slipped.

A gentleman at the counter heard the thud of plaintiff's fall, turned around, saw her on the floor, got down, and helped her to her feet. He testified that he noticed on the floor a piece of "gooey material about as big as a half dollar, maybe larger." This he scooped into a napkin and laid on the counter.

Defendant's store manager testified that the store was well lighted and the floor was clean; that it had been swept about eleven thirty that morning, about an hour before plaintiff fell. The manager admitted that she had been told of the removal of the greasy substance from the floor. This testimony was corroborated by the lady in charge of the lunch counter.

Upon stipulation, the issue of liability was tried first, and no evidence of damages was taken. The trial court found against plaintiff on negligence. From the judgment which followed plaintiff appeals.

There is little conflict in the evidence. Plaintiff slipped on something on the floor as she was leaving the lunch counter. She said it was a piece of an avocado. Her witness said it was a greasy substance. Witnesses for defendant did not deny that the substance, whatever it was, was on the floor, and that plaintiff slipped on it.

[1] The vital question here is whether defendant had actual or constructive knowledge of the dangerous condition on the floor. If defendant had, or should have had, such knowledge, and failed to use ordinary care to remedy the condition, then liability attaches. Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 184 P.2d 708; Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 206 P.2d 6.

[2, 3] But proof that plaintiff slipped on an avocado on defendant's floor does not compel a finding of negligence. It was the province of the trier of fact to determine the existence of the further essential part of plaintiff's cause of action—that the avocado had been on the floor long enough for defendant to have been actually or constructively aware of its presence there. This question of fact was for the determination of the judge who tried the case. Louie v. Hagstrom's Food Stores, supra, and cases cited.

[4] Herein lies the weakness of plaintiff's appeal, for under the substantial-evidence rule basic in our system of juris-

prudence in California this Court is bound by the finding of the trial court.

Plaintiff argues that the aged appearance of the avocado, and the fact that it was thrown away by employees of defendant raises a presumption that it had been on the floor for hours; also that defendant's failure to call as witnesses the janitor, the bus boy, and the waitress closest to plaintiff when she fell raises a presumption that such testimony was not produced because it was unfavorable to defendant. These were cogent arguments to have been presented to the trier of fact. In this Court they have no persuasive effect.

The judgment is affirmed.

DORAN, J., and HANSON, J., pro tem., concur.

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105 Cal.App.2d 839

LYONS v. LYONS.

Civ. 18509.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1951.

Motion by appellant to augment record on appeal from judgment of Superior Court of Los Angeles county, J. O. Moncur, J. The District Court of Appeal, White, J., held that in view of fact that clerk's transcript revealed that clerk had listed all of such exhibits and had given brief description of each of them in conformity with rules on appeal, exhibits not incorporated on appellant's opening brief because of inadvertence of printer, were part of record and motion of appellant would be considered as application to court to direct clerk to transmit to appellate such exhibits designated by parties as part of record.

Order in accordance with opinion.

Appeal and error 🔑654

Where exhibit which had been offered by appellant for identification and had been denied on appellant's motion for new trial had been inadvertently omitted from appellant's opening brief despite positive request made to printer for incorporation, but clerk transcript revealed that clerk had listed all of such exhibits with brief description of each of them in accordance with rules of appeal, exhibits were part of record on appeal and appellant's motion to augment record would be considered as application that court direct clerk of lower court to transmit all of original exhibits designated by parties as part of record. Rules on Appeal, rules 9(e), 10(b).

◆

John F. Poole, Henry F. Poyet, Los Angeles, for appellant.

Harry E. Sokolov, Philip Feldman, Beverly Hills, for respondent.

WHITE, Presiding Justice.

This is a motion by appellant to augment the record on appeal "by incorporating in the opening brief of the appellant on file, appellant's exhibits A through G which were offered for identification and denied on appellant's motion for a new trial." In his supporting affidavit appellant's counsel further avers that "Positive request was made of printer to incorporate same in Appellant's Opening Brief and through their inadvertence same was not incorporated therein."

An examination of the clerk's transcript reveals that pursuant to the provisions of Rule 9(c) of Rules on Appeal, the Clerk of the Superior Court has listed all of the foregoing exhibits, "not copied but designated for inclusion in appeal record", and in further conformity with the foregoing rule, there appears in the clerk's transcript "a brief description of each of them."

The exhibits in question are therefore now a part of the record on appeal.

We shall therefore regard appellant's motion as an application under Rule 10(b) that this court direct the clerk of the superior court to transmit to this court all of the original exhibits designated by the parties as a part of the record.

It is so ordered.

DORAN and DRAPEAU, JJ., concur.

104 Cal.App.2d 642

PEOPLE v. HESS et al.

Cr. 4336.

District Court of Appeal, Second District, Division 1, California.

June 12, 1951.

Rehearing Denied June 25, 1951.

Hearing Denied July 12, 1951.

John K. Hess, William E. Rose and Royall W. Wheeler, were convicted in the Superior Court of Los Angeles County, Frank G. Swain, J., of conspiracy to embezzle public monies and they appealed. The District Court of Appeals, White, P. J., held that evidence sustained convictions.

Judgment and orders denying new trial as to defendants Hess and Rose affirmed. The attempted appeal of Wheeler from the judgment dismissed and order denying his motion for a new trial affirmed.

Carter and Schauer, JJ., dissented.

1. Criminal law 🔑322

The actions of a jury commissioner in selecting and making a jury list are presumed to be valid, and in absence of some showing of abuse of discretion by him his actions will not be disturbed. Code Civ.Proc. §§ 198 to 201, 204.

2. Jury 🔑62(3)

In the selection of names to compose jury list, jury commissioner is invested with full power to decide as to who are qualified to serve and who are entitled to be excused and unless such selection is fraudulently made, or made in such a manner as to deprive an accused of a fair and impartial trial, jury commissioner's actions will not be invalidated. Code Civ.Proc. §§ 198 to 201, 204.

3. Jury 🔑82(1)

Generally, errors and irregularities in failing to comply strictly with statutes in making up a jury list, when there is no resultant prejudice to parties involved in litigation, does not invalidate the list. Code Civ.Proc. §§ 198 to 201, 204.

4. Jury 🔑83(1)

A defendant cannot complain if he is tried by an impartial jury and can demand nothing more

5. Jury 🔑62(3)

Selection of jury panel by jury commissioner entirely from register of voters was not unreasonable. Code Civ.Proc. § 204.

6. Criminal law 🔑1166½(6)

No prejudice to defendant could be inferred because jury consisted of eleven women and one man.

7. Jury 🔑33(1)

Neither state or federal constitutions guarantee an accused a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex.

8. Conspiracy 🔑43(6)

Fact that indictment alleged object of conspiracy to be commission of several separate and distinct crimes did not change or alter fact that crime of conspiracy was only offense charged in the indictment.

9. Conspiracy 🔑43(12)

Where indictment alleged object of conspiracy to be the commission of several separate and distinct crimes, proof of conspiracy to commit any one of offenses was sufficient. Pen.Code §§ 182, 184.

10. Indictment and Information 🔑110(10)

Where indictment charging defendants with offense of conspiracy to embezzle public monies was framed substantially in words of section of Penal Code defining that offense and particular circumstances thereof were furnished defendants by transcript of testimony upon which indictment was founded and which transcript was furnished defendants pursuant to the Penal Code, indictment was not wanting in any essentials of a valid accusation. Pen. Code §§ 504, 925, 950.

11. Embezzlement 🔑9

To constitute embezzlement it is not necessary to show actual possession of money or property and it is sufficient to show that while an accused was not in actual possession of money it was under his control in sense that it was under his direction and management.

12. Embezzlement 🔑44(5)

In prosecution for conspiracy to embezzle public funds based on alleged agreement between two defendant state right-of-way agents employed in division of highways and defendant realty broker, whereby realty to be purchased by state was purchased through defendant broker as representative of owners at price authorized by defendant agents for which agents received a commission from broker, evidence that before state warrants could be given to vendors of realty purchased by state, warrants were required to bear approval of defendant agents and that allotment appraisals of realty were prepared by agents and recommended for approval by them to their superior officer and that the defendant broker acted in concert with the two state agents showed a sufficient control of the state's money by defendant agents to authorize their conviction. Pen. Code §§ 182, 184, 504.

13. Embezzlement 🔑24

A person not a State official may be guilty of crime of embezzling public funds where he is shown to have aided and abetted an official in criminal act. Pen. Code § 504.

14. Embezzlement 🔑8

Where realty broker obtained authorization to sell properties for various vendors and vendors agreed to pay broker a certain percent of proceeds of sale and broker agreed with defendants, right-of-way agents in state highway division to pay them 40% of commission received from sale of property to state and every crucial act from placement of property to transfer of title and payment by state controller was lodged with defendant agents, amount of commissions remained at all times property of state and were such when they reached hands of the defendants, and when such money was appropriated to their own use and purpose defendants were guilty of crime of embezzling public funds. Pen. Code § 504.

15. Criminal law 🔑317

In prosecution for conspiracy to embezzle public funds, jury was authorized to take into consideration fact that none of defendants testified at trial to deny or explain any evidence, facts, or circumstances. Const. art. 1, § 13; Pen. Code, § 1323.

16. Conspiracy 🔑47

Evidence sustained conviction of defendants for crime of conspiracy to embezzle public funds. Pen. Code §§ 182, 184, 504.

17. Criminal law 🔑338(1)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two defendants, state right-of-way agents employed in state highway division and defendant realty broker, whereby various properties to be purchased by state would be handled by broker as representative of vendors at price appraised by defendant agents, and for which agents were to receive a portion of broker's commission, although broker was not connected with state highway division, testimony of practices and customs of state highway division was properly admitted and was binding on broker once it was established that he was member of conspiracy. Pen. Code §§ 182, 184, 504.

18. Conspiracy 🔑23

Common design is the essence of conspiracy, and crime may be committed whether parties comprehend its entire scope, whether they act separately or together, by same or different means, known or unknown to some of them, but constantly leading to same unlawful result. Pen. Code §§ 182, 184, 504.

19. Criminal law 🔑1169(1)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two defendants, state right-of-way agents employed in state highway division and defendant realty broker whereby properties to be purchased by state would be purchased through defendant broker as representative of vendors at price appraised by defendant agents and for which agents were to receive a portion of broker's commission, permitting supervising right-of-way agent to testify that it was practice to buy below appraised value of property was not prejudicial error. Pen. Code §§ 182, 184, 504.

20. Criminal law ⚷338(1)

In prosecution for conspiracy to embezzle public monies based on an alleged agreement between two defendants who were employed in state highway division as right-of-way agents and realty broker whereby sale of various properties to state would be handled by broker as representative of vendors at price for properties appraised by agents and for which agents were to receive portion of broker's commission, documentary evidence of customs and practices prevailing in office of division of highway to show that in initialing certain documents agents were conforming to established division customs and practices was not error and testimony was binding on broker as a member of the established conspiracy. Pen. Code §§ 182, 184, 504.

21. Criminal law ⚷371(1)

In prosecution for conspiracy to embezzle public monies, evidence as to substantive offenses which were dismissed by trial court, was properly admitted to show that defendants entertained a mutual design to commit offense designated as aim and objective of conspirators, followed by an overt act or acts in pursuance to such design and it was of no consequence whether such evidence made out substantive charges if it was material to and competent in relation to separate charge of conspiracy. Pen. Code §§ 182, 184, 504.

22. Conspiracy ⚷45

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of state highway division and realty broker to share in commissions received by broker from vendors which broker received in handling sale of various properties at prices appraised by defendant agents, permitting district attorney to ask property owner if agents had contacted him with reference to sale of property prior to time owner and his brother signed selling authorization to broker and whether owner would have sold property directly to state, to show that owner would have readily sold to state as he could have done had agents contacted him directly as was their duty to do, was not error. Pen. Code §§ 182, 184, 504.

23. Criminal law ⚷338(1)

Evidence is relevant when no matter how weak it may be it tends to prove issue before jury.

24. Conspiracy ⚷45
Criminal law ⚷741(1)

In prosecution for conspiracy to embezzle public monies evidence, whether it was insufficient to prove substantive charges contained in dismissed counts of indictment or not, was admissible if it had tendency to illustrate or throw any light on separate conspiracy charge, leaving strength of such tendency or weight of such evidence to be determined by jury. Pen.Code §§ 182, 184, 504.

25. Criminal law ⚷338(1)

The relevancy of evidence that may be offered upon an issue of fact depends on nature of issue to sustain which or against which it is offered, and a wide discretion is left to trial judge in determining whether it is admissible or not.

26. Conspiracy ⚷46

In a conspiracy prosecution, evidence of an overt act is admissible even though innocent except for its relation to illicit agreement. Pen.Code §§ 182, 184.

27. Criminal law ⚷1169(1)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of state highway division and realty broker to share in commissions received by broker from vendors in handling sale of their various property to state at prices appraised by and approved by defendant agents, admission of letter from chief right-of-way agent to district engineer calling attention to fact that it was strict policy of division of highways that right-of-way negotiating personnel should under no circumstances deliver maps or appraisal information to realty brokers for purpose of permitting those people to attempt to negotiate settlement with property owner at price less than appraised value and make profit at expense of property owner or possibly at expense of state, which letter was initialed by defendant agents in their handwriting, was not prejudicial error. Pen.Code §§ 182, 184, 504.

28. Criminal law 🔑372(6), 878(3)

In prosecution for conspiracy to embezzle public monies, acquittal of defendants of embezzlement of certain sum charged as a substantive offense in a count of the indictment did not constitute an acquittal of defendants of the conspiracy charge and evidence as to count of embezzlement which was dismissed was admissible under separate and distinct charge of conspiracy as part of alleged scheme or plan set forth in conspiracy count. Pen.Code, §§ 182, 184, 504.

29. Conspiracy 🔑28

Substantive crime of embezzlement and crime of conspiracy are separate and distinct offenses. Pen.Code §§ 182, 184, 504.

30. Conspiracy 🔑28

Although charge of embezzlement and charge for conspiracy both related to the same alleged unlawful transaction, they were separate and distinct offenses. Pen. Code, §§ 182, 184.

31. Criminal law 🔑150

Where indictment charging defendants with conspiracy was filed September 25, 1947 and overt acts which were alleged in conspiracy count were assertedly committed as late as March 5, 1947, or less than six months prior to filing of indictment, conspiracy being a continuing offense, statute of limitations had not run. Pen.Code, §§ 182, 184, 504.

32. Criminal law 🔑150

Although a conspiracy was formed prior to statutory period of limitations, prosecution is not barred where an overt act in furtherance of conspiracy is committed within that period. Pen.Code, §§ 182, 184.

33. Criminal law 🔑872½

A verdict of twelve jurors, one of whom was originally an alternate juror, is the verdict of jury originally sworn to try the case.

34. Criminal law 🔑172

Where no claim was made that alternate juror selected to serve in place of juror who was excused was not in fact an impartial person to act as a juror and same proceedings were had in selection of alternate juror as in case of first twelve who took their places in the box, defendants were not placed in double jeopardy by substitution of alternate juror for one of regular jurors. Pen.Code, § 1089.

35. Criminal law 🔑1144(8), 1166½(6)

Trial court did not abuse its discretion in advising juror of court's receipt of information that juror's father had suffered a paralytic stroke and inquiring of her as to whether, under the circumstances, she desired to be excused and in absence of any attempt on part of defendants to inquire into source of court's information concerning illness of juror's father, appellate court would assume that court had good cause to believe that juror's father had suffered a severe heart attack and action taken was not prejudicial to defendants' rights. Pen.Code, § 1089.

36. Escrows 🔑8(1)

An escrow holder simply acts as a depositary and as agent of both parties until terms of escrow are completed and holder obtains no title to fund deposited.

37. Conspiracy 🔑48

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of state highway division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised by and approved by defendant agents, refusal to instruct jury on status of money placed in escrow by state was not error since legal status of money was not changed by such deposit and to instruct jury as to status of money in escrow would serve only to confuse them and complicate issues presented. Pen.Code, §§ 182, 184, 504.

38. Criminal law 🔑1172(1)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of state highway division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, instruction that director of Department of Public Works of state was an officer within meaning of statute prohibiting the misappropriation of public monies, that division of highway was division of Department of Public Works under direction of director of Department of Public Works, and that defendants as right-of-way agents for division of highways, were clerks and servants of state Department of Public Works, within meaning of statute prohibiting misappropriation of public funds was not prejudicial error. Pen.Code, § 504.

39. Conspiracy ⚷48

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of State Highway Division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, advising jury that on question of control of state money, procedure requiring signature of a right-of-way agent on a right-of-way contract, recommending its approval, is one step in procedure for causing state to pay out public money for purchase of realty for highway purposes and that therefore defendant agents had a measure of control of state money and a sufficient control to satisfy requirement of statute prohibiting the misappropriation of public monies, was not error. Pen.Code § 504.

40. Criminal law ⚷829(3)

In prosecution for conspiracy to embezzle public monies in view of instructions given failure of one instruction to tell jury that the defendants could not be convicted unless they appropriated money while still state money was not error. Pen. Code §§ 182, 184, 504.

41. Conspiracy ⚷48

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of State Highway Division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, defendants' requested instruction that if jury found that defendant agents had only power to recommend sale or disposition of state property and did not have power to dispose of it, such recommendations on their part were not embezzlement of any property so involved was properly refused, since defendant agents were engaged in purchase of property for state highway purposes. Pen.Code § 504.

42. Criminal law ⚷829(3)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of State Highway Division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, refusal to give defendants' instruction that broker, not being an agent or employee of state, or in such capacity ever having possession or control of any state money could not be guilty of offenses charged unless he conspired with or aided and abbetted defendants to embezzle state monies was proper since proposed instruction was repetitious and cumulative. Pen. Code § 504.

43. Criminal law ⚷814(3)

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of State Highway Division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, defendants' requested instruction to effect that a policy or practice of a department of state is not binding on a defendant unless it is a rule or regulation of state filed with Secretary of State was properly refused since evidence furnished no ground on which to predicate it and there was evidence that in operation of state highway division they promulgated their own rules of practice and regulations. Pen.Code § 504.

44. Conspiracy 🔑48

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of State Highway Division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, defendants' requested instruction under which defendant broker would not be subject to prosecution for conspiracy under any circumstances in connection with the receipt by him of so-called real estate commissions was properly refused as being too broad and expansive. Pen.Code § 504.

45. Criminal law 🔑823(1)

Instructions should not be considered singly, but in their entirety.

46. Criminal law 🔑31

In prosecution for conspiracy to embezzle public monies based on alleged agreement between two right-of-way agents of state highway division and realty broker to share in commissions received by broker from vendors in handling sale of their properties to state at prices appraised and approved by defendant agents, defendants' requested instruction that if jury found that chief right-of-way agent of state who allegedly had bought property in path of freeway, signed his own appraisal and resold property to state at a hiked price was not prosecuted but that defendant agents were singled out for prosecution, defendant agents were entitled to an acquittal, was properly refused. Pen.Code §§ 182, 184, 504.

47. Constitutional law 🔑250

It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not.

48. Criminal law 🔑5

The right to enact laws making certain actions criminal and to designate punishment for such crimes is vested exclusively in legislature.

49. Constitutional law 🔑56

The legislature being clothed with power to prescribe penalties for violations of criminal statutes, legislative branch of government has power to declare that in certain cases probation may not be granted and exercise of such power in no way impinges on jurisdiction of judicial branch of government and does not impair, restrict or enlarge on jurisdiction of courts. Const. art. 6, §§ 1, 5, 6; Pen.Code § 1203.

50. Constitutional law 🔑52

The function of courts is to determine the guilt or innocence of an accused and what disposition may thereafter be made by way of penalty is for legislature to determine.

51. Constitutional law 🔑56
Criminal law 🔑978

Statute restricting right of trial judge to grant probation to any defendant who shall have been convicted of robbery or to any public official who, in discharge of duties of his public office of employment embezzled public money does not in any way attempt to affect right of courts to issue writs or impair exercise of their trial or appellate jurisdiction. Const. art. 6, §§ 1, 5, 6, Pen.Code, § 1203.

52. Criminal law 🔑982

Where trial judge denied defendant state employees' probation after their convictions on charge of conspiracy to embezzle public monies because of their conviction of the substantive offense of embezzlement of public funds and not because of conspiracy conviction, whether statute prohibited granting of probation to governmental employees convicted of a conspiracy charge was immaterial. Pen.Code § 1203.

◆

Russell E. Parsons, Los Angeles, for appellants, Hess and Rose.

Morris Lavine, Los Angeles, for appellant, Wheeler.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Asst. Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In a second amended indictment returned by the Grand Jury of Los Angeles County containing 26 counts, defendants were accused in Count I with conspiracy to violate sections 424 and 504 of the Penal Code and section 16, chapter 788 of statute 1933. This count alleged 52 overt acts. The other 25 counts consisted of specific substantive charges of violation of sections 424 and 504 of the Penal Code and section 16, chapter 788 of Statute 1933.

To the aforesaid second amended indictment defendants interposed a demurrer and two motions to set aside the indictment. The demurrer was sustained as to Counts XVI and XXVI without leave to amend, and they were subsequently dismissed. The motion of the District Attorney to dismiss Count XIX was granted as was his motion to amend Count I by striking therefrom the words "and section 16 of chapter 788 of the statutes of 1933 of the State of California". Demurrers of the defendants to the second amended indictment were overruled except as to Counts XVI, XIX and XXVI. Motion of the defendants to vacate and set aside the second amended indictment was denied.

Each defendant pleaded not guilty and the cause proceeded to trial before a jury. During the trial defendants moved for a dismissal of all counts of the indictment under section 1385 of the Penal Code. This motion was granted as to Counts II, IV, XII, XX and XXIV of the second amended indictment. The motion as to Counts I and XX of the second amended indictment was denied. The People moved to dismiss Counts III, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVII, XVIII, XXI, XXIII and XXV, which motion was granted. On motion of the People the charge as to conspiracy to violate section 424 of the Penal Code was stricken from Count I. This left Counts I and XX as the only remaining charges against the respective defendants and, as to Count I the crime charged was limited to that of conspiracy to violate section 504 of the Penal Code.

Defendants were found guilty of the offense charged in Count I and were acquitted on Count XX.

The charges in the second amended indictment were the outgrowth of 11 transactions in which the defendants allegedly participated relative to the purchase by the state of properties for the right-of-way of the Hollywood Parkway or Freeway in the City of Los Angeles. Defendant Wheeler was a real estate broker in the City of Los Angeles and defendants Rose and Hess were California state right-of-way agents. The charging portion of Count I of the second amended indictment upon which defendants were convicted reads as follows:

"The Grand Jury of the County of Los Angeles hereby accuses John K. Hess, William E. Rose and Royall W. Wheeler of a felony, to wit, the crime of Conspiracy To Violate ~~SECTION 424, PENAL CODE OF CALIFORNIA~~ and, Section 504 Penal Code of California ~~AND SECTION 16 OF CHAPTER 788 OF THE STATUTES OF 1933 OF THE STATE OF CALIFORNIA~~, in that about the year 1943, and continuously thereafter, in the County of Los Angeles, State of California, the above named defendants, John K. Hess, William E. Rose, and Royall W. Wheeler, and other persons whose true names are to the Grand Jury unknown, did willfully, unlawfully and feloniously conspire, combine, confederate and agree together, ~~that officers of this State and other persons charged with the receipt, safekeeping, transfer and disbursement of public moneys, would, without authority of law, be caused to appropriate said public moneys and portions of said public moneys to the use of said State officers and to the use of said other persons charged with said receipt, safekeeping, transfer and disbursement of said public moneys~~; ~~and also, to the use of other persons than said State officers and persons so charged with the said receipt, safekeeping, transfer and disbursements of said public moneys, and~~ that the said defendants, John K. Hess, William E. Rose and Royall W. Wheeler, and their co-conspirators would cause officers of this State and deputies, clerks and servants of such State officers to fraudulently appropriate to uses and purposes not in the due and lawful execution of the trust of said State officers and said deputies, clerks and servants of said State officers, public moneys, ~~property~~ which said State officers and said deputies, clerks and servants of said State officers had in their possessions and under their control, by virtue of the trust of said State officers and said deputies, clerks and servants of said State officers; ~~and that said defendants, JOHN K. HESS, WILLIAM E. ROSE and ROYALL W. WHEELER, and their co-conspirators would cause officers and employees of the Department of Public Works of the State of California to corruptly perform official acts of said officers and employees to the injury of the State.~~"

After the rendition of the guilty verdicts defendants moved to set aside such verdicts on the ground that they had been once in jeopardy by reason of the claimed illegal discharge of a juror during jury deliberations without the consent and over the objections of the defendants and the substitution of another juror in her place. Defendants moved to set aside the verdicts and dismiss the indictment on the ground that Count I of the second amended indictment, as amended, was barred by the statute of limitations. Defendants moved for a new trial and in arrest of judgment, they moved for entry of judgment of acquittal on the grounds of the aforesaid claimed illegal discharge of a juror. All these motions were denied.

Judgments were pronounced against defendants Hess and Rose, but as to defendant Wheeler, proceedings were suspended and he was placed on probation upon certain terms and conditions. As to him, therefore, the attempted appeal from the judgment must be dismissed and his appeal considered only as to the order denying him a new trial. Defendants Rose and Hess appeal from the judgments of conviction, as well as from the order denying their motion for a new trial.

Although the record contains some 22 transactions in which the appellants are charged with overt acts of alleged embezzlement of public funds, only the overt acts from 1 to 4, inclusive; 33 to 38, inclusive; 21 to 26, inclusive; 5 to 8, inclusive; and 39 to 46, inclusive were argued to the jury, so we deem it unnecessary to here set forth the overt acts other than those above mentioned. They are as follows:

"Overt Act No. 1

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 1st day of September, 1943, at and in the County of Los Angeles, State of California, talked to Leslie W. Hope and Sarah E. Hope concerning the sale of certain real property located at 427–431 and ¾ Virgil Street in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 2

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 25th day of October, 1943, at and in the County of Los Angeles, State of California, received One Thousand Dollars ($1,000.00), lawful money of the United States, in connection with the transaction mentioned in Overt Act No. 1.

"Overt Act No. 3

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 27th day of October, 1943, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of Four Hundred Dollars ($400.00) lawful money of the United States, made payable to 'W. E. Rose or John Hess', in connection with the transaction mentioned in Overt Act No. 2.

"Overt Act No. 4

"That pursuant to said combination, confederacy, agreement and conspiracy and to carry out the objects and the purposes of the same, the defendant, John K. Hess, on or about the 28th day of October, 1943, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 3.

"Overt Act No. 33

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 1st day of February, 1944, at and in the County of Los Angeles, State of California, talked to John P. Auer and Saima Auer concerning the sale of certain real property located at 4420–4424 Melrose Avenue and 654–660½ North Alexandria, in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 34

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant Royall W. Wheeler, on or about the 27th day of March, 1944, at and in the County of Los Angeles, State of California, received the amount of Three Thousand Five Hundred Dollars ($3,500.00), lawful money of the United States, in connection with the transaction mentioned in Overt Act. No. 33.

"Overt Act No. 35

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 27th day of March, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of Seven Hundred Dollars ($700.00), lawful money of the United States, made payable to 'W. E. Rose' in connection with the transaction mentioned in Overt Act No. 34.

"Overt Act No. 36

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 27th day of March, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of Seven Hundred Dollars ($700.00), lawful money of the United States, made payable to 'John Hess' in connection with the transaction mentioned in Overt Act No. 34.

"Overt Act No. 37

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, William E. Rose, on or about the 28th day of March, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 35.

"Overt Act No. 38

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, John K. Hess, on or about the 28th day of March, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 36."

"Overt Act No. 21

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, a representative of the defendant, Royall W. Wheeler, on or about the 1st day of August, 1944, at and in the County of Los Angeles, State of California, talked to Virginia W. Pannill concerning the sale of certain real property located at 823–825 North Ardmore Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 22

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 17th day of October, 1944, at and in the County of Los Angeles, State of California, received the amount of Five Hundred Twenty-five Dollars ($525.00), lawful money of the United States, in connection with the transaction mentioned in Overt Act No. 21.

"Overt Act No. 23

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 17th day of October, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of One Hundred Five Dollars ($105.00), lawful money of the United States, made payable to 'John Hess' in connection with the transaction mentioned in Overt Act No. 22.

"Overt Act No. 24

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, John K. Hess, on or about the 18th day of October, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 23.

"Overt Act No. 25

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, a representative of the defendant, Royall W. Wheeler, on or about the 1st day of October, 1944, at and in the County of Los Angeles, State of California, talked to Mamie K. Graham concerning the sale of certain real property located at 1257 North Western Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 26

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 20th day of December, 1944, at and in the County of Los Angeles, State of California, received the amount of One Thousand Three Hundred Fifty Dollars ($1,350.00), lawful money of the United States, in connection with the transaction mentioned in Overt Act No. 25."

"Overt Act No. 5

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 19th day of November 1943, at and in the County of Los Angeles, State of California, talked to trustees and legal representatives of the Estate of Charles Crary concerning the sale of certain real property located at 535–545 North Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 6

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 28th day of January, 1944, received One Thousand Fifty Dollars ($1,050.00), lawful money of the United States, in connection with the transaction mentioned in Overt Act No. 5.

"Overt Act No. 7

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 29th day of January, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of Four Hundred Twenty Dollars ($420.00), lawful money of the United States, made payable to 'John Hess or W. E. Rose' in connection with the transaction mentioned in Overt Act No. 6.

"Overt Act No. 8

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, William E. Rose, on or about the 29th day of January, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 7."

"Overt Act No. 39

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, a representative of the defendant, Royall W. Wheeler, on or about the 1st day of July, 1944, at and in the County of Los Angeles, State of California, talked to Elizabeth Russell Hiam concerning the sale of certain real property located at 827–829 North Ardmore Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

"Overt Act No. 40

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 12th day of July, 1944, at and in the County of Los Angeles, State of California, purchased a cashier's check in the amount of Two Thousand Dollars ($2,000.00), lawful money of the United States, and gave said cashier's check in the amount of Two Thousand Dollars ($2,000.00), lawful money of the United States, to Mrs. Elizabeth Russell Hiam in connection with the purchase of the property referred to in Overt Act No. 39.

"Overt Act No. 41

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 12th day of July, 1944, at and in the County of Los Angeles, State of California, purchased the property referred to in Overt Act No. 39 in the names of Christopher C. and Margaret Spohr, relatives of the defendant, Royall W. Wheeler.

"Overt Act No. 42

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 8th day of September, 1944, at and in the County of Los Angeles, State of California, received the amount of Four Hundred Twelve Dollars and Fifty Cents ($412.50), lawful money of the United States, in connection with the transaction mentioned in Overt Act No. 39.

"Overt Act No. 43

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 11th day of September, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of One Hundred Fifty Dollars ($150.00), lawful money of the United States, made payable to 'W. E. Rose' in connection with the transaction mentioned in Overt Act No. 42

"Overt Act No. 44

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, Royall W. Wheeler, on or about the 11th day of September, 1944, at and in the County of Los Angeles, State of California, obtained a cashier's check in the amount of One Hundred Fifty Dollars ($150.00), lawful money of the United States, made payable to 'John K. Hess' in connection with the transaction mentioned in Overt Act No. 42.

"Overt Act No. 45

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, William E. Rose, on or about the 12th day of September, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 43.

"Overt Act No. 46

"That pursuant to said combination, confederacy, agreement and conspiracy, and to carry out the objects and the purposes of the same, the defendant, John K. Hess, on or about the 12th day of September, 1944, at and in the County of Los Angeles, State of California, endorsed the cashier's check mentioned in Overt Act No. 44."

During the trial the People introduced evidence as to the procedure employed to acquire rights-of-way by the Department of Public Works, Division of Highways, State of California, and particularly the right-of-way of the aforesaid Hollywood Parkway or Freeway. First, the alignment is determined and a right-of-way map prepared showing the parcels of land to be acquired. Right-of-way agents prepare the allotment appraisal, sometimes reviewed by the district right-of-way agent and the supervising agent. Upon preparing the appraisal, the negotiating right-of-way agent to whom the matter is assigned recommends the approval of his appraisal. The appraisal report is approved by District Right-of-way Agent E. N. Whittmore, District Engineer S. V. Cortelyou, and Supervising Right-of-Way Agent E. F. Wagner. It is further approved in Sacramento by the head right-of-way agent, Frank C. Balfour, or his assistant, Raymond S. Pianezzi, and returned to the district office with authorization to negotiate for acquisition of the property. A "title dope sheet" is prepared indicating to the agent the conditions of the title acceptable to the department and the conditions that must be cleared or eliminated from the title. One of the department engineers prepares a grant deed, after receipt of a title report from the department title examiner, and the negotiating right-of-way agent is given a copy of the "title dope sheet", the deed, and the right-of-way contract. He then contacts the property owner and obtains the executed right-of-way contract and the deed. The aforesaid Mr. Wagner and Mr. Balfour testified that all right-of-way agents were instructed to deal directly with the property owners, not to negotiate through real estate brokers or attorneys unless the owners so insisted, and to acquire the property on the best possible terms.

The right-of-way agent indicates recommendation for approval of the contract in a place provided in the lefthand margin of the contract and prepares a memorandum to the district right-of-way agent explaining the reason why the State should enter into the contract and why the district right-of-way agent should approve. Upon the approval of the district right-of-way agent, further approval is obtained from the district engineer and from the Sacramento office, and the contract is finally executed by the district engineer as agent for the State. A duplicate thereof is mailed to the property owner. A bill or demand is mailed to the property owner or delivered to him by the contacting agent. The property owner signs the demand for the payment of the consideration by the state and the bill or demand, the original deed or a certified copy, and the title report are sent to the Sacramento office with a claim schedule supported by the foregoing documents, which are processed through the headquarters at the right-of-way office at Sacramento, and eventually to the controller who issues a state warrant out of highway funds. The warrant is returned to the district with a remittance advice slip. The district title examiner indicates on the remittance advice slip that it is satisfactory to release the check. It then goes to the right-of-way agent who originally negotiated the transaction, and in most cases the agent who made the appraisal has the final say in releasing the check to the owner upon said agent's "O.K."—by his initials together with the date of the release. Supervising right-of-way Agent Wagner further testified that oral instructions were given to all right-of-way agents not to release the warrant until the right-of-way agent who handled the original transaction gives his "O.K." by placing his initials on the remittance advice slip.

In the particular transactions here involved the record reveals the following:

Hope Transaction

(Overt Acts 1 to 4, aforesaid)

Defendants Hess and Rose were the negotiating right-of-way agents. They were given a right-of-way map containing a delineation of the Hope property prepared in January, 1942. A title report was prepared June 1, 1943; a grant deed June 4, 1943, and both given to defendants Hess and Rose a day or two thereafter. On June 10, 1943 defendants Hess and Rose prepared the allotment appraisal.

Pursuant to a letter from defendant Wheeler, a neighborhood real estate broker doing business as the Home Realty Company, received a few days prior thereto, Mr. Hope gave defendant Wheeler written authorization dated June 19, 1943 to make a survey and appraisal for the purpose of negotiating with the State, defendant Wheeler to receive a 5% commission upon the procural of an approved purchase report. Mr. Hope wanted $20,000 net for the property. Mr. Hope testified that he did not meet defendants Rose and Hess for a month or more after the written authorization to defendant Wheeler. In response to the question, "Mr. Hope, had Mr. Rose and Mr. Hess contacted you prior to the time you signed this selling authorization of June 19, 1943, would you have sold that North Virgil Street property to the State of California for $20,000?", he testified: "Well, I would classify them as any other broker or any other person. If I had been approached and had been offered the amount that I was hoping to get, I might have made the sale to someone else regardless of who it was, I mean before I had contracted with Mr. Wheeler. There was other brokers that I had discussed the problem or the sale with prior, I am quite sure, so I might or I probably would have made a sale to anyone that gave me—offered me my price."

September 16, 1943, the grant deed and the right-of-way contract were executed and on September 17, 1943, defendant Rose prepared a memorandum recommending purchase by the State for $21,000. October 21, 1943, defendant Rose wrote on the remittance advice slip, "Okay to release check 10–21–43, W. E. R.". Mr. Hope received the State warrant for $21,000 October 22, 1943 and deposited it in his bank account and gave defendant Wheeler a personal check for $1,000. October 25, 1943, defendant Wheeler deposited the check in the Home Realty Company bank account. October 27, 1943, defendant Wheeler purchased a cashier's check for $400 payable to W. E. Rose or John Hess. Defendant Hess endorsed the cashier's check. Two hundred dollars was deposited in the savings account of J. J. and J. F. Hess, father and brother of John K. Hess.

Crary Transaction
(Overt Acts 5 to 8, aforesaid)

The right-of-way map containing a delineation of the Crary property was prepared in January, 1942. The allotment appraisal was prepared November 15, 1943. On November 19, 1943, the Crary brothers gave defendant Wheeler written authority to sell the property. Allan H. Crary testified that he did not learn the State was to be the purchaser until approximately fifteen days thereafter. Alan H. Crary first met Mr. Hess some time subsequent to November 29th; he had never met Mr. Rose. His brother was ill and unable to attend court as a witness but it was stipulated that he would testify that at the date the selling authorization was signed he did not know that the State was going to purchase the property.

The right-of-way contract between the State and the Crarys was approved on the recommendation of defendant Hess December 6, 1943, and more than four months thereafter the allotment appraisal was approved on April 7, 1944. State Right-of-way Agent Wagner testified that "the instructions were that the negotiating agents were not to enter into any negotiations with the property owners until after the allotment appraisal had been approved in Sacramento and the district was advised, unless the agent was able to show that it was very advantageous for the State to acquire a particular piece of property, then under instructions from Sacramento they could negotiate it prior to completing their appraisal." December 13, 1943, defendant Hess prepared a memorandum recommending the acquisition of the Crary property and falsely stated that the grantors had a sale pending to another private party. January 26, 1944, Hess okayed the release of the State warrant in the sum of $21,000 to the Crarys. January 28, 1944, the Crarys drew a check in the sum of $1,050 payable to the Home Realty Company as commission in negotiating the sale to the State. January 29, 1944, Wheeler obtained a cashier's check in the sum of $420 payable to John Hess or W. E. Rose. Defendant Rose endorsed the check and it was cashed February 1, 1944, and debited to the account of the Home Realty Company.

The People asked Allan H. Crary if Mr. Rose or Mr. Hess had contacted him with reference to the sale prior to the written authorization to defendant Wheeler, would he have sold directly to the State, to which he replied: "We would have done so because it was our duty to get the most money we could for the trust."

Auer Transaction

(Overt Acts 33 to 38, aforesaid)

The right-of-way map containing a delineation of the Auer property was prepared in November, 1943, and it was the policy of the department to give the right-of-way map to the negotiating agents, in this case defendants Hess and Rose, shortly after its preparation.

January 15, 1944, a title report was prepared and January 14, 1944 a title "dope sheet" was prepared. It was the policy of the department to give copies thereof to the negotiating agents a day or two after the preparation of the title "dope sheet".

A rough draft of the grant deed was prepared January 25, 1944. It was the policy of the department to have the rough draft of the deed typed up in a day or two and given to the negotiating agents.

February 4, 1944, defendants Hess and Rose prepared an allotment appraisal for $76,400.

February 9, 1944, Mr. Wheeler visited Mrs. Auer, who had not met Mr. Wheeler prior to that time, and asked her if the Auers would sell the property for $75,000 cash. She first told him the property was not for sale and then said she would talk it over with her husband. February 10, 1944, Mr. Wheeler and Mr. Hess called on the Auers. Mr. Hess did not identify himself as being connected with the State. Mr. Wheeler gave the Auers a check for $2,000 and they signed a selling authorization agreement providing for a selling price of $75,000 and a five per cent commission. February 11, 1944, in accordance with the instructions of defendant Wheeler or defendant Hess, the Auers went to the bank to open the escrow. There they met all three defendants, and for the first time the Auers learned that the State was to be the purchaser. They signed the escrow instructions, as did defendant Hess.

February 10, 1944, defendant Hess had written to the Western Service Corporation with reference to the Auer transaction. Defendants Hess and Rose called on the Auers after the opening of the escrow and told them that Western Service Corporation wanted $2,000 as a bonus to accept payment of the mortgage on their property; the Auers told them they did not want to pay the bonus and to cancel the whole deal. Defendants Hess and Rose came the next day and said it was now $1,000. The Auers hesitated and after Auer talked with his wife he said they would split the amount and Hess said he would arrange some other way to pay the other half. The Auers signed additional escrow instructions agreeing to pay the $500 bonus.

The escrow officer testified that on February 11, 1944, defendants Wheeler and Hess conferred with him at the bank with reference to the contents of the escrow instructions.

The right-of-way contract was dated February 14, 1944, and was recommended for approval by defendant Hess. February 15, 1944, in a memorandum to the district engineer, defendant Hess stated that the Auers had a sale pending to a private purchaser for $75,000; that "The State's needs were explained and grantors agreed to sell the real property and improvements to the State for $70,000.00, provided the transaction could be completed at once and also a buyer could be found to take the furniture at $5,000.00. We were successful in securing a purchaser for this personal property at the stipulated price, who will take over the entire property on a master lease for a term of three years, the State having the right to terminate the lease on ninety days' notice at any time beginning in the third year of the lease. Inasmuch as this property is now offered for sale by its owners at a fair open market value and will be sold to a private individual if the State does not acquire now, it would seem advisable to complete the transaction at this time and avoid possible speculation in the area * * *".

On March 10, 1944, defendant Hess okayed the release of the State warrant in the amount of $70,000 on the remittance advice slip. On March 21, 1944, after a conversation with the escrow officer, defendant Wheeler signed additional escrow instructions. Defendant Wheeler agreed to the deduction of $250 from sums the Home Realty Company was to receive out of the escrow, the said $250 to be applied or credited to the Auers, to apply on a bonus to be paid to the Western Service Corporation.

On March 24, 1944, the Auer escrow was closed and on the same date, defendants Hess and Rose wrote to the district engineer relative to the allotment appraisal. The allotment appraisal was not approved by the superior officers of defendants Hess and Rose until April 7, 1944, almost two months after the right-of-way contract was entered into, which constituted a violation of the instructions given to right-of-way agents.

On March 27, 1944, a check dated March 25, 1944, in the sum of $5,500 was deposited to the account of Home Realty Company. On the same day defendant Wheeler made application for cashier's checks in the sum of $700 each to Hess and Rose, which cashier's checks were cashed by Hess and Rose.

Pannill Transaction

(Overt Acts 21 to 26, aforesaid)

The right-of-way map containing a delineation of the Pannill property was prepared in November, 1943. The allotment appraisal was dated July 31, 1944 and approved by defendants Hess and Rose.

Mrs. Pannill testified that Mr. Myers, a real estate agent in defendant Wheeler's office, had called on her and that several days later he returned, at which time she signed the right-of-way contract dated August 11, 1944, which he presented to her. Several days thereafter, defendant Hess visited her and stated he was from the state highway department and that he came to see about her property. She told him Mr. Myers had been there and defendant Hess asked whether she wanted to do business with Myers. She replied there was no alternative since she had signed the right-of-way contract with Myers. She did not know there was anyone else taking care of the business. The demand on the State signed by Mrs. Pannill was for $10,500, $7,975.70 payable to her and $2,524.30 to the California bank. Defendant Rose okayed the release of the warrant on the remittance advice slip.

On October 16, 1944, Mr. Myers delivered the warrant to Mrs. Pannill and she gave him a check for $525 payable to the Home Realty Company as commission. The check for $525 was deposited to the account of the Home Realty Company on October 17, 1944 and on the same day defendant Wheeler purchased a cashier's check in the sum of $105 payable to defendant Hess, which Hess cashed.

Hiam-Spohr Transaction

(Overt Acts 39 to 46, aforesaid)

The right-of-way map containing a delineation of the Hiam property was prepared in November, 1943. On January 18, 1944, the title report was prepared. February 10th or 11th, 1944, a grant deed was prepared in the name of Elizabeth Russell Hiam. July 11, 1944, defendants Hess and Rose appraised the Hiam property and listed it as owned by Christopher C. Spohr for $9,150.

Two or three weeks prior to July 12, 1944, Mrs. Hiam had phoned the Home Realty Company and said, "I wanted my property to be sold, that I wanted to put my property on the market to sell." She wanted $8,500. A salesman came to her home and told her a party was interested for $8,000. The next day Mrs. Hiam found an apartment and she called Mr. Wheeler and told him she would split the difference and accept $8,250. July 11, 1944, defendant Wheeler gave her a cashier's check for $2,000, purchased by the Home Realty Company. The Hiam-Spohr escrow instructions were signed July 12, 1944, at which time the escrow was opened. Sometime prior to the opening of the escrow, defendants Wheeler and Hess informed the escrow officer that the escrow was coming in. Mr. Wheeler told Mrs. Hiam it was to be a sixty-day escrow to await money expected from the east. Mr. Wheeler gave the escrow officer the information contained in the escrow instructions and took them out to be signed. The escrow instructions signed by the Spohrs were either returned by Mr. Wheeler in person or mailed to the escrow officer by Mr. Spohr. The escrow officer did not meet the Spohrs, nor did Mrs. Hiam. Defendant Wheeler informed the escrow officer that $2,000 had been paid outside escrow for the purchase of the property, and that the additional $6,250.00 was to be paid through the escrow. Also dated July 12, 1944, is People's Exhibit 154, which is an acceptance agreement on the stationery of the Home Realty Company signed "Home Realty Company, by R. W. Wheeler" and accepted by C. C. Spohr, Buyer, and accepted by Elizabeth Russell Hiam.

Christopher Spohr is defendant Wheeler's father-in-law. He testified that he did not know defendants Rose and Hess, that he did not know Mrs. Hiam, and that he had never met her. He further testified that he did not go to the bank to sign the escrow instructions but that they were brought to his home by defendant Wheeler or his wife. Defendant Wheeler also brought the state right-of-way contract to his home. Mr. Spohr did not recall receipt of the escrow checks, but he and his wife endorsed them and turned them over to defendant Wheeler. Mr. Spohr went by the Hiam property but he did not go inside. He thought he might possibly live there. Defendant Wheeler told him that if he bought the property through a broker it would be worth more money.

With reference to the Spohr-State escrow, the escrow officer at the bank testified that defendants Wheeler and Hess conferred with him concerning the escrow instructions. He could not recall "whether it was before this second deal was opened or whether it was before the first deal was opened, but it was some time at least before the second escrow was opened."

On July 14, 1944, defendant Wheeler wrote the escrow officer a letter marked "Personal. Not for your file." stating he had made arrangements with Hess relative to the escrow charges. The escrow officer recived the State documents for the escrow files from defendant Hess.

The escrow instructions in the Spohr-State escrow are dated July 15, 1944. One of the provisions appearing therein is as follows: "You will transfer sufficient funds to your Escrow No. 113–14044–B (the Hiam-Spohr escrow) to meet my money requirements therein.", which provision was contained therein on the instructions of defendant Wheeler to the escrow officer. The right-of-way contract between the Spohrs and the State is also dated July 15, 1944, and was recommended for approval by defendant Hess.

On July 24, 1944, Mr. Pianezzi returned the right-of-way contract to Mr. Cortelyou unapproved as it was submitted prior to the submission and approval of the appraisal report and in his letter of transmittal he called attention to Mr. Balfour's previous letter requesting that papers be held until the appraisal report had been completed and approved. Mr. Whittemore testified that he read the letter and referred it to Mr. Hess with the instructions to prepare an answer for Mr. Whittemore's signature. Said answer was dated July 27, 1944, and called attention "to the circumstances in this case, which are somewhat unusual." The letter continues:

"In the normal verbal discussion in acquisition matters, held in this instance quite some time prior to the receipt of Mr. Balfour's letter of July 6th, agreement was made to acquire this parcel and papers were drawn, although it is true that contracts were dated July 15th and received in our office subsequent to receipt of Mr. Balfour's letter.

"The situation is that Mr. and Mrs. Spohr, grantors, had purchased this parcel from the former owner, Elizabeth Russell Hiam, under an unrecorded agreement to convey, but had not at the time we approached them received the deed to the property. As soon as they found the State desired the property for highway purposes, they agreed to deed to the State and promptly went to considerable trouble to relocate themselves.

"They succeeded in finding a satisfactory property and requested us to enter escrow opened with the Security-First National Bank of Los Angeles, which we did. Deed from Elizabeth Russell Hiam to the Spohrs, dated July 13, 1944, was also filed in this escrow and property certified copy furnished our office. Parties from whom the Spohrs are purchasing other property have also entered escrow.

"In justice to the Spohrs, we believe subject contract should be approved immediately, as they have gone out of their way to cooperate with the State and have completed their part of the escrow. As the Spohrs must use the proceeds from Parcel 327 to pay for the new property, if approval of the contract cannot be had now so that payment from the State may be deposited in escrow soon, Spohrs' new grantors may withdraw from escrow and accept another offer where payment will be immediate. This would, to say the least, create a very bad situation in a right-of-way area just opening and would have a tendency to make other transactions in this locality very difficult.

"The appraisal work on this area is very nearly completed, as was pointed out in memorandum of July 17 to S. V. Cortelyou from John K. Hess, submitting this transaction. As soon as photographic prints can be obtained and certain other details completed, the appraisal covering the entire area will be forwarded Central Office for approval.

"Considering the exceptional circumstances cited, we again forward the papers to you for review and respectfully request that you reconsider the matter of immediate approval of this contract."

The Spohr-State escrow file showed deposit of the State warrant in the sum of $8,750 on August 15, 1944. The allotment appraisal was approved at Sacramento August 25, 1944, and on the same day, defendant Hess okayed the release of the State warrant for $8,750.00.

On September 2, 1944, in accordance with the previous instructions of defendant Wheeler, $6,218.86 was transferred from the Spohr-State escrow to the Hiam-Spohr escrow. On the same day an escrow check was made payable to the Spohrs in the sum of $2,515.89 and another escrow check was made payable to the Home Realty Company in the sum of $412.50, the latter of which was deposited to the account of the Home Realty Company on September 8, 1944. The check for $2,515.89 was endorsed by the Spohrs and given to defendant Wheeler, and subsequently cashed. On September 8, 1944, a total of $3,234.39 was deposited to the account of the Home Realty Company. September 11, 1944, defendant Wheeler purchased a cashier's check payable to defendant Rose in the sum of $150 and a cashier's check payable to defendant Hess in the sum of $150. The check to defendant Rose was cashed September 13, 1944, and $75 of the check to defendant Hess was received in cash and $75 deposited to the account of the father and brother of Hess.

As a first ground of appeal, it is contended that the selection of the jury panel was not in conformity with the law governing the method of securing jury panels, and that the selection of the panel in the instant case was in violation of due process of law guaranteed by the 14th amendment to the Constitution of the United States.

Section 198 of the Code of Civil Procedure sets forth who is competent to act as a juror, while section 199 of the same code designates those persons who are not competent to act as jurors. Section 200 of the Code of Civil Procedure designates those who are exempt from jury service. Section 201 of the same code sets forth the considerations governing the excuse of jurors otherwise eligible for service. While this section provides that a juror shall not be excused for "slight or trivial causes, or for hardship, or for inconvenience to said juror's business", it does nevertheless invest a wide discretion in the court and jury commissioner, in excusing, for good cause those summoned for jury duty, the latter acting as an attaché of the judicial system of the State to enable the court to transact its judicial work in an orderly and expeditious manner.

Section 204a of the Code of Civil Procedure specifically authorizes the superior court in certain counties, "whenever in their opinion the business of the court requires it", to "in their discretion, appoint a jury commissioner * * * to assist the judges thereof in making selections of trial jurors * * *".

Section 204b of the Code of Civil Procedure provides that the jury commissioner shall annually "furnish the judges of the court a list of persons qualified to serve as trial jurors or grand jurors during the ensuing year". That, "A majority of the judges of the court may, from time to time, adopt such rules and instructions as may be necessary for the guidance of the jury commissioner, who shall at all times be under the supervision and control of the judges of the court".

The record herein shows that the jury commissioner selected the jurors on the panel here under consideration, under the guidance and direction, and pursuant to a method provided by the judges of the superior court. The names of jurors for the year here in question were taken from the last published registered voters list of Los Angeles County. The entire registration was taken. Each precinct list averaged between 300 and 350 names. Each 5th precinct was selected, i. e., if the commissioner started with precinct two he would take precincts 7, 12, 17 and so on. From the precinct lists each ninth name would be selected. Depending upon the year, the name selected would begin with the first, second, or subsequent name on the list. These names are then listed and they approximate a list of some 35,000 names. In selecting the names from the precinct lists there is no discrimination made between men and women, single or married, poor or well-to-do, or occupation. A letter is then sent to each of those on this list to report for examination. Six hundred letters a day are sent out. Of this list some 3,500 were selected for jury duty. The others were eliminated by interview after personal appearances before any one of three judicial secretaries although the entire staff of some six judicial secretaries would work on the selection. A prospective juror was not excused after reporting for examination by the jury commissioner on the ground of race, creed, color, sex, occupation, religion or wealth. Each prospective juror in preparation for interview by the jury commissioner fills out a data sheet provided by the jury commissioner's office. The code provisions are used for the purpose of determining those who are eligible and ineligible for jury duty. No other rules or regulations are specified. Prospective jurors are excused from jury duty by the jury commissioner or his assistants among other things for hardship, children without supervision, lack of understanding, lack of schooling, inability to write, disastrous financial hardship. Some are excused before making out the "Data of Prospective Jurors" on legal grounds. None of those who have the legal qualifications as jurors are excused except by affidavit, which excuse they must request and then they are only excused for cause. Every prospective trial juror for the panel must fill out the "Data of Prospective Jurors" form before he will be placed on the panel list submitted to the judge. Before the list of 3,500 names was adopted it was presented to the judges for their signatures and it requires a majority of the judges' signatures before it is adopted as the jury list. The judges are furnished only the names and addresses unless they request further information on individuals on the list. The criminal and civil trial jury lists are obtained from the latter list by drawing names from a jury wheel by the sheriff. All of the names are placed on a sheet and when a venire is needed for a particular case names are drawn by chance from the wheel. The majority of the panel in the instant case were women. The reason for this is primarily an economic one because of low jury fees which would work an undue hardship on families if a man supporting a family is taken from his occupation. An affidavit to that effect is accepted as an excuse. No effort is made to get any particular group of men who are reportedly financially able to serve. The information obtained from interview of prospective jurors is confidential. The jury panel for criminal trials in the superior court comes in at different times, January, February and March. The names are drawn out of the jury wheel in the master calendar department in open court by the clerk of that court; a list of them is then made which is sent to the sheriff who summons them. Usually about 120 are summoned at a time. These persons then appear before the judge of the master calendar where they present any reasons they may have for being excused from jury duty. The balance of the names of those not excused are then turned over to the jury clerk. Along in January 1948 (the year with which we are here concerned) the percentage excused of those summoned before the judge of the master calendar was about 50%. In March it ran a little over that. Of the three groups of 120 drawn at the time the instant case was reached there were 199 on the list. Of the panel compiled in January, February and March there were 142 women and 57 men. Defendants' Exhibit "D" contains the document of the jury commissioner's office pertaining to the selection of Mrs. Gehl juror No. 1 in instant case. The jurors for the case at bar were drawn in Department 37 by the clerk of that court. On March 24th thirty jurors were sent to the trial department along with their names in an envelope; the names were dropped in the jury box and drawn by chance from that box. When these jurors' names were exhausted twenty-nine more were sent over and handled in the same manner; upon exhausting these names thirty more were sent over.

[1] Appellants contend that it is incredible and unreasonable that after examination of a list of some 35,000 names summoned by the jury commissioner only 3,500 names were placed on the jury panel for submission to the judges of the court. In a county the size of Los Angeles County it does not appear to us unusual or unreasonable that a large number of prospective jurors might be excused under the provisions of Code of Civil Procedure sections 198, 199, 200 and 201, as well as in the discretion of the jury commissioner, pursuant to the terms of section 204c of the same code. Furthermore, the actions of a jury commissioner in selecting and making up a jury list are presumed to be valid, and in the absence of some showing of abuse of discretion by him his actions will not be disturbed. No such showing is made herein.

[2-4] In the selection of names to compose the jury list the jury commissioner is invested with full power to decide as to who are qualified to serve and who are entitled to be excused. Unless such selection is fraudulently made, or made in such a manner as to deprive an accused of a fair and impartial trial, the jury commissioner's actions will not be invalidated. As a general rule, errors and irregularities in failing to comply strictly with the statutes in making up a jury list, when there is no resultant prejudice to the parties involved in litigation, does not invalidate the list. People v. Parman, 14 Cal.2d 17, 19, 92 P.2d 387; People v. Tennant, 32 Cal.App.2d 1, 8, 88 P.2d 937; People v. Crossan, 87 Cal.App. 5, 10, 261 P. 531. A defendant cannot complain if he is tried by an impartial jury and can demand nothing more.

[5] Appellants' contention that the selection of the jury panel entirely from the register of voters was improper because thereby non-voters were excluded and such selection did not provide a cross-section of the community, and was prejudicial to them is clearly untenable. If recourse were had to the membership of clubs, lodges, fraternities, etc., as urged by appellants, it appears reasonably certain that a vast majority of such selections would be men and women who are registered voters. The register of voters therefore, presents a reasonable medium for carrying out the provisions of Code of Civil Procedure section 204. A selection of names from the telephone directory, city directory and the register of voters has been held legal and proper. U. S. v. Local No. 36, D.C.Cal., 70 F.Supp. 782, 798; State v. Perkins, 211 La. 993, 31 So.2d 188, 192; Vol. 15, No. 3, p. 55, Los Angeles Bar Association Bulletin.

[6] Appellants complain that in the instant case, when the jury was selected it was composed of eleven women and but one

man. This may have resulted from factors other than the elimination of prospective jurors by the jury commissioner. It may have been the result of the drawing of names by the clerk from the jury box, excuses or elimination of veniremen by the court in its discretion, challenges for cause on the part of both the prosecution and defense, or the exercise of peremptory challenges by them. No prejudice to appellants may be inferred because the jury consisted of eleven women and one man. People v. Coleman, 20 Cal.2d 399, 401, 126 P.2d 349; Wong Yim v. U. S., 9 Cir., 118 F.2d 667.

[7] There is nothing in the state or federal constitutions, or in any statute, which guarantees to an accused a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. People v. Parman, supra, 14 Cal.2d at page 20, 92 P.2d at page 387. There is no showing whatever in the case at bar that in selecting the jury list the jury commissioner excluded any eligible class or group in the community in disregard of the prescribed standards of jury selections. There was no departure from the statutory scheme. The jury panel here in question was drawn from qualified voters, both men and women of all races, creeds, types of employment and conditions of wealth.

[8, 9] Appellants next assert that the court erred in not sustaining the demurrer to the second amended indictment contending that it attempted to charge a series of "multiple little conspiracies and to join them together in one major conspiracy". This claim upon the part of appellants cannot be sustained. The fact is that the allegations of the indictment allege the object of the conspiracy to be the commission of several separate and distinct crimes and that does not change or alter the fact that the crime of conspiracy is the only offense charged in the indictment. Proof of conspiracy to commit any one of the offenses would be sufficient. The case of Kotteakos v. U. S., 328 U.S. 750, 66 S.Ct. 1239, 96 L.Ed. 1557, does not aid appellants. It is easily distinguishable from the case at bar in that in the cited case each of the offenses charged against the defendants were separate and independent of each other, and there was no joint concert of action. It was not, as in the instant case, a single enterprise with an interest common to all defendants. In the Kotteakos case the proof admittedly made out a case, not of a single conspiracy, but of several. Nothing is indicated in sections 182 or 184 of the Penal Code to the effect that a charge of criminal conspiracy must be limited to an agreement to commit but one crime. People v. Gilbert, 26 Cal. App.2d 1, 6, 7, 78 P.2d 770; People v. Yant, 26 Cal.App.2d 725, 729, 730, 80 P.2d 506. The offense of conspiracy is sufficiently stated in the second amended indictment under the laws of this state.

Appellants complain that the second amended indictment does not conform to the provisions of subdivision 2, section 950 of the Penal Code in that it does not contain a statement of the acts constituting the offense in ordinary and concise language, or in such manner as to enable a person of common understanding to know what is intended. It is argued that the pleading does not specify who the officers are who were "caused to misappropriate money and that their official capacity is not disclosed to show they had such public moneys in their custody or under their control in their official positions".

[10] An examination of the indictment in the light of sections 950 and 504 of the Penal Code discloses that the allegations were sufficient to inform the accused of the charges they would be required to meet at the trial. The second amended indictment was framed substantially in the words of section 504 of the Penal Code. Appellants were thereby informed of the offenses with which they were charged. The particular circumstances thereof were furnished them by the transcript of the testimony upon which the indictment was founded, and which transcript was furnished them pursuant to section 925 of the Penal Code. Under our simplified forms of criminal pleading, the second amended indictment was not wanting in any of the essentials of a valid accusation. People v. Yant, supra, 26 Cal. App.2d at page 730, 80 P.2d at page 506; People v. Gordon, 71 Cal.App.2d 606, 610, 163 P.2d 110.

Appellants earnestly urge that the verdicts finding them guilty are contrary to the law and the evidence in that there is no evidence of conspiracy to embezzle public moneys. It is argued that embezzlement requires that property must be appropriated by a person to whom it has been intrusted.

[11–13] To constitute embezzlement it is not necessary to show actual possession of the money or the property. It is sufficient to show that while an accused was not in actual possession of the money it was under his control in the sense that it was under his direction and management. People v. Knott, 15 Cal.2d 628, 631, 104 P.2d 33, 128 A.L.R. 1367. In the case just cited, a county auditor fraudulently issued certain warrants payable by the county treasurer in satisfaction of alleged interest coupons on highway bonds. Although the auditor did not have possession of the funds, her authority to issue warrants on the county treasurer was held to be such a limited control as to support the charge. In the instant case, we are satisfied that such a limited control in appellants Hess and Rose was shown when it was established that before the state warrant could be delivered to the vendors of the property purchased by the State, they were required to bear the approval and "O.K." of such appellants. Also, the allotment appraisals of the lots in question were prepared by the aforesaid appellants and were recommended for approval by them to their superior officers, the latter of whom added their approval without individual check or inquiry, and because of their faith and confidence in appellants Hess and Rose. While it is true that appellant Wheeler was neither an officer nor an employee of the State of California, there was evidence that he acted in concert with appellants Hess and Rose who were officers or employees of the State, and for that reason appellant Wheeler is chargeable as a conspirator with the latter two. A person not a State official may be guilty of the crime of embezzling public funds defined in section 504 of the Penal Code where he is shown to have aided and abetted an official in the criminal act. People v. Little, 41 Cal.App.2d 797, 805, 107 P.2d 634, 108 P.2d 63; People v. Fronk, 82 Cal.App. 465, 469, 255 P. 777.

[14] Appellants urge that upon delivery of the State warrant to the vendor of the property title passed to the latter and the money thereafter could not be the subject of embezzlement by State officials or employees. The answer to this is that when appellant Wheeler obtained authorization to sell the properties for the various vendors the latter agreed to pay him five percent of the proceeds of the sale. Manifestly, the vendors did not intend to keep such five percent paid to them, but to pay it to appellant Wheeler. The evidence establishes a compelling inference that appellant Wheeler had entered into an understanding with the State agents, appellants Hess and Rose, to pay them some 40% of the commissions he received. The amount of these commissions remained at all times the property of the State and were such when they reached the hands of appellants. When such money was appropriated to their own use and purpose, the act came squarely within the language of section 504 of the Penal Code. People v. Langdon, 1 Cal.App.2d 287, 291, 36 P.2d 424. Every crucial act from the appraisement of the properties to the transfer of title and payment by the state controller was lodged with appellants Hess and Rose as agents of the State.

[15, 16] We have heretofore narrated the testimony concerning the various transactions upon which the verdicts of the jury are predicated, and shall not here repeat them. Suffice it to say that appellants Hess and Rose, in their capacity as State right-of-way agents, knew these properties must be acquired by the State to build a highway long before they were acquired. They appraised the properties, but did not, as they were required to do, approach the owners in an effort to obtain the properties for the State at their actual appraised value. Instead they worked in conjunction and by agreement with appellant Wheeler. The inference is reasonable that their appraisals were influenced by the knowledge that appellant Wheeler would receive a profit by way of commissions in which they were to share in the amount of 40%, or, as in the

Hiam-Spohr transactions, to enable appellant Wheeler to purchase the property through "dummies" and sell to the State at a substantial profit in which appellants Hess and Rose shared to the amount of 60%. Under these and all the other facts and circumstances here present, to say that the evidence is insufficient to establish a violation of section 504 of the Penal Code would exalt form and ignore substance. The jury was also authorized to take into consideration the fact that none of the appellants testified at the trial to deny or explain any of the evidence, facts, or circumstances aforesaid. Const. of Calif. Art. I, sec. 13; Penal Code, sec. 1323. In the transactions wherein appellant Wheeler acted as the broker, the vendors set the net value of their properties and told him that the commission must be obtained from the buyers. It was reasonable therefore, that the jury could infer that the money received by the vendors minus the commission or profit was the market value of the property, and that had appellants Hess and Rose directly approached the sellers, the property could have been obtained for the State at amounts less than such amounts plus the commission. Title to the excess amount never passed to the vendors. They simply collected it for appellant Wheeler and acted as a convenient conduit for that purpose. The evidence was sufficient to support the guilty verdicts as to Count I of the second amended indictment.

[17, 18] We come now to a consideration of appellants' contention that the court erred in its rulings upon the admission and exclusion of evidence. There was no error in permitting evidence of the practices and customs of the state highway division. People v. Silver, 87 Cal.App.2d 337, 347, 197 P.2d 90. Although appellant Wheeler was not connected with the state highway division, such testimony was binding upon him once it was established that he was a member of the conspiracy. Common design is the essence of conspiracy, and the crime may be committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but constantly leading to the same unlawful result. As a co-conspirator, appellant Wheeler was bound by the testimony.

[19] Equally without merit is appellants' claim that it was prejudicially erroneous to permit supervising right-of-way agent E. F. Wagner, to testify that it was a practice to buy below the appraised value of the property. This witness spoke from a wealth of actual experience and neither appellants Hess or Rose denied the truth of such testimony, although they were employed in the division of highways, and it must be assumed, knew the rules, practices and customs prevailing therein. For the reasons above stated, the testimony was binding upon their co-conspirator Wheeler. The provisions of Article I, section 14 of the Constitution of California are not pertinent to a consideration of the court's ruling.

[20] There was no error in the rulings upon the admission of documentary evidence of customs and practices prevailing in the office of the division of highways, and for the reasons stated above such testimony was binding upon appellant Wheeler as a member of an established conspiracy. If the prevailing customs and practices could have been established by the oral testimony of a qualified witness, People v. Silver, supra, 87 Cal.App.2d at page 347, 197 P.2d 90, certainly there can be no valid objection to documentary evidence establishing the existence of such customs. The testimony was offered to show that in initialing certain documents appellants Hess and Rose were conforming to established highway division customs and practices.

Appellants earnestly urge that the court erred in refusing to strike from the record evidence relating to all counts of the amended indictment, save and except Counts I and XX which alone went to the jury.

[21] At the close of the prosecution's case, appellants moved the court to strike from the evidence Exhibits 1 to 30, inclusive, which were contained in the Auer transaction (Counts XX and XXI). This motion was predicated on the fact that the

Auer counts had been dismissed by the court. It was not error to deny the motion. Even though the substantive offenses alleged in Counts XX and XXI (the Auer transaction) were dismissed by the trial court, evidence received in support thereof was not necessarily inadmissible as to the conspiracy count upon which the appellants were found guilty. The purpose of evidence in a conspiracy case is to establish an illicit concord of the participants therein, and the challenged evidence was admissible to show that the appellants entertained a mutual design to commit the offense designated as the aim and objective of the conspirators, followed by an overt act or acts in pursuance to such design. It is of no consequence whether this evidence made out the substantive charges contained in the Auer transaction counts if it was material to and competent in relation to the separate charge of conspiracy.

[22] There was no error in the ruling by which the district attorney was permitted to ask a witness who was one of the property owners, "if Mr. Rose and Mr. Hess (state right-of-way agents and appellants herein) had contacted you with reference to the sale of the three lots to the State of California prior to November 19, 1943, which is the day you and your brother signed the selling authorization to Mr. Wheeler (appellant herein), would you have sold those three lots directly to the State of California?". The state of mind of the vendor at the time of the transaction in question was material and relevant to the issues involved and was not, as appellants claim, a conclusion upon his part. Macart v. San Joaquin B. & L. Ass'n, 45 Cal.App.2d 395, 400, 114 P.2d 395; Whitlow v. Durst, 20 Cal.2d 523, 525, 127 P.2d 530; Bridge v. Ruggles, 202 Cal. 326, 330, 260 P. 553; Katz v. Enos, 68 Cal.App.2d 266, 275, 156 P.2d 461. The evidence discloses that the State wanted the property and was out to purchase it for freeway purposes, all of which appellant Wheeler knew and did not disclose to the vendors when he procured a sales authorization. No effort was required on his part to sell the property, and it was material to show that the vendor would have readily sold to the State as he could have done had appellants Hess and Rose contacted him directly, as it was their duty to do.

[23–26] Appellants' contention that the court erred in refusing to strike out all evidence and exhibits relating to the counts dismissed cannot be sustained. As heretofore pointed out, the real question involved is whether such evidence is relevant. Evidence is relevant when no matter how weak it may be it tends to prove the issue before the jury. The existence of a conspiracy was a question of fact as was the question of appellants participation therein, and any evidence, whether it was insufficient to prove the substantive charges contained in the dismissed counts or not, was admissible if it had a tendency to illustrate or throw any light on the separate conspiracy charge, leaving the strength of such tendency or the weight of such evidence to be determined by the jury. The relevancy of evidence that may be offered upon an issue of fact depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not. We perceive no prejudicial error in the rulings of the trial judge in the admission of the evidence herein challenged by appellants, Evidence of an overt act is admissible even though innocent except for its relation to the illicit agreement.

[27] No prejudicial error was involved in the court's ruling admitting into evidence a letter from G. B. McCoy, chief right-of-way agent at Sacramento to the district engineer at Los Angeles, calling attention to the fact that "it is the strict policy of the division of highways that our right of way negotiating personnel shall under no circumstances deliver maps or appraisal information to real estate brokers, attorneys or other individuals for the purpose of permitting these people to attempt to negotiate a settlement with property owners at a price less than our appraised value and make a profit at the expense of the property owner or possibly at the expense of the state." The letter was initialed by both appellants Hess and Rose in their handwriting, thereby indicating that they read it.

The evidence being sufficient to establish a conspiracy and that appellant Wheeler was a member thereof and participated therein, the letter was binding upon him. Indeed, the evidence fully warrants the inference that appellants Hess and Rose gave appellant Wheeler all information including their appraisals, and shortly after the appraisals were made, appellant Wheeler approached the property owners and secured selling authorizations from them for less than the appraisal price, of which the owners had no knowledge, and the commissions were added to that price.

Appellants' next ground for a reversal is that their acquittal on the charge contained in Count XXII of the second amended indictment amounted to an acquittal on Count I, the conspiracy charge.

[28-30] Count XXII charged the embezzlement of $912.50 of public money. This amount was made up of $412.50 in real estate commissions paid in the Hiam-Spohr transaction (Counts XXII and XXIII), and $500 which appellant Wheeler received as profits from the sale of the property. Upon the conclusion of the prosecution's case and, when the court held that the real estate commission did not constitute embezzlement of public funds, the district attorney amended the indictment to make the $912.50 read $500. Appellants urge that their acquittal of the embezzlement of the $500 charged as a substantive offense in Count XXII constituted an acquittal under Count I, the conspiracy charge. None of the overt acts alleged in support of the conspiracy charge were dismissed by the court. The fallacy of appellants' argument is apparent when it is remembered that the proof necessary in the conspiracy is the establishment of an illicit agreement, and that the overt acts in support thereof may be considered, not necessarily in the light that they involved completed substantive offenses, but that they were steps in proof of the claimed agreement to embezzle funds of the State. Whether or not the aforesaid $500 profit amounted to an embezzlement, evidence thereof was admissible under the separate and distinct charge of conspiracy, as part of the alleged scheme or plan set forth in the conspiracy count. Before the plea of res adjudicata urged by appellants can be sustained, the prosecution must have been for the same offense. The substantive crime of embezzlement and the crime of conspiracy are separate and distinct offenses. The trial under Count XXII was for embezzlement and under Count I was for conspiracy, both relating to the same alleged unlawful transaction it is true, but separate and distinct offenses none the less. Woodman v. U. S., 5 Cir., 30 F.2d 482; Fall v. U. S., 60 App.D.C. 124, 49 F.2d 506, 511; U. S. v. De Angelo, 3 Cir., 138 F.2d 466, 469. In People v. MacMullen, 218 Cal. 655, 656, 24 P.2d 793, it was held that the dismissal of a charge of conspiracy to commit grand theft after empanelment of the jury, although it may in legal effect, amount to acquittal of the charge of conspiracy, is not a bar to subsequent prosecution for the crime of grand theft, although the crime is alleged in the conspiracy indictment as the sole overt act committed in furtherance of it. See also People v. Chait, 69 Cal.App.2d 503, 513, 159 P.2d 445; People v. Benenato, 77 Cal.App.2d 350, 175 P.2d 296; People v. Dukes, 2 Cal.App.2d 698, 38 P.2d 805. The cases of People v. Koehn, 207 Cal. 605, 279 P. 646, and People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168, cited by appellants, are readily distinguishable from the facts with which we are herein confronted.

[31, 32] Appellants' contention that the statute of limitations had run out on the conspiracy charge (Count I) is unavailing. The indictment in the case at bar was filed September 25, 1947. Overt acts were alleged in the conspiracy count which were assertedly committed as late as March 5, 1947, or less than six months prior to the filing of the indictment. While the authorities are in conflict as to when the statute of limitations operates as a bar to prosecutions for conspiracy, the majority favor the view that although the conspiracy was formed prior to the statutory period of limitations, the prosecution is not barred where an overt act in furtherance of the conspiracy was committed within that period. The California view apparently is that a conspiracy is a continuing offense. People v. Ware, 67 Cal.App. 81, 84, 85, 226

P. 956. Therefore, the statute of limitations had not run.

Appellants' next complaint is addressed to the action of the court in discharging a juror (Mrs. Waters) after the jurors had been deliberating some two days. In connection with such discharge of the juror, the following occurred after the return of the jury to the courtroom:

"The Court: I was advised that Mrs. Waters' father had a stroke, and of course nobody knows what his condition will be. Mrs. Waters, what do you wish to do? I have the authority to excuse you if you request it.

"Juror Waters: I would like to be.

"The Court: I can excuse you only on your own request. That is why I brought you over. Do you make that request?

"Juror Waters: Yes.

"The Court: Under Section 1089 of the Penal Code I have the authority. If there is any legal objection—

"Mr. Brandler: No objection, your Honor. The People are willing to stipulate that by reason of the illness of Mrs. Waters' father she may be excused.

"Mr. Parsons: May we approach the bench?

"The Court: There is not a thing in the world that I can conceive of that would be helpful in approaching the bench. If counsel do not care to stipulate I will take the responsibility of excusing her.

"Mr. Parsons: We are willing to do anything we can in a situation like this, but we wonder what we might be doing with respect to the rights of the defendants, that is all.

"The Court: Rather than prolong the matter and have any discussion, I do excuse Mrs. Waters.

"Mr. Lavine: May I voice my objection?

"The Court: Yes, if you have any legal objection.

"Mr. Lavine: That is it."

Following some further discussion the court excused Mrs. Waters without the consent of appellants and directed the clerk to draw the name of one of the alternate jurors, who thereupon replaced Mrs. Waters in the jury box.

Appellants' first claim is that excusing the juror under the circumstances here present constituted jeopardy and therefore, an acquittal of appellants. Relying heavily upon the case of People v. Young, 100 Cal. App. 18, 279 P. 824, appellants earnestly urge that they were once in jeopardy and because a juror was excused without their consent, they are not subject to further prosecution and, in effect, have been acquitted. The case last cited is readily distinguishable from the situation presented in the instant matter. In that case a peremptory challenge was allowed after the entire jury—regulars and alternates—had been empaneled and sworn. Under the provisions of section 1068 of the Penal Code the challenge cannot be exercised after the jury is completed and sworn even with leave of court. Another ground of distinction is that in the Young case the place of the challenged juror was not filled by one of the alternates as in the instant case, but by a juror called from the venire. Thereby, the unity of the jury composed of twelve regulars and two alternates already accepted by both sides (upon whose empanelment jeopardy had attached) was destroyed by the calling in of a new juror.

[33, 34] It is definitely held in the cases of People v. Howard, 211 Cal. 322, 325, 295 P. 333, 71 A.L.R. 1385, and People v. Peete, 54 Cal.App. 333, 363, 364, 202 P. 51 that a verdict of twelve jurors, one of whom was originally an alternate juror, is the verdict of the jury originally sworn to try the case. When the substitution of the alternate juror for one of the regular jurors is in accordance with the provisions of Penal Code section 1089 no question of double jeopardy would arise. Such procedure does not destroy the unity of the jury because the jury is not complete until the alternate is accepted and sworn. At all times, the alternate is a potential member of the regular jury. Furthermore, no claim is made that the alternate juror seated was not in fact a fair and impartial person to act as a juror. We may assume therefore, that the appellants were satisfied that

the alternate juror selected would give them the fair and impartial trial to which they were entitled, should he be called in lieu of any of the regular jurors. The same proceedings were had in the selection of the alternate juror as in the case of the first twelve who took their places in the box. Under the circumstances here present it must be held that appellants have been but once in jeopardy. People v. Burns, 84 Cal.App.2d 18, 24, 189 P.2d 868.

Appellants further contend that prejudicial error was committed in dismissing Juror Waters, as they assert, "after a mere perfunctory statement by the court and without any legal showing as to the condition of the juror's father".

At the time of the trial of this action Penal Code section 1089 pertaining to the substitution of alternate for regular jurors, read as follows:

"If at any time, whether before or after the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

[35] In the instant case as heretofore pointed out, the court was informed that Juror Waters' father had suffered a paralytic stroke. We find no abuse of discretion in the action of the court advising the juror of the court's receipt of such information and inquiring of her as to whether, under the circumstances, she desired to be excused. Tested in the light of the information which had come to the court at the time it made its decision we cannot conclude that the action taken was, as appellants assert, arbitrary, but that it was a reasonable exercise of the discretion conferred by Penal Code section 1089. In the absence of any attempt on the part of appellants to inquire into the source of the court's information concerning the illness of the juror's father, we must assume that the court had good cause to believe that her father had suffered a severe heart attack. The action taken was not prejudicial to appellants' rights. People v. Lanigan, 22 Cal.2d 569, 577, 140 P.2d 24, 148 A.L.R. 176; People v. Von Badenthal, 8 Cal.App.2d 404, 410, 48 P.2d 82; People v. Burns, supra.

Appellants direct our attention to numerous cases, all of which are cited in Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422, strongly relied upon by appellants. In that case a jury had been empaneled and sworn to try the cause when, over the objection of and without the consent of the accused, the court discharged the jury. The sole question involved was whether jeopardy attached. The case bears no parallel with the facts confronting us herein and is not therefore helpful. In the case at bar, as heretofore pointed out, the question of double jeopardy is not present, and the court exercised its discretion in conformity with the authority conferred upon it by law.

[36-38] Appellants next assert error in the giving and refusing of certain instructions. It was not error for the court to refuse to instruct the jury on "the status of the money in escrow". The escrow holder simply acts as a depositary and is the agent of both parties until the terms of the escrow are completed. The escrow holder obtains no title to the fund deposited in escrow. The deposit of moneys in the escrow does not alter or change the ownership thereof. If the money here in question was the property of the State when deposited in escrow, its legal status was not changed by such deposit. To instruct the jury as to the status of money in escrow would serve only to confuse them, and complicate the issues presented to them. It is true, as pointed out by appellants, that some time after the jury retired to deliberate, they returned into court and through the foreman asked, "Some of the jurors want to know—the money paid into the Hiam-Spohr escrow, the state paid the money into escrow, but whose money was it while it was being held in escrow?", to which the court responded, "The state paid the money not into the Hiam-Spohr

escrow but into the Spohr-State escrow." Thereupon, the judge informed the jury that it was his impression he had "covered that with an instruction. I don't have the instructions now * * * if there is some question about that, why we can pick it up tomorrow morning. I will have in mind the question which the jurors are asking to determine whether or not I will give any additional instruction". Beyond the request of one of appellants' counsel that "We ask your Honor to give the particular instruction" an examination of the record reflects that nothing further was done in the matter. When court reconvened on the following day no mention was made concerning the jury's request and it must be assumed that the court decided against giving any further instructions on the issue requested. As heretofore pointed out, the failure to give instructions as to "the status of the money in escrow" was not prejudicial error. Neither was prejudicial error committed in advising the jury by way of instruction, that the Director of the Department of Public Works of the State of California was an officer within the meaning of section 504 of the Penal Code; that the division of highways is a division of the department of public works under the direction of the director of the department of public works, and that appellants Hess and Rose, as right-of-way agents for the division of highways, were clerks and servants of the State of California in the department of public works, within the meaning of Penal Code section 504. People v. Knott, supra; People v. Kirk, 47 Cal.App.2d 136, 117 P.2d 385.

[39] There was no error in advising the jury that on the question of control of State money, the procedure requiring the signature of a right-of-way agent on a right-of-way contract, recommending its approval, "is one step in the procedure for causing the state to pay out public money for the purchase of real property for highway purposes". That "Therefore, Rose and Hess as right-of-way agents did have a measure of control of state money—and a sufficient control to satisfy the requirement of section 504 of the Penal Code". There was no dispute that appellants Hess and Rose, right-of-way agents, recommended the approval of right-of-way contracts, and that without such approval, no State funds would have been paid out. The question of whether or when the moneys ceased to be State funds was one of fact for the jury to determine under the evidence and instructions of the court. To have advised the jury when such funds ceased to be public funds would have invaded the province of the triers of fact.

The next instruction complained of involved in part the substantive offense charged in Count XXII. Appellants were acquitted on this count. We fail to perceive wherein the jury was misled by the instructions insofar as Count I, upon which appellants were convicted was concerned.

[40] Appellants' complaint as to another instruction in that it allegedly failed to tell the jury that they could not be convicted unless they appropriated money while it was still State money is without merit. In other instructions the jury was definitely so advised.

[41] The court properly refused appellants' requested instruction Number 18, reading in part as follows: "if you find from the evidence in this case that the defendants Rose and Hess had only power to recommend the sale or disposition of state property and did not have the power to dispose of it, such recommendations on their part were not and are not embezzlement of any property so involved within the laws of the State of California."

Appellants Hess and Rose were not engaged in the sale or disposition of state property, but in the purchase of it for state highway purposes. We find nothing in the cases of People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024, or People v. Adams, 14 Cal.2d 154, 93 P.2d 146, applicable to the facts in the instant case.

[42] The failure to give appellants' proffered instruction 16 that appellant Wheeler, not being an agent or employee of the state, or that in such capacity he ever had possession or control of any state money and therefore, could not be guilty of the offenses charged unless he conspired with or aided and abetted appellants Hess

and Rose to embezzle state moneys was proper. The jury was fully and fairly apprised of the kind and quantum of evidence required before appellant Wheeler could be convicted of conspiracy under Count I, and the proposed instruction was merely repetitious and cumulative.

[43] It was not error to refuse to give appellants' instruction Number 14 to the effect that "the policy or practice of a department of the state is not binding upon a defendant unless it is a rule or regulation of the state filed in accordance with the statutes and regulations with the Secretary of State". The only reason assigned by appellants in support of their contention that this instruction should have been given is that another official, "head of the state highway department had engaged in a very similar transaction with the state and had made a profit out of it and he was not being prosecuted". Assuming the truth of this statement, it furnishes no ground upon which to predicate an instruction concerning the conduct of those who were on trial. Furthermore, there was evidence that in the operation of the state highway division they promulgate their own rules of practice and regulation. Our attention is not directed to any statute requiring the filing of such rules and regulations with the Secretary of State. Furthermore, neither appellants Rose or Hess, who were state agents, took the stand to deny the existence of or their familiarity with such rules and regulations.

[44] Appellants proposed instruction Number 23 was properly refused because by it appellant Wheeler would not be subject to prosecution for conspiracy under any circumstances in connection with the receipt of him of so-called real estate commissions. The instruction was too broad, expansive, and therefore should not have been given.

[45] Appellants challenge the correctness of several other instructions given, and assert error in the refusal to give others, but when we remember that instructions should not be considered singly, but in their entirety, People v. Macken, 32 Cal.App.2d 31, 41, 42, 89 P.2d 173; People v. Curtis, 36 Cal.App.2d 306, 322, 98 P.2d 228, we are persuaded that when so viewed the instructions given are not subject to the criticisms urged by appellants, and the rejected instructions were properly refused. A review of all the instructions given convinces us that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof required before appellants could be convicted of the crime of conspiracy charged in Count I of the second amended indictment. This is all that was required.

[46, 47] As a further ground for reversal, appellants urge that they were denied the equal protection of the laws in that the chief right-of-way agent of the state who allegedly, "had bought property in the path of the freeway, signed his own appraisal and the property was resold to the state at a hiked price" was not prosecuted, but that "petty agents (appellants Rose and Hess) were singled out for prosecution". Appellants offered an instruction that such was their contention and, that if the jury found such to be true, appellants were entitled to an acquittal. For reasons about to be advanced, the instruction was properly refused and the claim of appellants must be rejected. Aside from the fact that there is considerable evidence in the record showing no parallel between the transaction of the chief right-of-way agent with the state and the activities of appellants, the latter sought to inject a false issue into the trial of the instant case, which, as is stated in People v. Darcy, 59 Cal.App.2d 342, 353, 139 P.2d 118, 125, "if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted". It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. People v. Darcy, supra, 59 Cal.App.2d at page 353, 139 P.2d at page 118; People v. Oreck, 74 Cal.App.2d 215, 222, 168 P.2d 186; People v. Montgomery, 47 Cal.App.2d 1, 11, 117 P.2d 437. The case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and other cases by appellants are distinguishable from the case at bar, see People v. Darcy, supra, 59 Cal.App.2d at pages 353, 358, 139 P.2d at page 118.

Finally, appellants Hess and Rose contend that the provisions of section 1203 of the Penal Code insofar as they restrict the right of a trial judge to grant probation "to any defendant who shall have been convicted of robbery * * * nor to any public official * * * who, in the discharge of the duties of his public office or employment * * * embezzled public money * * *", is unconstitutional.

[48–50] Appellants urge that the courts of this state derive their powers and jurisdiction from the Constitution of California (Art. VI, sections 1, 5, 6), and that this jurisdiction can neither be restricted nor enlarged by legislative action. The right to enact laws making certain actions criminal and to designate the punishment for such crimes is vested exclusively in the legislature. Clothed with the power to prescribe penalties for violations of criminal statutes, it necessarily follows that the legislative branch of the government has the power to declare that in certain of these cases, probation may not be granted. The exercise of such power in no way impinges upon the jurisdiction of the judicial branch of the government. It does not impair, restrict nor enlarge upon the jurisdiction of the courts. The function of the courts is to determine the guilt or innocence of an accused. What disposition may thereafter be made by way of penalty is for the legislature to determine.

[51] Section 1203 of the Penal Code does not in any way attempt to affect the right of the courts to issue writs or to impair the exercise of their trial or appellate jurisdiction. It is not necessary to extend this opinion further by considering the cases cited by appellants. It is sufficient to say that they do not conflict with the conclusions we have reached.

We have satisfied ourselves that there is no substantial merit in the point presented by appellants Rose and Hess although it has been ingeniously and with as much force as untenable legal problems may be supported pressed upon us in their brief. Section 1203 of the Penal Code insofar as its provisions are herein challenged is constitutional.

Furthermore, it is noteworthy that in denying probation to appellants Rose and Hess in the instant case the court was not influenced by the challenged provisions of Penal Code section 1203. This is evidenced by the statement of the trial judge at the time probation was denied, wherein he said:

"I am denying probation and I do deny probation to the defendants Hess and Rose in this case, No. 115,518, because it is mandatory that I sentence the defendants to prison in the other case under count 2. If I could grant probation to defendants Hess and Rose so that they would not have to go to San Quentin on any other counts I would feel differently about this. I am making this statement for the record".

[52] In "the other case" referred to by the court, and now on appeal and pending in this court (Criminal #4337) appellants Rose and Hess, state employees, were convicted of the substantive offense of embezzlement of public funds. Whether section 1203 of the Penal Code prohibits the granting of probation to governmental employees convicted on a conspiracy charge, such as the one charged herein, becomes immaterial because the denial of probation was manifestly based on the conviction on the substantive charge as contained in a case other than the present one.

A reading of the voluminous transcript in this case, containing 1,988 pages and the briefs, made up of 555 pages, impresses us that the learned trial judge was fair and just to both the prosecution and the defense. Throughout the protracted trial he was patient and kindly disposed toward all the parties and counsel for both sides. Appellants have been fairly tried and justly convicted of the offense charged against them.

The judgments and the orders denying a new trial as to defendants Hess and Rose are, and each is affirmed. The attempted appeal of defendant Wheeler from the judgment is dismissed, and the order denying his motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

105 Cal.App.2d 623

SLAUGHTER et al. v. ZIMMAN et al.
ZIMMAN et al. v. FOSTER.

Civ. 18257.

District Court of Appeal, Second District,
Division 2, California.

July 25, 1951.

Hearing Denied Sept. 20, 1951.

Action by J. A. Slaughter, and others, partners, under the firm name and style of the Doctors Business Bureau of Southern California, against Louis Zimman and others and Louis Zimman, as guardian ad litem for Rose Zimman and another, to recover the value of professional services rendered by the plaintiffs' assignors to the minor defendant, wherein the defendants filed a cross-complaint against Paul D. Foster for damages resulting from alleged malpractice. The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment in favor of plaintiffs on their complaint and against defendants on their cross-complaint and the defendants appealed. The District Court of Appeal, McComb, J., held that the evidence sustained trial court's finding that the adult defendants were liable for the professional services rendered by a physician to their children.

Affirmed.

1. Appeal and error 🔑966(1)
Continuance 🔑7

An application for a continuance is addressed to sound discretion of trial judge whose ruling will not be reviewed except for most cogent reasons and an abuse of discretion must be shown to justify a reversal of judgment because of a ruling denying a continuance.

2. Continuance 🔑20(1)

In action to recover value of professional services, where trial judge told one defendant that if he relieved his attorney from representing him it would not be grounds for a continuance and record failed to disclose any reason why this defendant had not obtained an attorney after he consented to withdrawal of attorney, trial court did not abuse its discretion in refusing to grant motion for a continuance.

3. Physicians and surgeons 🔑24(3)

Evidence sustained trial court's finding that defendants were liable for professional services rendered by a physician to their children. Civ.Code, § 196.

4. Appeal and error 🔑110

A purported appeal from an order denying a motion for new trial in a civil action would be dismissed since such an order was nonappealable.

Herbert Gall, Los Angeles, for plaintiffs-respondents.

Morris Lavine, Los Angeles, for cross-complainants and appellants.

De Forrest Home, Los Angeles, for respondent Foster.

McCOMB, Justice.

From a judgment in favor of plaintiffs on their complaint to recover the value of professional services rendered by their assignors to defendant minors and against defendants on their cross-complaint for damages resulting from alleged malpractice by plaintiffs, defendants appeal. There is also a purported appeal from the order denying defendants' motion for a new trial.

Facts: In response to plaintiffs' complaint defendants filed a cross-complaint on behalf of the minors which was prepared by attorney Theodore Epstein. At the time of the trial on May 17, 1950, defendant Louis Zimman appearing in propria persona made a motion for a continuance which was denied. On the hearing of this motion it appeared that on May 8, 1950, Theodore Epstein told Louis Zimman, the guardian ad litem for the minors, that he could not and would not represent him further and told him to get another lawyer. On May 8, the substitution of attorneys was signed and it was filed on May 9, 1950. By this document Louis Zimman was substituted in propria persona in place of attorney Epstein. At the hearing on the motion for a continuance the trial judge called to the attention of Louis Zimman this substitution of attorneys, and Mr. Zimman stated that he had been told a week previous to trial that he should have an attorney in the action.

Questions: First: *Did the trial court err in denying defendants' motion for a continuance?*

[1] *No.* It is settled that an application for a continuance is addressed to the sound discretion of the trial judge whose ruling will not be reviewed except for the most cogent reasons. The trial court was apprised of all the circumstances of the case and the previous proceedings and was therefore better able to decide upon the propriety of granting the application than an appellate court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling denying a continuance. (In re Lovern, 137 Cal. 680, 681, 70 P. 783; Mission Film Corp. v. Chadwick Pictures Corp., 207 Cal. 386, 388, 278 P. 855.)

[2] In the instant case the record fails to disclose any reason why defendant Louis Zimman had not obtained an attorney after he had consented to the withdrawal of attorney Epstein. On the contrary, it discloses that the trial judge told said defendant that if he relieved attorney Epstein from representing him it would not be grounds for a continuance of the trial of the case, and after said statement said defendant stated that he did not want Mr. Epstein to represent him and thereupon the court consented to Mr. Epstein's withdrawal from the case and denied defendants' motion for a continuance. Clearly no abuse of the trial court's discretion appears in the record. (Cf. Jones v. Green, 74 Cal.App.2d 223, 230, 168 P.2d 418.)

Second: *Was there substantial evidence to sustain the trial court's finding that defendants Louis and Bessie Zimman were liable for the professional services rendered to their children?*

[3] *Yes.* Dr. Foster testified as to the extent of the services which he had rendered to the minor children of defendants, and as to the reasonable value thereof. Such testimony substantiated the trial court's findings that the professional services were rendered by plaintiffs' assignors to the children of the adult defendants and as to the reasonable value of such services. It is conceded that the children were minors. Therefore the adult defendants as parents were liable for such services pursuant to section 196 of the Civil Code which reads in part as follows: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

[4] Since an order denying a motion for a new trial in a civil action is nonappealable the purported appeal from such order is dismissed. (Berry v. Ryan, 97 Cal.App.2d 492, 493, 217 P.2d 1015.)

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.

105 Cal.App.2d 631

BRIDGFORD v. SAWYER et al. (two cases).

Civ. 7893, 7894.

District Court of Appeal, Third District,
California.
July 25, 1951.

Rehearing Denied Aug. 23, 1951.

Hearing Denied Sept. 20, 1951.

Consolidated actions by Ivy J. Bridgford and Glenn Bridgford, respectively, against Scott Sawyer, the Merced Irrigation District, and others, for personal injuries caused by the overturning of an automobile in which plaintiffs were traveling while crossing a flooded portion of a highway. From an order of the Superior Court, Merced County, R. R. Sischo, J., granting defendant district's motion for a new trial after a jury's verdict against it, plaintiffs appealed. The District Court of Appeal, Peek, J., held that the order was valid as against the contention that it did not specify the insufficiency of the evidence to justify the verdict as the ground for the order and that the trial judge did not abuse his discretion in granting the motion.

Order affirmed.

1. New trial 🔑163(1)

An order, stating that Superior Court was of opinion that evidence was insufficient to justify jury's verdict for plaintiffs and therefore ordered that verdict be set aside and defendant granted new trial, specified insufficiency of evidence to justify verdict as ground for order and hence was valid as against contentions that it was not usual unequivocal order granting new trial on such ground and that reading thereof as whole demonstrated that insufficiency of evidence was not true basis of order. Code Civ.Proc. § 657.

2. New trial ⚷163(1)

Where trial court's language in order passing on motion for new trial is susceptible of interpretation as tantamount to granting new trial for insufficiency of evidence to justify jury's verdict, exact language set forth in code section for such an order need not be used; language bearing same import and conveying same idea being sufficient. Code Civ.Proc. § 657, subd. 7.

3. Appeal and error ⚷717

On appeal from order granting new trial, trial court's reasoning, set forth in order, will not be considered to show that insufficiency of evidence to support jury's verdict was not true basis of order or to overthrow trial court's ruling on such ground. Code Civ.Proc. § 657.

4. Appeal and error ⚷717

The trial judge's opinion will not be considered by appellate court in determining whether jury's verdict or trial court's findings are supported by evidence, as question for reviewing court is whether trial court's final decision, judgment or order is correct, not whether reasons expressed in court's opinion are in harmony with result reached or sustain decision.

5. New trial ⚷6

The granting of motion for new trial rests completely within trial judge's discretion.

6. Appeal and error ⚷933(1)

On appeal from order granting new trial, all presumptions are in favor of order as against jury's verdict.

7. Appeal and error ⚷1015(1)

An appellate court will reverse trial court's order granting new trial only when there is no substantial evidence as matter of law, to support contrary judgment.

8. New trial ⚷70

In action against irrigation district for injuries to occupants of automobile overturned while crossing portion of highway alleged to have been flooded because of cut or opening in irrigation ditch, granting of district's motion for new trial on ground of insufficiency of evidence to justify jury's verdict for plaintiffs was not abuse of trial court's discretion, in absence of substantial evidence to support finding of district's freedom from negligence. Code Civ.Proc. § 657.

9. Appeal and error ⚷867(2)

Whether irrigation district enjoys sovereign immunity from liability for damages for personal injuries is not properly before District Court of Appeal on appeal from order granting district's motion for new trial after jury's verdict for plaintiffs in consolidated actions against district for such injuries; only question before court being propriety of such order.

◆

Willens & Boscoe, Stockton, Landram & Silveira, Merced, for appellant.

C. Ray Robinson, W. Eugene Craven, Merced, for respondents.

PEEK, Justice.

Plaintiffs in these two consolidated actions have appealed from the order granting defendant Merced Irrigation District's motion for a new trial.

The complaints allege that while the plaintiffs were traveling in an automobile driven by Glenn Bridgford, the automobile overturned as a result of crossing a flooded portion of the highway, causing severe injuries to them both. It was further alleged that the flooding of the highway was caused by a cut or opening in the District's irrigation ditch bordering the highway. Named as defendants were the Irrigation District, its directors and certain of its employees, and certain employees of the State Department of Public Works, Division of Highways. A nonsuit was granted as to the directors of the Irrigation District and as to three of the employees of the Division of Highways. Following the verdict, which was in favor of both plaintiffs against the Irrigation District, the District moved for a new trial. In the order granting the motion the court expressly stated that the ground was that the evidence was insufficient to justify the verdict. The sole question on appeal is the validity of the order granting said motion.

From the evidence adduced at the trial it appears that the flooding of the highway, which caused the accident, was in turn caused by a cut in the irrigation ditch bordering the highway. The absence of vegetation on the inside of the cut indicated that it was a new one. In the past employees of the Division of Highways had cut openings in the bank of the ditch in order to drain water from the highway. After the accident the cut in question was filled by an employee of the Irrigation District. The day prior to the accident the ditch had been patrolled by an employee of the Irrigation District, and no breaks or cuts in the bank were discovered at that time.

Appellants' principal contention is that the order granting a new trial does not specify insufficiency of the evidence to justify the verdicts within the meaning of section 657 of the Code of Civil Procedure, both because it was not the "usual unequivocal order" and because a reading of the order as a whole demonstrates that insufficiency of the evidence was not the true basis of the order.

The written order granting the new trial contained a short discussion by the court on some aspects of the case and concluded with these two sentences:

"For the foregoing reason the Court is of the opinion that the evidence is insufficient to justify the verdict of the jury and for that reason is against the law.

"It Is, Therefore, Ordered that the verdict of the jury in this case be set aside and the defendant, Merced Irrigation District is hereby granted a new trial."

[1, 2] There can be no question but that the import of the language quoted from the order was that the basis of granting the new trial was insufficiency of the evidence. Hence it falls squarely within the statement in Secreto v. Carlander, 35 Cal.App.2d 361, 364, 95 P.2d 476, 477, that it is the law of this state that "if in passing upon a motion for a new trial, the language used by the trial court in its order is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence, it is unnecessary to use the exact language set forth in subdivision 7, section 657 of the Code of Civil Procedure, and that language used in the order bearing the same import and conveying the same idea as the specific language set forth in the code section is sufficient."

[3, 4] Furthermore, the reasoning of the court as set forth in the order itself will not be here considered to show that sufficiency of the evidence was not the true basis of the order or to overthrow the trial court's ruling. Diaz v. Schultz, 81 Cal.App.2d 328, 183 P.2d 717. "While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence. * * * The order when made by the court concludes the case and it cannot be impeached by the judge's opinion. The question that concerns the reviewing court is whether or not the final decision, judgment or order is correct and not whether the reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision." Stone v. Los Angeles County Flood Control Dist., 81 Cal.App.2d 902, 907, 185 P.2d 396, 399.

[5–8] The only question that remains, then, is whether the granting of a new trial on the ground of insufficiency of the evidence was, under the facts and circumstances of this case, an abuse of discretion. The granting of a motion for a new trial rests completely within the discretion of the trial judge, and on appeal from an order granting a new trial all presumptions are in favor of the order as against the verdict. Stone v. Los Angeles County Flood Control Dist., supra. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689. From our examination of the record before us we cannot say that there was no substantial evidence to support a finding that the respondent was free from negligence. It necessarily follows that there was no abuse of discretion in the granting of a new trial.

[9] The question raised and discussed at length in the briefs of the respective parties as to whether an irrigation district enjoys sovereign immunity from liability for damages for personal injuries is not properly before this court. This appeal is solely from the order granting respondent a new trial. Therefore the only question before this court is the propriety of that order.

The order is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

WARD et al. v. JONES et al.

Civ. 17976.

District Court of Appeal, Second District, Division 1, California.

July 9, 1951.

Hearing Granted Sept. 7, 1951.*

Aileen Mary Ward and others sued A. B. Jones and others to recover for the wrongful death of Joseph T. Ward occurring when he came in contact with a high tension electric transmission line while engaged in painting a tower at an electric substation of his employer, the Department of Water and Power of the City of Los Angeles, and while acting under the supervision of the defendants. The Superior Court, Los Angeles County, Wm. B. McKesson, J., entered judgment dismissing the action, and plaintiffs appealed. The District Court of Appeals, White, P. J., held that the statutes requiring the filing of a verified claim where it is claimed that any person has been injured as a result of the negligence of public employees was not applicable to an action for wrongful death.

Reversed and remanded with directions.

1. Automobiles ⚷230
Municipal corporations ⚷741(1)

The word "accident", as used in the California Government Code Section requiring that notice be filed within 90 days after "accident" has occurred where it is claimed that any person has been injured as a result of negligence of any public officer or employee, means the same thing as the word "occurrence", as used in the equivalent Kentucky statute requiring that notice be filed within 90 days of the "occurrence", and both words refer to the incident or event causing the personal injuries, such as the incident of a collision of automobiles, the incident of falling into an excavation, etc. Government Code, § 1981.

See publication Words and Phrases, for other judicial constructions and definitions of "Accident" and "Occurrence".

2. Death ⚷19, 33
Municipal corporations ⚷741(1)

The statute making cities and other public agency liable for negligence in certain instances where "injuries to persons" have resulted has been construed to include liability for wrongful death and to require filing of a claim as a prerequisite to maintenance of action for wrongful death under such statute, but such interpretations do not require that the language of the Government Code Section requiring filing of claim within 90 days after the accident has occurred whenever it is claimed that "any person has been injured" as the result of the negligence or carelessness of any public employee be construed similarly, notwithstanding the fact that the pertinent statutes were reenacted as part of the Government Code after the decision construing the first statute to include liability for wrongful death. Government Code, §§ 1953, 1981,

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* Subsequent opinion 249 P.2d 246.

53051, 53052; Pol.Code, § 4075; Gen. Laws, Act 5618.

3. Death ⚷19
Municipal corporations ⚷741(1)

In enacting the statute requiring that, whenever it is claimed that any person has been injured as the result of the negligence of any public employee, verified claim must be filed within 90 days after the accident has occurred, it was intention of legislature to qualify common-law right of action against negligent person by requiring filing of verified claim only in event injured person claimed that he had been injured as result of negligence of public employee occurring during course of latter's public employment, and such statute will not be construed as extending to new and different cause of action which comes into existence at time of death of injured person. Government Code, § 1981.

4. Statutes ⚷176

Court should not, under guise of judicial interpretation, attempt to add to or detract from legislative intent as expressed in words of statute.

◆

Richard L. Mayers, Lawrence William Steinberg, Beverly Hills, for appellants.

Ray L. Chesebro, City Atty. of City of Los Angeles, Gilmore Tillman, Chief Asst. City Atty, for Water and Power, and Wendell Mackay, Deputy City Atty., all of Los Angeles, for respondents.

WHITE, Presiding Justice.

A general demurrer to their amended complaint (hereinafter referred to as the complaint) having been sustained without leave to amend, plaintiffs have appealed from the ensuing judgment of dismissal. The action is one for wrongful death brought by the widow and minor children of Joseph T. Ward. The decedent met his death by coming in contact with a high-tension electric transmission line while engaged as a painter in painting a tower at an electrical substation of the Department of Water and Power of the City of Los Angeles. The decedent was an employee of the Department and the defendants were fellow employees having varying degrees of supervision over or connection with the work of painting the tower. The complaint alleged, in substance, that it was extremely dangerous for a painter to work on the tower in the vicinity of the high-voltage wires, and that reasonable care required that the current be turned off while such work went on; that there be two competent electricians present at all times; that no painters, nor any equipment except of a nonconducting quality be permitted within ten feet of the wires while they were energized; that safety belts be used. It was charged that the defendants, in violation, neglect and disregard of their duties as officers and employees of the Department, carelessly and negligently failed to take such precautions; further that defendants O'Connor and Williams, as foreman and assistant foreman of the painting crew, caused an electrical mechanic to be removed from the job in order to expedite the work by omitting the precautions insisted upon by the electrical mechanic and thereafter, "in willful, negligent and reckless disregard of the lives and limbs of members of said crew, adopted the practice of working and did cause his painting crew to work in dangerous proximity to said high tension wires," and "to the knowledge and with the consent and authority and pursuant to the directions of" the other defendants.

The demurrer was based upon the sole ground that the complaint failed to allege that the plaintiffs presented a verified claim to the defendants within ninety days from the date of the accident. The complaint in this connection contained the following allegations "That on October 8, 1948, plaintiff Aileen Mary Ward filed a written verified claim for damages with the City of Los Angeles, State of California by filing same with Walter Peterson, City Clerk of said City; that said claim for damages specified the names and addresses of the claimants, the nature of the damages and injuries, when and where the injuries occurred, and a description of the manner and nature of the accident and injuries."

Section 1981 of the Government Code reads as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

Appellants present three reasons why, they assert, the causes of action here involved do not come within the requirements of the aforesaid section 1981: 1. That an action for wrongful death is not included within the wording of the section, which refers only to situations where "it is claimed that any person has been injured or any property damaged"; 2. That the section by its terms does not include cases involving wilful misconduct, appellants here contending that they have set forth a cause of action for wilful misconduct rather than mere negligence; and 3. That the statute should not be construed to include an action by an injured employee against a fellow employee.

As a fourth ground of reversal, appellants assert that even though section 1981 should be held applicable in the instant action, their filing of a claim with the city clerk of the City of Los Angeles should be held to constitute substantial compliance.

The majority view of the courts of other jurisdictions as reflected in cases we consider as exceptionally well reasoned, is that statutes containing language similar to that involved in the section here under consideration do not apply to an action for wrongful death. The language of the Supreme Court of Missouri in Glasgow v. City of St. Joseph, 1944, 353 Mo. 740, 748, 184 S.W.2d 412, 416, is illustrative: "Unless actions for death by wrongful act, are explicitly included, it is generally held that like statutory provisions do not apply to an action for wrongful death. This is especially so where, as in Missouri" (and as in California), "the wrongful death action is considered a new cause of action, first springing into existence at the time of death." Citing 25 C.J.S., Death, § 30, sub. sec. a, p. 1102; 38 Am.Jur., p. 392, Sec. 688; 6 McQuillin, Municipal Corporations, p. 1285, Sec. 2890, n. 12; Annotation, 64 A.L.R. 1059.

[1] The case of Spangler's Administrator v. City of Middlesboro, 1945, 301 Ky. 237, 191 S.W.2d 414, 415, involved a statute providing that "No action shall be maintained against any city * * * unless notice * * * be filed within ninety days of the occurrence for which damage is claimed * * *." The court there pointed out that where an injured party dies, the usual necessity for prompt examination to determine exact extent of injuries is obviated and the coroner's inquest provides the city with ample notice for the purpose of eliminating for the future the dangerous condition which caused the death. But further, as pointed out by the Kentucky court, the notice is required to be filed within ninety days of the "occurrence" for which damages are claimed. (The California statute uses the word "accident". Clearly so far as an action for personal injuries is concerned, the words "occurrence" and "accident" mean the same thing—the incident or event causing the personal injuries, such as the incident of a collision of automobiles, the incident of falling into an excavation, etc.) As stated in the last-cited case, if it were held that notice were necessary to the maintenance of an action for wrongful death, the action would be barred where the "injury"—that is the "accident" or "occurrence" occurred more than ninety days before death.

The language of the Supreme Court of Vermont in Bigelow v. Town of St. Johnsbury, 1918, 92 Vt. 423, 105 A. 34, 38, is here appropriate: "It is argued that * * * persons financially injured through the death of their next of kin must give notice the same as they would be required to give if they were themselves physically injured. The absurdity of such a construction is manifest from its logical result. If a person injured is, in consequence thereof, bereft of his reason, and the injuries result in his death 21 days after the occurrence of such injury, no action can be had or maintained, under the statute, for the benefit of the next of kin, because notice was not given within 20 days of the time of injury, during all which time the injured person was yet alive. An absurd purpose is not to be attributed to the lawmakers, and a construction leading to an absurd consequence must always be avoided."

Another Vermont case illustrative of the difficulties that would be involved were the statute held applicable is Eames v. Town of Brattleborough, 1882, 54 Vt. 471, where the person injured died within half an hour after the accident. Recovery was sought on behalf of two minor daughters, no claim or notice having been filed. The court said: "We think there is no room for doubt that no notice was required in this case. The language is plain and the effect of it unmistakable. The 'person injured', as used in the proviso, refers to the person injured in the accident, not to the person injured pecuniarily, as a result of the accident."

We will refer further to the meaning in section 1981 of the words "whenever it is claimed that any person has been injured" in discussing respondents' contentions with respect to the applicability of the statute.

Other cases holding typical claims statutes to be inapplicable to wrongful death actions, many involving statutes containing much broader language than that involved in the instant case, are: Diariotti v. Missouri Pacific Ry. Co., 1914, 262 Mo. 1, 170 S.W. 865; Nesbit v. City of Topeka, 1912, 87 Kan. 394, 124 P. 166, 40 L.R.A.,N.S., 749; Orth v. Belgrade, 1902, 87 Minn. 237, 91 N.W. 843; Senecal v. City of West St. Paul, 1910, 111 Minn. 253, 126 N.W. 826; Parish v. Town of Eden, 1885, 62 Wis. 272, 22 N.W. 399; McKeigue v. City of Janesville, 1887, 68 Wis. 50, 31 N.W. 298; Laconte v. City of Kenosha, 1912, 149 Wis. 343, 135 N.W. 843; Knight v. Town of Haverhill, 1915, 77 N.H. 487, 93 A. 663; Perkins v. Inhabitants of Oxford, 1877, 66 Me. 545; Prouty v. City of Chicago, 1911, 250 Ill. 222, 95 N.E. 147; Devine v. City of Chicago, 1911, 166 Ill.App. 17.

[2] Respondents urge that the language "person * * * injured" includes injury resulting from the wrongful death of another, and that this view is supported by the interpretations, expressed or assumed, of similar language in related statutes, in decisions of the courts of this state. In this connection, it is said that the various statutes [1] on the subject of the liability of cities, public agencies, and their officers, and the filing of claims therefor, "must all be read together and so construed, the liability of a city or its agents must be determined and the procedure therein set forth must be followed." Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623, 624. See also Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.2d 835; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Ansell v. City of San Diego, 35 Cal.2d 76, 216 P.2d 455; Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226; Tyree v. City of Los Angeles, 92 Cal.App.2d 182, 206 P.2d 912.

Section 53051 of the Government Code (formerly Stats.1923, p. 675) provides that counties, municipalities and school districts shall be "liable for injuries to persons and property * * *." In Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d

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[1] Act of 1923 (Stats.1923, p. 675), making cities and other public agencies liable for negligence in certain instances. Now substantially incorporated in section 53051, Government Code.

Act of 1911 (Stats.1919, p. 756), relating to liability of officers of cities and other public agencies. Now incorporated in section 1953, Government Code.

Act of 1931 (Stats.1931, p. 2475), requiring filing of claims with clerk of the legislative body of a city or public agency. Now section 53052, Government Code.

113, 119 it was expressly held that "injuries to persons" referred to in the statute, include such injuries as may be caused to persons by reason of the death of others. Further it is pointed out by respondents, in such cases as Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, and Spencer v. City of Calipatria, 9 Cal.App. 2d 267, 49 P.2d 320, it was held that a recovery could not be had under the provisions of section 53051 of the Government Code unless a claim is filed as required by section 53052 of the same code, which latter section provides (as does section 1981), "When it is claimed that a person has been injured * * * a * * * claim for damages shall be filed * * *." However, no case has been found in which it has been squarely held that a claim must be filed under section 53052 in a death action arising under section 53051. Respondents urge that since these pertinent statutes (secs. 1981, 1953, 53051 and 53052, Govt. Code) were re-enacted as part of the Government Code after the decision in Arellano v. City of Burbank, supra, it must be presumed that the Legislature intended them to apply to death cases.

The cases of Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048, and Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.2d 835, are of no particular assistance in the solution of the question here presented. The former case involved section 4075 of the Political Code, which required that "all claims" against a county should be presented as therein provided, while in the latter case the court was concerned with whether the plaintiff had proved the elements of liability required under the statute then in force (Stats. 1919, p. 756; Deering's Gen.Laws, Act No. 5618). The same is true with reference to cases involving wrongful death actions against the City of Los Angeles, Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993, 997; Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918, as these cases involved a charter provision that "No suit shall be brought upon *any* claim * * * until a demand for the same has been presented * * *."

Thus, while a statute imposing liability for "injuries to persons" has been construed to include liability for wrongful death, Arellano v. City of Burbank, supra, and cases cited, and while it has been sometimes assumed that a statute requiring the filing of a claim as a prerequisite to suit includes a suit for wrongful death, in no case has it been held that the provisions of section 1981, requiring the filing of a claim "Whenever it is claimed that *any person has been injured* * * * within 90 days after the accident has occurred" apply to a wrongful death situation. Nor does it necessarily follow that because the phrase "injuries to persons" as used in a statute imposing liability has been construed to include wrongful death, that the language of section 1981 should be construed to require the filing of a claim as a prerequisite to the maintenance of an action for wrongful death.

[3, 4] It is manifest from the plain wording of section 1981 that it was the intention of the Legislature to qualify the common law right of action against the negligent person by requiring the filing of a verified claim only in the event the *injured person* claims that he has been injured as a result of the negligence of a public employee occurring during the course of the latter's public employment. Had it been the intention of the Legislature to extend the provisions of this section to another, new and different cause of action which comes into existence at the time of death of the injured person, appropriate language could, and no doubt would, have been used. Courts should not, under the guise of judicial interpretation, attempt to add to or detract from the legislative intent as expressed in the words of a statute. This is especially true when, as the Supreme Court said in the recent case of Stewart v. McCollister, 37 Cal.2d 203, 231 P.2d 48, 50, "The several claims statutes and charter provisions prescribing varying requirements concerning the length of time for the filing of verified claims, the contents thereof, and the manner of filing or presentation may well be said to have become traps for the unwary.

No additional trap should be added by an unwarranted construction of said section 1981." We are unwilling to give our imprimatur to a strained construction of the section by applying it to a cause of action which, from a reading of the section's terms, is not included within its purview.

In view of the foregoing conclusion at which we have arrived, we deem it unnecessary to discuss or decide other points made and issues raised upon this appeal.

The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer and try the cause upon the merits.

DORAN and DRAPEAU, JJ., concur.

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105 Cal.App.2d 465

SORRELS v. SORRELS.

Civ. 18147.

District Court of Appeal, Second District, Division 3, California.

July 16, 1951.

Rehearing Denied Aug. 2, 1951.

Hearing Denied Sept. 13, 1951.

Carl W. Sorrels filed an affidavit seeking modification of a divorce decree awarding Marvel M. Sorrels custody of the child of the parties. The Superior Court, Los Angeles County, Walter S. Gates, J., entered an order modifying the decree by changing the custody of the minor child from the mother to the father and an order denying the wife's motion for attorney's fees and costs on appeal from the modification order, and the wife appealed. The District Court of Appeal, Vallée, J., held that the evidence would not sustain the trial court's finding that mother was not a fit and proper person to have custody of the child and held that it had been an abuse of the trial court's discretion to refuse to make the wife a reasonable allowance to prosecute the appeal.

Orders reversed with directions.

1. Parent and child 🔑2(3, 3.2)

Under statute providing that "other things" being equal, if child is of tender years, it should be given to mother, "other things" that are to be weighed and considered are good home, congenial surroundings, intelligent attention and direction in matters affecting health, growth and development of children; and court has broad discretion in determining whether such advantages are offered by respective parents and whether they are equal, but if evidence clearly establishes that children will have equal advantages in home of mother and that mother has demonstrated her ability and willingness to perform her maternal duties properly, law requires that young children be placed with her. Civ. Code, § 138(2).

2. Infants 🔑19

The courts are reluctant to order change of custody and will not do so except for imperative reasons, since it is desirable that there be an end to litigation and undesirable to change the child's established mode of living, and ordinarily change will not be ordered for alleged unfitness of one having custody without showing that welfare of child clearly requires it, but paramount consideration is welfare and best interest of child. Civ. Code, § 138(2).

3. Divorce 🔑303(3)

In proceeding upon husband's application for modification of divorce decree insofar as it related to custody of child, evidence would not sustain trial court's finding that child's mother was no longer a fit and proper person to have custody of child, and therefore trial court abused its discretion, in view of age of child, in modifying the provisions of decree awarding custody to mother. Civ. Code, § 138(2).

4. Parent and child 🔑2(3.3)

In determining fitness of parent to have custody of child, his or her fitness at time of hearing as it relates to welfare of child is controlling.

5. Divorce 🔑312.6(3)

On appeal by wife from order modifying divorce decree by changing custody of minor child from mother to father, where there was conflict in evidence as to whether wife had admitted to her husband that she had spent night with another man, husband's testimony would have to be accepted by reviewing court.

6. Divorce ⚷303(2)

A custody proceeding is not one to discipline one parent for such parent's shortcomings as individual, nor to reward other for any wrong suffered therefrom, and acts and conducts of one of parties to divorce which give offense to other, or even to public at large, are not matters that call for or permit change of custody unless such acts and conduct are shown to affect directly welfare and best interests of child, and therefore, where court has decreed custody to one parent, such parent may not be deprived of custody for any supposed unfitness, unless it be shown that he or she is so unfit as to endanger the child's welfare. Civ. Code, § 138(2).

7. Divorce ⚷312.4

In proceeding upon wife's motion for allowance of attorney's fees and costs on appeal from order modifying divorce decree by changing custody of minor child from wife to husband, where it appeared that appeal was meritorious and taken in good faith, and evidence on hearing of motion showed that wife did not have funds necessary to prosecute appeal or pay attorney's fees and that husband was in position financially to pay reasonable sum therefor, refusal to make wife reasonable allowance to prosecute appeal was abuse of discretion.

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Walker W. Downs, La Verne, for appellant.

Carter, Young, Zetterberg & Henrie, Pomona, Richard T. Young, Pomona, for respondent.

VALLEE, Justice.

Appeals by plaintiff-wife from 1) an order modifying interlocutory and final decrees of divorce by changing the custody of the minor son of the parties, aged three, from the mother to the father, and 2) an order denying her motion for attorney's fees and costs on appeal from the foregoing order.

The parties married April 5, 1946, and separated April 19, 1948. On the latter date they entered into a property settlement agreement, wherein they agreed it was "to the best interest" of the minor child, then one year of age, that the wife should have his full custody and control, the husband to pay $50 a month for his support, as well as medical and dental expenses, and to have the right of reasonable visitation. Plaintiff filed an action for divorce on April 22, 1948, on the ground of cruelty, in which it was alleged that the custody and control of the child was then in the plaintiff "who is a fit and proper person to have and be awarded the custody of said child." The husband defaulted, and on June 22, 1948, an interlocutory decree was granted plaintiff, the custody of the child awarded to her, and defendant ordered to pay $50 a month for his support, and his medical and dental expenses. The final decree, entered June 30, 1949, incorporated the provisions of the interlocutory decree respecting the custody and support of the child.

On February 3, 1950, defendant filed an affidavit seeking modification of the decrees as to custody of the child on the ground that plaintiff was unfit to have custody, that conditions had changed since the order was made, and that a change would be for the best interest of the child. The matter was contested. The court found that plaintiff was not, and defendant was, a fit and proper person to have custody of the child, and that it was for the best interest and welfare of the child that his custody be awarded to defendant. Plaintiff was given permission to visit the child at San Jacinto, California, each Saturday, from noon to 5 o'clock "provided however, that said child shall not be taken from San Jacinto." Plaintiff was also given the right to have the child visit her at her home in Los Angeles for two weeks during the Christmas vacation. The interlocutory and final decrees were thereupon modified and defendant relieved from further support payments for the child.

Plaintiff contends that the evidence is insufficient to show 1) that she is not a fit and proper person to have custody of the child, 2) a change of conditions justifying a change of custody, and 3) that the welfare of the child required a change of custody. Her contentions are well taken.

[1, 2] As between parents adversely claiming the custody of a minor child "neither * * * is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother". Civ. Code, § 138 (2). "The 'other things' that are to be weighed and considered are a good home, congenial surroundings, intelligent attention and direction in matters affecting the health, growth and development of the children—these are the principal advantages that must be looked for. The court has a broad discretion in determining whether such advantages are offered by the respective parents, and whether they are equal, but if the evidence clearly establishes that the children will have equal advantages in the home of the mother and that the mother has demonstrated her ability and willingness to perform her maternal duties properly, the law requires that young children be placed with her." Bemis v. Bemis, 89 Cal.App. 2d 80, 83, 200 P. 2d 84, 86. Generally, "until some change of circumstance arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will refuse to make any modification of such order." Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719, 722; Johnson v. Johnson, 72 Cal.App. 2d 721, 723, 165 P.2d 552. It is well established that "the courts are reluctant to order a change of custody and will not do so except for imperative reasons; that it is desirable that there be an end to litigation and undesirable to change the child's established mode of living; that ordinarily a change will not be ordered for alleged unfitness of the one having custody without a showing that the welfare of the child clearly requires it. See Washburn v. Washburn, 49 Cal.App. 2d 581–587, 122 P.2d 96." Bemis v. Bemis, supra, 89 Cal. App. 2d 80, 90, 200 P.2d 84, 91. The paramount consideration is, however, the welfare and best interest of the child.

[3] The evidence reveals that both parents have great affection for the child and he for them; and that at the time of the hearing both parents were able to offer the child a good home, a yard to play in, their own personal care, love, and attention during the day as well as night, and the love and affection of those strangers with whom the child would come in daily contact, namely, the stepfather if the child were permitted to remain in the custody of his mother, or defendant's uncle and aunt in the event custody was awarded to the father. We think it clear that the advantages which the child would receive in the home of his mother were equal to those of the father, and in view of the child's tender years—three—his custody should be with his mother unless it has been shown that she is no longer a fit and proper person to have such custody. We are unable to find any substantial evidence supporting the court's finding of unfitness.

[4] In determining the fitness of a parent to have the custody of a child, his or her fitness at the time of the hearing is controlling. Prouty v. Prouty, 16 Cal.2d 190, 194, 105 P.2d 295, as it relates to the welfare of the child.

[5] Two incidents which occurred some eight months prior to the date of the hearing, and during a brief six-week period in which the parties attempted a reconciliation after the interlocutory decree, were relied upon by defendant as evidence of plaintiff's unfitness. No evidence was offered with respect to plaintiff's personal acts or conduct during any other period from the date of the interlocutory decree to the date of the hearing. Plaintiff was away from the home of the parties at the time the two incidents occurred. On both of these occasions she had left the child at home in the care of a responsible person—with defendant on one occasion, and with a competent baby sitter on the other. Mrs. Owens, a witness for defendant, testified that on the night defendant was home caring for the child, plaintiff appeared at a country club where she, Mrs. Owens, was working as a hat check girl and "spent most of the time talking with me." Plaintiff then went to

the bar, where she met two boys. They asked Mrs. Owens to go with them to Crestline. Mrs. Owens testified: "I didn't particularly want to. So while I was making up my mind, I drove my car to Pomona and they got in Marvel's [plaintiff's] car * * * and drove along beside me. And when we got to Pomona, I just went on home, and the last I saw they were parked on Fifth Avenue." There is nothing in this testimony which indicates that on this occasion plaintiff did not conduct herself in other than a fit and proper manner. Plaintiff explained that the two boys were classmates of hers; one of them wanted a ride into town; she took him, and immediately went home. The explanation was a reasonable one, and not controverted. The second incident occurred while defendant was away on an overnight fishing trip with several men, including Mrs. Owens' husband. Mrs. Owens testified that she and plaintiff decided they, too, would go out in the evening and that plaintiff would stay overnight with her. Plaintiff's child and the nine-year-old daughter of Mrs. Owens were left in charge of the same baby sitter. The two women drove to a bar in Maywood and while there met Leonard Drumm and another man. Plaintiff had known Leonard Drumm, who is now her husband, and had gone out with him after the interlocutory decree. He drove the four of them to his apartment for a drink and to listen to the radio. His apartment consisted of one room and a kitchen. The room had only a davenport and a bed in it. There were no chairs. Mrs. Owens and the other man sat on the davenport. There is a conflict as to whether plaintiff and Drumm sat down or "laid" down on the bed while in the presence of the other two. In either event, Mrs. Owens did not testify that they conducted themselves improperly. Mrs. Owens then wanted to go home, and Drumm drove the four of them back to where her car and the other man's car were parked, and Mrs. Owens drove home alone. Drumm testified that he and plaintiff then drove to the beach for awhile, and later he took her to her aunt's home in Maywood where she stayed overnight. Both Drumm and plaintiff testified that he picked her up the next morning and drove her back to Mrs. Owens' home. Plaintiff asked Mrs. Owens not to tell defendant where she had been but to say she had been with her. Defendant testified that Mrs. Owens informed him of this incident shortly after it happened and that plaintiff also admitted to him that she had stayed all night with Drumm. This was in direct conflict with the testimony offered by plaintiff and Drumm that plaintiff had stayed overnight with her aunt. Accepting defendant's testimony, as we must in view of the conflict, defendant did not consider that her conduct rendered her unfit as a mother, for he testified that he "was willing to overlook it if we could keep right on going and making a go of it."

[6] Whatever may be said of plaintiff's conduct, there is no showing that plaintiff neglected any of her maternal duties toward the child at either of these times or at any other time. "[A]cts and conduct of one of the parties to the divorce which give offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody unless such acts and conduct are shown to affect directly the welfare and best interest of the child. Where a court has decreed custody to one parent, such parent may not be deprived of the custody for any supposed unfitness unless it be shown that he or she is so unfit as to endanger the child's welfare. A custody proceeding is not one to discipline one parent for such parent's shortcomings as an *individual*, nor to reward the other for any wrong suffered therefrom." Washburn v. Washburn, 49 Cal.App.2d 581, 587–588, 122 P.2d 96, 100. As we have said, the child was not left alone on either of these two occasions. She was left in competent care. There is evidence which unequivocally shows that plaintiff was a fit mother. Mrs. Owens, defendant's witness, testified as follows:

"Q. To your knowledge was Van ever left alone on any occasion? A. I don't think he was.

"Q. Have you observed the conduct of Mrs. Sorrels toward Van? A. Yes, sir, she seemed to love her child.

"Q. Did she always show the child a lot of attention? A. As much as a mother is supposed to, I guess, like any mother does.

"Q. Did she keep the child clean. A. Yes, sir.

"Q. Did she feed the child regularly? A. As far as I know.

"Q. In all respects, did she care for the child as well as you cared for yours? A. Yes, sir."

Defendant was asked by his attorney to state what plaintiff did, or failed to do, in taking care of the child, during the attempted reconciliation period, and answered: "She took good care of the child when she was home, but she wasn't home much." Plaintiff's attorney questioned defendant as follows:

"Q. Have you at any time seen Mrs. Sorrels abuse the child? A. No, because when I would go after the baby, she wouldn't be there.

"Q. When she was home, insofar as you could observe, did she feed the child when he should be fed? A. Yes, she has always fed the child when he should be fed.

"Q. Did she keep the child clean? A. Yes.

"Q. She was a good mother in all respects, except at the time she wasn't at home; is that correct? A. She was a good mother, except she wouldn't keep the baby with her."

The statement that plaintiff "wasn't home much" had reference to the six-week period of the attempted reconciliation. During the first two weeks of this period plaintiff stayed at home and took care of the baby; but because of an indebtedness of about $700, incurred as a result of a major operation she had had after the separation, she felt compelled to go to work to pay her debts. Her first job was as a waitress, working from 6 p. m. until midnight. Defendant objected to this job and plaintiff quit after about a week or a week and a half. Defendant testified he then told plaintiff that "*if you had to work, I would try to get her a job some place else.* So she went to work at Whalen's Drug Store in the day time, and had a friend of ours come over and get the baby in the morning and take care of him. And I would get off work at 4:00 o'clock and pick the baby up and take him home and give him his supper and get her at 7:00." Both parties continued to work until the time the reconciliation failed, some four weeks later.

A month after the interlocutory decree plaintiff placed the child in the care of a Mr. and Mrs. Stanton who had two children of their own. The Stantons had been recommended to plaintiff by the wife of the minister of the First Christian Church of Bell. The child remained with the Stantons for approximately a year and a half—from about June, 1948, to February 11, 1950—not including the six-week period he was with his own parents. It was conceded that he received the very best of care while with the Stantons. Defendant testified they were "a fine couple" and "[t]hey have given him the best care two people can give a baby. * * * They have done everything they could, except they are not the mother and father of the baby."

It seems to be defendant's contention that because plaintiff boarded the child out full time, and did not do so under a day-nursery plan whereby she could have the child with her nights, she was neglectful in her maternal duties and thus unfit to have the child's custody. Defendant admitted that plaintiff was compelled to support herself after the divorce. The property settlement agreement made no provision for alimony other than the sum of $50 for plaintiff's "support during the time that she is obtaining employment." No alimony was asked for in the divorce action and none was awarded. Economic necessity compelled plaintiff to work. Having no other place to keep the child, she did what she considered best under the circumstances,—placed him in the care of persons who had been recommended to her by her minister's wife, and rented a room for herself. Plaintiff did what any other working mother would have done under similar circumstances. The fact that a divorced working mother is impelled by circumstances to relinquish the physical care of her child when boarding him, is not, in itself, indicative of a relinquishment of her power and duty of supervision over her child. There was no showing here that plaintiff surrendered anything other than the physical care of the child when she left him with the Stantons. The evidence shows she visited the child every day when her work permitted, and when it did not, she visited him two or three times a week and had him with her on alternate Sundays (defendant had him the other Sundays); she lavished love and affection upon him; was concerned over his welfare and health; saw to it that he was regularly taken, either by herself or her mother, or by Mrs. Stanton, to the pediatrician who had attended him since birth; saw to it that he received all of the recommended immunizations and vaccinations; and, perhaps most important, was exceedingly careful in her selection of the persons in whose care she was entrusting the physical care of her child.

As further illustrative of plaintiff's unwillingness to assume and perform her proper maternal duties, defendant argues that plaintiff permitted the child to remain with the Stantons for a period of a little over two months following her remarriage. Plaintiff testified that she had continued working after her marriage in order to "clear up" about $200 of the bills she had incurred as a result of her operation, that she did not feel that her new husband "should pay for them. They were mine. I had them before I met him." Under the circumstances this fact does not show neglect of the child. At the time of the hearing plaintiff was no longer working, the child was living with his mother and stepfather, and she was devoting her full time and attention to his care.

Defendant admitted that during the reconciliation period he slapped plaintiff while she had the child in her arms. He admitted he had been drunk a couple of times. He testified: "I have a bottle of beer once in awhile, and I have been drunk a couple of times. I have never been drunk enough that I couldn't walk. I don't mean drunk,—I have had a few drinks where I feel happy, and so does everybody else."

Considering the age of the child and the record, we are of the opinion it was an abuse of discretion to modify the custody provisions of the decrees. See Bemis v. Bemis, 89 Cal.App.2d 80, 200 P.2d 84; Juri v. Juri, 69 Cal.App.2d 773, 160 P.2d 73; Moon v. Moon, 62 Cal.App.2d 185, 144 P.2d 596; Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96.

[7] Plaintiff also appealed from an order denying her motion for allowance of attorney's fees and costs on the appeal from the order modifying the decrees. The court erred in denying plaintiff's motion. From what has been said, it appears that the appeal was meritorious and taken in good faith. The evidence on the hearing of the motion showed that plaintiff did not have the funds necessary to prosecute the appeal or to pay attorney's fees, and that defendant was in a position financially to pay a reasonable sum therefor. It is plain that the refusal to make plaintiff a reasonable allowance to prosecute the appeal was an abuse of discretion. Kyne v. Kyne, 74 Cal.App.2d 563, 568–569, 169 P.2d 272; Norris v. Norris, 50 Cal.App.2d 726, 735, 123 P.2d 847; Coleman v. Coleman, 23 Cal.App. 423, 426, 138 P. 362.

The order modifying the interlocutory and final decrees of divorce is reversed. The order denying plaintiff's motion for costs and attorney's fees on appeal is reversed with directions to allow plaintiff a reasonable sum therefor.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

105 Cal.App.2d 645

SCHAEFER v. KERBER et al.

Civ. 18043.

District Court of Appeal, Second District,
Division 1, California.
July 26, 1951.

Hearing Denied Sept. 20, 1951.

Action by Paula Schaefer against Nathan Kerber, and another, to recover damages for alleged injury. The Superior Court of Los Angeles, Wm. B. McKesson, J., dismissed the action on the motion of defendants, and the plaintiff appealed. The District Court of Appeal, Second Appellate District, Doran, J., held that plaintiff's complaint raised the issue as to whether defendant insurance company intentionally prevented plaintiff from filing lawsuit until after statute of limitations had run.

Order of dismissal reversed.

1. Limitation of actions ⚿13

A person, by his conduct, may be estopped to rely upon defense of the statute of limitations, and where the delay in commencing the action is induced by the conduct of the defendant, it cannot be availed of by him as a defense.

2. Limitation of actions ⚿185½

In considering ruling on defendants' demurrer, allegations in plaintiff's complaint that insurance company intentionally and purposely delayed progress of action, so that defendants were thus estopped to set up the statute of limitations, must be accepted as true. Code Civ.Proc. § 340.

3. Limitation of actions ⚿179(1)

Where complaint alleged that insurance company caused plaintiff to believe that only question in dispute was amount of claim, and failed to notify her of disposition of her claim, it raised the issue as to whether the insurance company intentionally delayed progress of transaction, preventing plaintiff from filing lawsuit until after the statute of limitations had run, and demurrer to complaint was improperly sustained.

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Chas. A. Son, Joseph D. Taylor, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the order of dismissal.

In this action for damages the demurrer to the amended complaint was sustained with 10 days to amend. No amended complaint was filed and about three months later the action was dismissed on motion of defendant.

It appears from the record that the alleged injury occurred on May 8, 1948 and the action was filed June 17, 1949. It is alleged that the conduct of the insurance company, acting as defendants' agent, tolled the statute of limitations, Code Civ.Proc. § 340. In that connection the complaint in substance alleges, as recited in appellant's brief, "that in February or March, 1949, the defendant's insurance company requested the plaintiff to submit to a physical examination by its doctor and the plaintiff did so submit to an examination; (2) that prior to March 1, 1949, the defendant's insurance company informed the plaintiff that it was necessary to secure the approval of the home office before the claim could be settled, and thereby caused the plaintiff to believe that the only question in dispute was the amount of the claim; (3) that prior to May 8, 1949, the company discussed with the plaintiff only questions concerning the extent of her injuries, the amount of her claim and did not advise the plaintiff that any doubt existed as to legal liability; (4) that on or about March 1, 1949, the company told the plaintiff that she would be informed as to the company's disposition of her claim; (5) that the company knew the plaintiff had employed no attorney and was endeavoring to negotiate a settlement without an attorney; (6) that plaintiff did not know her claim for personal injuries was barred in a year; (7) that between March 1, 1949, and May 8, 1949, the plaintiff endeavored to communicate with the company to ascertain whether the company would pay her claim; (8) that relying on the insurance company, the plaintiff did not seek legal advice; (9) that the company did not inform the plaintiff of the disposition of her claim until or about May 16, 1949, at which time the company advised the plaintiff that it recognized no liability and the claim was outlawed". It is also alleged "that the purpose of said company, acting as defendant's agent, in failing to notify plaintiff of the disposition of her claim and in representing to the plaintiff that the only question involved was a question of the extent of her injury and the amount which the company would pay on said claim was to prevent the plaintiff from filing a lawsuit until after the statute of limitations had run so that the claim would be outlawed. That by reason of the conduct of the agent duly authorized by the defendants to act on behalf of the defendants as herein set forth, said defendants are estopped to set up the statute of limitations".

Respondent contends that "The fact that the plaintiff may not have known that her claim for personal injuries was barred by the statute of limitations one year after the accident, cannot excuse her filing said action after the year had elapsed", and that "There is no allegation in the complaint that the insurance company had knowledge of plaintiff's ignorance of the statute of limitations, or that the insurance company in any way attempted to mislead her or deceive her as to the running of the statute of limitations". It is also argued that there was no duty on the part of the insurance company to advise plaintiff and in substance that no fraud is involved.

[1] The situation here presented is somewhat similar to that presented in Carruth v. Fritch, 36 Cal.2d 426, 224 P.2d 702. There at page 429 of 36 Cal.2d, at page 704 of 224 P.2d, the opinion recites: "In considering the ruling upon the demurrer, the allegations of the complaint must be accepted as true. The question, therefore, is whether, under the facts pleaded by Miss Carruth, the statute of limitation has been tolled and the action may be maintained to recover for the injuries claimed to have been received". And in Berkey v. Halm, Cal.App., 224 P.2d 885, at page 889, appears the following: "It is well settled that a person, by his conduct, may be estopped to rely upon the defense of the statute of limitations; and where the delay in commencing action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. (Citing cases.)"

[2, 3] In the within action the complaint raises the issue as to whether respondent insurance company intentionally and purposely delayed the progress of the transaction. And as above noted in considering the ruling on the demurrer the allegations must be accepted as true.

The order of dismissal is therefore reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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105 Cal.App.2d 602

DALE v. CITY COURT OF CITY OF MERCED.

Civ. 8005.

District Court of Appeal, Third District, California.
July 24, 1951.

Hearing Denied Sept. 20, 1951.

Proceeding by Toni Dale against the City Court of the City of Merced, County of Merced, for a writ of prohibition to restrain defendant from any further proceedings in an action against petitioner. The District Court of Appeal, Third District, Van Dyke, J., held that in a misdemeanor case before an inferior court a defendant's counsel could, in the absence of the defendant, plead either guilty or not guilty, or make any other authorized plea.

Writ discharged.

1. Criminal law 🔑252(5), 268

The legislature has drawn a definite line of demarcation between the matter of pleas before the superior courts in felony cases, providing that such pleas must be put in by defendant himself in open court, and the matter of pleas in inferior courts in misdemeanor cases, providing that such pleas can be made by defendant or his counsel. Pen.Code, §§ 1018, 1429.

2. Criminal law ⚷252(5)

In misdemeanor cases before inferior courts of the city court class, a defendant's counsel may in the absence of the defendant plead him either guilty or not guilty or make any other authorized plea. Pen.Code, § 1429.

3. Criminal law ⚷252(5)

Where petitioner entered her pleas of not guilty to four charges in city court personally, instead of through her counsel, she did not thereby limit his authority to subsequently withdraw such pleas and plead her guilty to any of the charges, and he had the same authority thereafter as he would have had if he had entered the not guilty pleas for her in the first instance. Pen.Code, § 1429.

4. Jury ⚷29(4)

As the constitutional guarantee of right to trial by jury has no application where there are no issues to be tried, petitioner's argument that when her attorney changed her personal pleas of not guilty to pleas of guilty it amounted to a waiver of her rights in violation of the Constitution, was unsound. Const. art. 1, § 7; Pen.Code, § 1429.

5. Judgment ⚷648

Where city court granted petitioner, upon application of her counsel, permission to withdraw her personal pleas of not guilty, and accepted her guilty pleas through her counsel, and subsequent order denying motion to set aside pleas of guilty because counsel acted without authority was affirmed by Superior Court, the question whether counsel acted without authority was finally determined by city court and on appeal to Superior Court, and was res judicata in subsequent proceeding for writ of prohibition. Pen.Code, § 1429.

6. Criminal law ⚷997, 1023(12)

Petitioner's motion in city court to withdraw pleas of guilty and enter in lieu thereof pleas of not guilty, was in the nature of a petition for a writ of error coram nobis, and within jurisdiction of city court to decide, and order denying such motion was appealable to Superior Court. Pen.Code, § 1429.

7. Attorney and client ⚷70

An attorney acting and appearing for a party is presumed to have authority to take action in all procedural matters involved in the proceeding in which he represents his client, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence.

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Kenneth C. Zwerin, San Francisco, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Petitioner herein seeks a writ of prohibition to restrain the respondent City Court of Merced from any further proceedings in the matter of People v. Toni Dale. It is alleged that complaints were filed in the respondent court charging petitioner with four separate crimes, two of them charging violation of Subdivision 4 of Section 51 of the California Alcoholic Beverage Control Act, Gen.Laws, Act 3796, and of Section 315 of the Penal Code. Both offenses are misdemeanors. It is further alleged that on September 7, 1950, after these charges were made, petitioner, accompanied by her attorney, was arraigned upon all four charges and personally entered her plea of not guilty to each, and as to each requested a jury trial; that on October 23rd following, petitioner's attorney appeared before the respondent court in the absence of petitioner and stated that she desired leave to change her pleas. Upon his motion this leave was granted. He thereupon, as petitioner's counsel, entered pleas of guilty to the two charges respecting the Beverage Control Act and Penal Code Section 315, and upon motion of the prosecuting attorney the remaining charges were dismissed. Petitioner's counsel then waived time for pronouncing judgment and sentence upon the pleas of guilty and thereupon the respondent court pronounced judgment as follows: That petitioner for violation of Section 315 of the Penal Code pay a fine of $500 and serve sixty days in the county jail; that for violation of the Beverage Control Act she pay a fine of $150.

Petitioner alleges that she did not know that her attorney was intending to ask permission of the court to withdraw her former pleas nor of his intention, if such permission be granted, to plead her guilty to any of the charges; and that she did not authorize him to do so. Her position is that for want of authority the withdrawal of her pleas and the entering of the guilty pleas were void acts; that as a result thereof the records of the court purporting to show that she was convicted and sentenced must be held for naught. Petitioner makes it further to appear, and upon this there is no dispute, that on November 1, 1950, she moved the respondent court to set aside the pleas of guilty and that her motion was denied; that thereafter she appealed from that order of denial to the Superior Court in Merced County and that the Superior Court affirmed the order and thereafter denied her petition for rehearing; that remittitur has issued from the Superior Court to the respondent court, which, purporting to act pursuant to its judgments and sentences, has issued its bench warrant and directed that she be taken into custody.

Respondent first contends that prohibition does not lie in this matter because the issuance of the writ would be merely to stay the enforcing of the bench warrant which is in effect the stay of a ministerial act. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. However, we prefer to pass upon the merits of the petition, for if in truth by the proceedings complained of the respondent court wrongfully deprived petitioner of her right to a trial upon the charges made against her and of a right to have those charges tried to a jury, then denial of prohibition upon the technical ground as urged would but result in delay while petitioner submitted herself to restraint under the judgments and sentences claimed to be void and then applied to this or another court for a writ of habeas corpus to test the legality of her confinement. If, however, the actions of respondent court here assailed were done under warrant of law then it may as well be so here declared.

In the case of In re Casas, 9 Cal.App.2d 122, 48 P.2d 990, 991, the following language upon the subject of pleas in justices' courts and courts of like jurisdiction appears:

"They maintain that a plea of guilty cannot be entered by an attorney but must be entered by a defendant in person. In support of this contention they cite sections 977 and 1018 of the Penal Code and In re Brain, 70 Cal.App. 334, 233 P. 390.

"Those two sections of the Penal Code are found in the chapters dealing with criminal procedure in superior courts and relate to that subject only and not to justices' courts. People v. Aymar, 98 Cal.App. 1, 276 P. 595. The manner of entering a plea in a criminal case in a justice's court is set forth in section 1429 of the Penal Code. That section, unlike section 1018 of the Penal Code, does not contain the provision that the plea of guilty can be entered by the defendant only. Section 1434 of the Penal Code provides that the defendant must be present before the trial can proceed. Section 1451 of the same Code contains the provision that a new trial in a justice's court may be granted 'when the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had.' Thus it would seem that it is only during the trial in a justice's court that the defendant should be personally present and that his absence from the trial is not always a ground for a reversal of the judgment. It is our conclusion that in a criminal case in a justice's court a defendant need not personally enter the plea of guilty, but that his attorney may enter it for him."

In 22 Corpus Juris Secundum, Criminal Law, § 415, page 635, we find the following:

"At common law accused was required to plead in person; and an applicable statute requiring him to do so is mandatory. Certainly, it is without the power and authority of the court to enter a plea for accused when he is absent and not represented by an attorney. However, according to a distinction frequently made, in felony cases accused must appear and plead in person, while in misdemeanor cases this properly may be done by an attorney in his absence."

In 14 American Jurisprudence, page 944, Section 259, it is stated: "There is no objection to pleading by attorney to a charge of misdemeanor, at least where the defendant has authorized it. This seems to be the rule even though the defendant is absent when the plea is made by counsel."

[1, 2] We think it significant that Section 1018 of the Penal Code, dealing with pleas in felony cases before the superior courts, provides that such pleas must be put in by defendant himself in open court, whereas Section 1429 regarding pleas in misdemeanor cases provides that pleas to such charges can be made by the defendant or by his counsel. The legislature itself has thus drawn a definite line of demarcation between the matter of pleas before the superior courts in felony cases and the matter of pleas in inferior courts in misdemeanor cases. We conclude that in misdemeanor cases before inferior courts of the class of respondent court that a defendant's counsel may in the absence of the defendant plead him either guilty or not guilty or make any other plea authorized by the statutes.

[3] By retaining counsel to represent her in the matter of these charges petitioner authorized him to take any step coming within the scope of his agency. When the petitioner here as defendant in the respondent court personally entered her pleas of not guilty to the charges against her she placed herself in no different position from the one she would have been in had her attorney entered her pleas in her absence. Had he in her absence entered pleas of not guilty he would also have had authority to change those pleas upon receiving the court's permission to withdraw the former pleas. We think that when petitioner entered her pleas personally instead of through her counsel she did not thereby limit his authority to act thereafter in the way he did; and that, notwithstanding her personal pleas, he had the same authority thereafter upon leave of court to change her pleas as he would have had had he in the first instance entered the not guilty pleas for her.

Petitioner argues that when she personally plead not guilty to the charges against her and demanded a jury trial as to each that she thereby created a status such that the acts of her counsel in changing her pleas thereafter amounted to a waiver of her right to trial by a jury in violation of the provisions of the Constitution contained in Article I, Section 7 thereof. It is therein provided that: "The right of trial by jury shall be secured to all, and remain inviolate; * * *. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel".

[4] We think the argument unsound. The constitutional guarantee has to do with the trial of issues that are made by the pleadings and if the pleadings are such that no issue is to be tried, as in the case of a plea of guilty, then the guarantee has no application, for there are no issues and there can be no trial. There is, therefore, no occasion that the constitutional provisions as to the manner in which a jury trial may be waived be adhered to. In a certain sense, of course, a defendant who pleads guilty in a criminal case waives trial by jury in that he waives all trial and makes no issue. But the Constitution does not speak of such a waiver. On the contrary, it speaks of the trial of issues made by the pleadings, and assumes there are such. See In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12.

[5, 6] Although it appears from the record, as we have stated, that the respondent court acted pursuant to law in first granting to petitioner, upon application of her counsel, permission to withdraw her pleas of not guilty and in there-

after accepting her guilty pleas through her counsel, nevertheless the question of whether or not the counsel acted without authority in fact is presented by her pleading here. But that issue of fact has already been determined, as likewise appears from her petition, and is now res judicata. Her motion made in respondent court for leave to withdraw her pleas of guilty and to enter in lieu thereof pleas of not guilty was in the nature of a petition for a writ of error coram nobis. It was within the jurisdiction of the respondent court to entertain and decide. Also the order denying such motion was an appealable order and the superior court had jurisdiction to reverse, affirm or modify the order appealed from. People v. Superior Court, 28 Cal.App.2d 442, 82 P.2d 718.

[7] It appears without dispute from the record here that the factual issue involved was by the respondent court decided adversely to petitioner and it further appears that it was so determined upon conflicting evidence. The affidavit of petitioner and the affidavit of her counsel in support of her motion in respondent court was opposed factually by the presumption that her attorney acted within his authority; for an attorney acting and appearing for a party is presumed to have authority to take action in all procedural matters involved in the proceeding in which he represents his client. "The rule, founded in reason and sanctioned by the authorities, is that it is presumed that an attorney appearing and acting for a party to a cause has authority to do so and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence." People v. Western Meat Co., 13 Cal.App. 539, 545, 110 P. 338, 340.

Upon the factual conflict presented to it the respondent court made its determination. An appeal was taken to the superior court and that court affirmed the trial court's decision.

It therefore appears that as to the issue of fact which the petitioner seeks to present here the proceedings taken in the respondent court and the proceedings on appeal in the superior court have finally determined the same.

The writ is discharged.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.

105 Cal.App.2d 626

WIEBER v. WORTON et al.

Civ. 18367.

District Court of Appeal, Second District,
Division 2, California.

July 25, 1951.

Hearing Denied Sept. 20, 1951.

Action by Emil Wieber against W. A. Worton, and others, for declaratory relief as to whether plaintiff had right to have defendants answer certain questions which had been asked of defendants in depositions being taken in prior action. The Superior Court of Los Angeles County, Arnold Praeger, J., sustained general demurrers of defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that in view of fact that plaintiff had remedy by application to trial court in such prior actions for order requiring witnesses to answer questions, with punishment for contempt for refusal to answer after determination that questions should be answered, it was not abuse of discretion to deny declaratory relief.

Affirmed.

1. Declaratory judgment 🔑5

The entertainment of action for declaratory relief is within discretionary power of trial court and is not reviewable upon appeal except for abuse of discretion. Code Civ.Proc. §§ 1060, 1061.

2. Declaratory judgment 🔑41

Trial court does not abuse its discretion in refusing declaratory relief when adequate remedy exists under some other form of action. Code Civ.Proc. §§ 1060, 1061.

3. Declaratory judgment ⚷113

Where defendants in two prior actions had, on advice of counsel, refused to answer certain questions in depositions being taken by plaintiff and had refused to produce certain documents despite subpoena duces tecum, and plaintiff had remedy by application to court for order requiring witnesses to answer questions with punishment for contempt upon refusal to answer, refusal of declaratory relief as to right of plaintiff to have questions answered was proper.

◆

John J. McMahon, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Roland Wilson, Dickinson Thatcher, Deputy City Attys., Los Angeles, for respondents W. A. Worton and D. C. Satterlee.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent Eugene W. Biscailuz, Sheriff of Los Angeles County.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrers without leave to amend in an action for declaratory relief, plaintiff appeals.

Facts: In the complaint it was alleged that plaintiff brought two prior actions against defendants wherein he caused the depositions of three of them to be taken; on advice of counsel they refused to answer certain questions and to produce a document which they had been directed by subpoena duces tecum to produce; an actual controversy exists between the parties as to their respective legal rights, plaintiff asserting that he has a right to have the questions answered and the document produced and defendants taking the position that they are not required to answer the questions or to produce the document; plaintiff has no speedy or adequate remedy at law.

Each defendant filed a general demurrer which was sustained without leave to amend.

Question: *Did the trial court commit prejudicial error in sustaining the demurrers without leave to amend?*

[1, 2] *No.* The trial court may refuse to exercise the power granted by the declaratory relief law (Sec. 1060, Code Civ. Proc.) in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. (Sec. 1061, Code Civ.Proc.)

Mr. Justice Wilson, speaking for this court in Pacific Electric Ry. Co. v. Dewey, 95 Cal.App.2d 69, 71, 212 P.2d 255, 256, thus accurately declares the rules:

"The entertainment of an action for declaratory relief is within the discretionary power of the court (Code Civ.Proc., sec. 1061) and is not reviewable upon appeal except for an abuse of discretion. (Citing cases.) Permission to resort to declaratory relief is a matter of sound discretion of the court. Such an action is usually unnecessary where an adequate remedy exists under some other form of action (citing cases). * * *" (See also Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326.)

[3] The foregoing rules are applicable to the facts of the present case. Plaintiff had an entirely adequate remedy in the actions in which he was endeavoring to take the depositions by applying to the trial court, pursuant to the provisions of section 1991, Code of Civil Procedure, for an order requiring the witnesses to answer the questions, and if upon the trial court's determination that such questions should be answered, they refused to do so, the trial judge could have punished them for contempt of court.

Such procedure afforded plaintiff a speedy and adequate remedy. Therefore the trial court properly sustained the demurrer in the present case.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

105 Cal.App.2d 478

PEOPLE v. JOHNSON.

Cr. 2715.

District Court of Appeal, First District,
Division 2, California.
July 17, 1951.

Hearing Denied Aug. 16, 1951.

Henry Ernest Johnson was convicted in the Superior Court, County of Contra Costa, S. C. Masterson, J., of murder of the second degree, and he appealed. The District Court of Appeal, Goodell, J., held that evidence sustained the conviction.

Judgment affirmed.

1. Homicide 🔑228(1)

In murder prosecution, evidence sustained finding that defendant's wife met her death by a criminal agency.

2. Criminal law 🔑409

Defendant's admissions may strengthen and fortify proof of the corpus delicti to the extent that evidence may have that effect.

3. Criminal law 🔑406(1)

In murder prosecution, in ultimately determining guilt of defendant jury was warranted in considering along with all other evidence defendant's several admissions that he had shot his wife, as testified to by four disinterested witnesses.

4. Criminal law 🔑1171(1)

In murder prosecution, where a colloquy respecting admissibility of certain parts of coroner's record by defense occurred and district attorney took a card from his file and waved it before jury, saying, "I have official records here of the police department. It is not admissible", and it appeared that district attorney's action was in response to, and evoked by, defense's argument respecting admissibility of official records as such, conduct of district attorney was not prejudicial.

5. Criminal law 🔑730(1)

In murder prosecution, where district attorney referred to fact that on voir dire examination of prospective jurors defendant mentioned self-defense but failed to thereafter refer to self-defense and on objection of the defendant district attorney was admonished and instructed to confine his argument to testimony introduced and admonished jury that statements of counsel were not evidence and were not to be considered as such, there was no prejudicial misconduct.

6. Criminal law 🔑730(7)

In murder prosecution, where district attorney made statement in argument characterizing the killing as murder but at defendant's request jury was admonished that statements of counsel were not evidence and were not to be considered by them, misconduct, if any, was not prejudicial.

7. Criminal law 🔑814(1)

Jury instructions must be responsive to the issues, and the issues in a criminal case are determined by the evidence.

8. Homicide 🔑309(3)

In murder prosecution, where defendant denied shooting his wife and the rest of his testimony simply related to what he did after discovering her lying on the floor and he testified that when questioned by police officers he did not know a thing about it, refusal to give defendant's requested instruction on manslaughter was proper.

* * *

Popper & Burnstein, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarance A. Linn, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

Appellant, charged with the murder of his wife, pleaded not guilty and was convicted by a jury of murder of the second degree. The appeal is from the judgment and the order denying a new trial.

Appellant and his wife lived in a three-room apartment numbered 2-C on the second floor of an apartment building on Taft Avenue in Richmond, California. Mrs. Johnson died in the bedroom thereof somewhere between 10 and 11 o'clock on the evening of March 14, 1950, from a gunshot wound produced by a .22 caliber rifle. The officers arrived after she had expired, and appellant was taken into custody then and there.

The verdict rests on circumstantial evidence and on extra-judicial statements of the appellant.

An adult son of the Johnsons visited them on that evening, from about 8:50 to about 9:40. The subject of the conversation between the three persons does not appear; nobody else was present. Shortly after the son departed, appellant left the apartment, visited neighbors living around the corner, and returned to the apartment shortly after 10 o'clock.

The witness Clifford E. Burns, who lived on the first floor of the same building, testified that on arriving home at about 10:08 or 10:10 he saw appellant at the foot of the stairway, apparently on his way upstairs.

The witness Ruth N. Austin, a housewife living on the first floor directly beneath the Johnsons' apartment, testified that after retiring she heard a scream and then heard some one say " 'No Ernest, no, don't, don't,' something to that effect. Then, I heard another scream and a thud." The thud she placed at "probably 10:20 or 10:25." She "sat up trying to think where it could come from, thinking it might be a little girl in the back" and then heard walking back and forth directly overhead in the Johnson apartment which, she judged, lasted about 15 minutes, or until about 10:40. Then she heard someone walk to the door, and the door opened and shut, "and somebody come downstairs and I heard a knock at the door" of the next apartment [the Graceys'] and then she heard appellant's voice. Later she heard people going upstairs from the Graceys' apartment. At the time of the screams, the outcry, and the thud she heard no man's voice.

The witness Nancy Lawson, a housewife, lived on the second floor, next door to the Johnsons. She had retired at 9:30. She testified that she was awakened, (but could not fix the time) and "the first I heard was Mrs. Johnson's voice pleading 'Ernest don't, Ernest, don't' * * * And then I heard her scream— * * * I ran to the front of the house to see if anyone had heard anything, and then I went and knocked on Mr. Johnson's door." She apparently got no response, and started to go back to bed when someone knocked. She asked who was there. "And they said Johnson, and I told him to get away from my door. And he went down stairs." Later appellant said to her "Come on over, Nancy * * * Go on in and see Lou." She did so and found her on the floor. When the witness asked her what had happened she did not at first answer but later "* * * She told me she was shot, she was dying." "I asked Mr. Johnson what he hit her with, and he said he didn't hit her."

The witness Everett L. Gracey, whose apartment was on the first floor of the building, testified to having heard a "deep thud" at approximately 10:20, coming from upstairs toward the rear of the apartment, and that when they (he, his wife, and their guests) heard it, they stopped and exclaimed about it "because it was louder than usual."

The witness Reuben Brehm and his wife were visiting the Graceys. He testified that "we noticed a thud * * * It appeared to come from overhead." It was "approximately 10:20 or 10:25."

Mrs. Brehm testified that they heard loud noises—a heavy noise on the floor which appeared to come from upstairs.

None of these witnesses heard the report of any shot.

Inspector Grimes identified the .22 caliber rifle which he found on the top bunk of a double-bunk sleeping arrangement in the room where decedent's body lay on the floor. He also identified the cartridge casing and the spent bullet which Officer Lee found. He testified that he examined Mrs. Johnson's clothing for powder burns but found none. His examination was by the naked eye, not by microscope.

Officer Lee testified to finding the spent .22 slug on the floor "Laying to the back of the body." He also found a .22 shell which had not been fired, lying on the bed.

The rifle had belonged to appellant for some years.

The foregoing sums up the circumstantial evidence produced by the prosecution. We interrupt the narration of facts to point out that up to this point there has been no narration of any testimony respecting appellant's admissions. While Mrs. Lawson was testifying, defense counsel called attention to the fact that the corpus delicti had not been proved. The court halted proceedings until the autopsy surgeon could attend, and he testified as to the cause of death and gave his findings. Thus the usual order of proof was observed and no testimony was offered respecting extrajudicial admissions until after prima facie proof of the corpus delicti had been made.

Somewhere around 10:30 p. m. appellant left his apartment and went downstairs. The witness Gracey testified that appellant came to his apartment and was rather nervous and fidgety. He sat down on the edge of the couch and said "My wife is upstairs dying. Call an ambulance, and help me." Brehm exclaimed "What—you shot her?" and he said "Yes". Gracey and Brehm then went upstairs to investigate and found Mrs. Johnson lying on the floor between the bed and the wall. The witness did not remember appellant saying "I shot her, she forced me to do it. I had to do it" but testified that he did hear him say "I shot her." He fixed the time of the conversation at approximately 10:35. Appellant was in the Gracey apartment from 5 to 10 minutes, according to this witness, before they went upstairs. When they did so Mrs. Johnson was still alive; it was then approximately 10:45. He estimated the time of death at about 11 o'clock.

Mrs. Gracey placed appellant's appearance at their apartment at about 10:15 or 10:20, but was not sure. She testified that he said "I shot my wife. She is dying; call the ambulance * * * but not the police." When Gracey and Brehm went upstairs appellant tarried momentarily and after they left he said to Mrs. Gracey "Don't get nervous, I didn't do it."

Mrs. Brehm fixed the time when appellant came to the Gracey apartment at approximately 10:30. She testified that he said " 'My wife is dying, I shot her.' And then he said, 'She forced me to shoot her.' And as he was leaving, he said, 'I didn't shoot her.' "

The witness Brehm testified that appellant "came in and sat on the edge of the chesterfield, and said, 'My wife is upstairs dying, I had to shoot her' * * * I then asked him what he meant by shoot, and he said 'She forced me to do it; I had to shoot and fast'." Then after a few seconds he said " 'You had better get an ambulance, or do something for her.' " He estimated that it was about 5 minutes before he and Gracey went upstairs, about 10:35 or 10:40. Mrs. Johnson was still alive when they reached the Johnson apartment at about 10:35. He remained 4 or 5 minutes and then called the police.

Appellant's first contention, that the verdict is contrary to the law and the evidence, is presented under four hearings, i. e., (a) that there is no evidence sufficient to sustain the verdict that defendant killed his wife; (b) that there is no evidence sufficient to sustain the judgment that deceased met her death by a criminal agency; (c) that the court erred in admitting the extrajudicial statements, since no corpus delicti has been proved, and, (d) that prima facie proof of corpus delicti sufficient to admit extrajudicial admissions are not sufficient to sustain the judgment.

Appellant's position under his headings (a) and (b) is that the evidence does not show that the deceased met her death by a criminal agency. The principal basis for this claim is that the doctor who performed the autopsy admitted on cross-examination that *from the position of the entry of the projectile*, the wound could have been self-inflicted. From that premise the argument is advanced that it was incumbent on the prosecution to prove beyond a reasonable doubt that the wound could not possibly have been self-inflicted, and that such proof was not made.

An autopsy was performed on the day after the death. The doctor who performed it testified that the cause of death was an inner abdominal hemorrhage caused by a gunshot wound. He described the course of the bullet, the wounds it made on entering and leaving the body, and the damage it did to the abdominal organs. On cross-examination he was asked "From the position of the entry of the projectile, it could have been self-inflicted?" and answered "Yes", but he also testified that no powderburns were visible on the body. Inspector Grimes testified that no powder burns were visible on the garments with which the decedent was partially clothed, and admitted that he had not used a microscope in his examination for burns.

On cross-examination the doctor testified:

"Q. As a matter of fact, from the description that you just gave to the jury as to the course of the bullet, apparently the gun was held pretty close to the deceased; is that correct? A. It had to be more than two feet as far as I could tell.

"Q. How do you arrive at that? A. Well, of course, there is one item that I couldn't definitely state, because I don't know whether the body was clothed when the shot was fired or not. * * *

"Q. Now, doctor, assuming that the bullet penetrated the coat first, would that change your testimony as to the distance of the gun, the distance the gun was held? A. I can tell you, if the bullet entered the body through the part that was not clothed, it would have to have been fired at a distance greater than two feet. Effect on the clothing would have been important if it entered the clothed portion.

"Q. Did you ever examine the coat? A. No. * * *

"Q. Assuming, doctor, that there were powder burns on the clothing, this wound could have been self inflicted could it not? A. Well, if there was powder burns, it would depend on a lot of factors; the distance in which the powder burns extended away from the wound and also the weapon used. If the wound was self inflicted, there would have been found powder burns on the clothing."

This testimony was given in the course of the proof of the corpus delicti. The jury might have decided that the wound was self-inflicted, but it is to be implied from the verdict that they drew the inference, because of the absence of powder burns on the body or garments, that the gun was held so far away that it could not have been fired by the decedent (following the doctor's reasoning). Such inference, if drawn, eliminated suicide of course.

However, there were additional circumstances, proved before any admissions were offered, from which it was inferable not only that decedent came to her death by a criminal agency, but which at the same time, connected appellant with the offense. We refer, of course, to Mrs. Austin's testimony as to a scream, and then the outcry "No Ernest, no, don't, don't", followed by another scream and then a thud, and to Mrs. Lawson's testimony, which identified the voice as that of Mrs. Johnson, "pleading 'Ernest don't, Ernest, don't'" followed by a scream. There is no contradiction that Mrs. Johnson called her husband by name in a pleading tone of voice. Appellant himself corroborated it, but offered the explanation that his wife cried out in protest because he had attempted to lift her from the floor while she was in pain. The outcry, identified as Mrs. Johnson's, was strong circumstantial evidence of an assault or threat of violence of sufficient gravity to evoke the screams and the pleading cry followed by another scream, from which an inference of suicide could not reasonably be drawn.

[1] The testimony as to the screams and outcry was part of the prima facie proof of the corpus delicti and sufficient, if believed, to have entirely eliminated suicide from the case. The fact that the doctor answered "yes" to the question whether *"From the position of the entry of the projectile,* it [the fatal wound] could have been self-inflicted?" (emphasis added) did not contradict or limit his positive statement to the effect that in case of a self-inflicted wound powder burns would have been found. Nor could his quoted statement foreclose further inquiry as to whether the death was by a criminal agency. It simply introduced into the case an issue which was contra to the prosecution's theory. The testimony respecting the screams and outcry was sufficient, when taken in connection with other evidence, to make out

prima facie proof of the corpus delicti. Appellant testified that the outcry, which named him, was a protest by his wife when he attempted to lift her from the floor (which would necessarily mean that she had already fallen) while, on the other hand, the testimony of Mrs. Austin was that the outcry naming "Ernest" was *followed* by the thud. The uncontradicted testimony respecting the outcry and screams was evidence of "physical circumstances surrounding the affair", 8 Cal.Jur. p. 166, and, as we view it, highly incriminating evidence, which would have a strong tendency to remove any impression which might have been created by the doctor's testimony that from the position of the entry of the projectile the fatal wound could have been self-inflicted. At the very least it showed "a reasonable probability" that the criminal act of another was the cause of death. People v. Ives, 17 Cal.2d 459, 464, 110 P. 2d 408, 411. All this evidence went in before any admissions were offered.

Appellant's third heading (c) is that "the court erred in admitting the extrajudicial statements of defendant over his objection since no corpus delicti has been proved" and his fourth (d) is that "prima facie proof of corpus delicti sufficient to admit extrajudicial admissions of defendant [is] not sufficient to sustain judgment of conviction."

Appellant contends that "By reducing the State's evidence to its logical and simplest denominator, it is immediately apparent that the conviction of the defendant could only have come from the effect that the alleged extrajudicial statements of the defendant had upon the jury. While slight proof of the corpus delicti has in many cases been held to be sufficient basis for the admission of extrajudicial statements or confessions, every element of the crime, however, must first be made to appear before such alleged admissions or confessions are admissible, and they cannot be used to establish any necessary element for the commission of the crime. That is, the State must prove, independent of the defendant's alleged admissions or confessions, that there has been a killing and that it resulted from unlawful means."

In support of that statement (which is not too clear or explicit) appellant cites People v. Tapia, 1901, 131 Cal. 647, 63 P. 1001, and because he relies on that case we must interpret the foregoing statement as contending that *in determining whether there is sufficient evidence of the corpus delicti the jury cannot consider admissions or confessions or other evidence which does not tend to prove the corpus delicti, but merely tends to connect the appellant with the crime charged.* The language which we have just emphasized is substantially what the court said in the Tapia case, 131 Cal. at page 654, 63 P. 1001, in holding that it was prejudicial error to refuse such an instruction.

Such holding, however, was expressly disapproved 25 years later in People v. Selby, 1926, 198 Cal. 426, 432–439, 245 P. 426, where there is a lengthy discussion of the subject.

In People v. McMonigle, 1947, 29 Cal.2d 730, 738, 177 P.2d 745, 749, there is a clear and complete summation of the whole subject, wherein the court says: "In this state of the record, defendant first contends that the court erred in instructing the jury concerning the evidentiary effect of his extrajudicial statements. The challenged instruction reads as follows: 'The Court instructs you that initially and in the first instance the corpus delicti for every criminal case must be proven by satisfactory evidence aside from any statement, confession or admission of the defendant. (Citing cases.) After the latter however have been received in evidence they may strengthen and fortify the proof of the corpus delicti to the extent that the evidence may have that effect.' This is a correct statement of the law in recognition of the 'sharp distinction between the rule governing the *admission* of extrajudicial statements, admissions, or confessions and the rule governing the jury in its *consideration*, of such evidence after it is admitted.' People v. Selby, 198 Cal. 426, 434, 245 P. 426, 429. 'To warrant a conviction [the corpus delicti] must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom.' People v. Ives, 17 Cal.2d 459, 463, 110 P.2d 408, 411."

The opinion in the McMonigle case then, 29 Cal.2d at pages 738–740, 177 P.2d 745, continues on with a comprehensive review of the subject, and cites many cases. At page 740 of 29 Cal.2d, at page 750 of 177 P.2d it again quotes approvingly the Selby case, 198 Cal. at page 439, 245 P. 426, as follows: "When the case is submitted for their verdict, the jury may consider *all* the evidence in the case, including the extrajudicial statements, admissions or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt. If this were not the correct rule, proof of the extrajudicial statements, admissions, or confessions of the accused would have no utility except to connect him with the crime charged."

[2, 3] The rules just discussed make it clear that a defendant's admissions "may strengthen and fortify the proof of the corpus delicti to the extent that the evidence may have that effect", People v. McMonigle, supra, which simply means, in the last analysis, that in ultimately determining the guilt of appellant, the jury was warranted in considering (along with all the other evidence) appellant's several admissions that he had shot his wife, as testified to by four disinterested witnesses. Such admissions, of course, indicated a death by a criminal agency.

Appellant's second contention is "that counsel prosecuting the case has been guilty of prejudicial misconduct * * *" and three instances are specified.

First, after the defense rested there was a colloquy respecting the admissibility of certain parts of the coroner's report, the defense contending that it was admissible because it was an official vital statistics record. Thereupon the district attorney took a card from his file and waved it before the jury, saying "I have official records here of the police department It is not admissible." Defense counsel then assigned the action as misconduct. It would appear that the district attorney's action was in response to, and evoked by, the defense's argument respecting the admissibility of official records as such. What the defense sought to show was the entry in the report that the time of the death was "10:40 p. m. on March 14—". The district attorney then stipulated that the coroner's record so showed.

Several cases are cited by appellant under this head. In People v. Cowley, 7 Cal.App. 501, 94 P. 866 misconduct was practically the only ground urged on appeal. The court held, however, that it was not prejudicial and affirmed the conviction. In People v. Fleming, 166 Cal. 357, 136 P. 291 the record was 4400 pages long and contained numerous instances of misconduct. The court said, 166 Cal. at page 359, 136 P. at page 292, that although there was "sufficient evidence to legally sustain the verdict, the guilt of appellant by no means satisfactorily appears therefrom" and the judgment of conviction was reversed. Because of the numerous instances and the flagrant character of the misconduct there, that case cannot be used as a fair basis of comparison with this case. In People v. Berryman, 6 Cal.2d 331, 57 P.2d 136, as in the Cowley case, the conviction was affirmed; misconduct was found, but held to be nonprejudicial. People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867 was reversed both for "flagrant" misconduct and for palpable error in an instruction. It is clear from the opinion in People v. Bowers, 79 Cal. 415, 21 P. 752 that the misconduct (of both the judge and the district attorney) would not have led to a reversal had not the case been "one of great difficulty."

[4] The record shows nothing respecting the contents of the card, hence the case is different from those cases where the district attorney by an improper question, later withdrawn or struck out, "telegraphs" to the jury some prejudicial matter, or where he makes a bald statement of fact which is not in the record and could not be admitted in evidence. Respondent admits that the district attorney overstepped the bounds in

this instance but claims that the transgression was minor and nonprejudicial, and we are satisfied that such is the case.

Appellant's second assignment under this head is that the district attorney was guilty of prejudicial misconduct in making certain statements in his closing argument.

The first twelve jurors examined were accepted and sworn. Eleven of them were interrogated on voir dire by appellant's counsel on the subject of self-defense. The first juror was asked: "I believe His Honor will instruct you * * * on self-defense. Now, if a man has killed a woman in self-defense, and the evidence justifies that, you would have no qualm about bringing back a verdict of not guilty because he acted in self-defense? * * * Understand, that a self-defense would be justifiable? * * * And the fact that it happens to be a woman who met her death when a man was acting in self-defense would not affect your verdict in any way?" The other ten were asked substantially the same question with slight variations and some additions. The question put to one juror contained the following language: "if the facts show that the defendant acted in self-defense, *which it evidently will show,* that he acted in apprehension of threat to his life." (Emphasis added.) Several others were told that the jury would be, or would probably be, instructed on self-defense.

The district attorney in his closing argument said: "Now, right in the beginning of this argument they said that they wanted to go back to the questions on voir dire, and they mentioned the elements of the crime, but they forgot to talk about the rest of the thing that they talked about on voir dire. They forgot all about self-defense." Appellant objected: "* * * Voir dire examinations are for qualification purposes, and it is not evidence, and it can't be argued by the district attorney, and I ask that Your Honor instruct the district attorney to refrain from doing that, and admonish the jury to disregard the last highly prejudicial statement." Whereupon the judge said: "You will have to confine your argument to the matter of the testimony that was introduced in the matter, and the jury is admonished that statements of counsel are not evidence in the case and they're not to be considered as such." The district attorney then said: "Self-defense * * * is where you protect yourself from someone—" The defense repeated its objection and the judge remarked, "Mr. Quinlan, there is no evidence in the case of self-defense, and you will have to confine your argument to the evidence that is in the case.

"Mr. Quinlan: That is right, Your Honor, but they mentioned in their argument about accident and self-defense. They have talked about that all the time. I say there is no evidence of it and I will agree—

"Mr. Bernstein: (Interposing) I want the record to show that we did not say one word nor argue, if the Court please. We questioned the jury for the purpose of qualification. I respectfully request Your Honor to admonish the district attorney again, and I certainly cite that as misconduct of the district attorney by reference to this matter. The inquiry is for qualification purposes and not evidence."

"The Court: I think you understand now, Mr. Quinlan—"

[5] The first answer to the claim that there was prejudicial misconduct, is the action of the court in admonishing the district attorney and in instructing the jury that statements of counsel are not evidence.

The second answer is found in People v. Pantages, 212 Cal. 237, 297 P. 890. In that case defense counsel in their opening statement told the jury that they expected to prove certain things. In the district attorney's opening argument he called attention to the fact that no such promised proof had been made and did so in vehement language. The court said, 212 Cal. at pages 244–245, 297 P. at page 894: "As ruled by the trial judge, and as indicated in State v. Boyce, 24 Wash. 514, 64 P. 719, the district attorney and his chief deputy were within their legal rights in plainly and simply directing the attention of the jury to the fact that, although counsel for defendant had stated to the jury that he expected to prove certain specified facts on behalf of defendant, nevertheless no evidence had been received by the court in substantiation thereof; but when, in substance, the district attorney and his chief deputy had thus far proceeded, the limit of legitimate quasi argument in that regard had been reached. To go further * * * and to charge the * * * attorneys who represented defendant with the grossest of 'bad faith' in the matter, and thereupon, impliedly at least, to predicate an impassioned and compelling argument demanding the conviction of defendant, constituted an error which was prejudicial to the substantial rights of defendant. * * * When it is considered that what was said by the district attorney was apparently with the sanction and approval of the judge of the trial court, the prejudicial effect on the substantial rights of the defendant becomes apparent."

In the first place, here there was no sanction or approval by the trial judge, but definite disapproval. Moreover in the Pantages case the court, after adopting the opinion of the District Court of Appeal, added the following, 212 Cal. 278, 297 P. 907: "While it is our conclusion that this judgment must be reversed, we feel bound to state that the instances of misconduct of the district attorney hereinbefore set forth would not, standing alone, necessarily require such a result. The other errors, however, were in our opinion vitally prejudicial, and considered together with the misconduct complained of, warrant the conclusion that the defendant was not lawfully convicted."

The Chief Justice in his concurring opinion emphasized this.

The Pantages case is so closely in point that no further authority need be cited. The only difference between that case and this lies in the fact (which seems to be unimportant) that there the *assertion* of what the defense expected to prove was made in the opening statement while here the *suggestion* that self-defense might be proved was made on voir dire. The language used in the present case was mild compared to that in the Pantages case, and did not constitute prejudicial misconduct.

Appellant's third assignment under this head arises from the following statement of the district attorney in argument:

"Mr. Quinlan: * * * they have talked a lot about our lack of evidence. But I say to you that they don't have any evidence. They are just relying upon, and trying to convince you, that we have to prove that somebody saw somebody get shot. Now, if that were true, you would never convict a secondary murderer, and that is what this defendant is. This lady was killed when only he and she were in the room.

"Mr. Bernstein: That is assuming something not in evidence and I ask that that go out and the jury be admonished.

"Mr. Quinlan: There is evidence that they were in the room.

"The Court: The jury is admonished that statements of counsel are not evidence and must not be considered by them."

It is argued that in a murder case "the killing should not be characterized as murder in advance of the verdict so finding" and People v. Garbutt, 197 Cal. 200, 239 P. 1080, 1083 is cited. There the court said: "It is true, of course, that the killing should not have been characterized as 'murder' in advance of a verdict so finding. But we do not think, in view of the connection in which the word was used by the district attorney, and the admonitory instruction promptly given by the court, that the jury was influenced thereby."

[6] As quoted above, the jury was admonished in this instance, and we are satisfied that the misconduct, if any, was not prejudicial.

Defendant's third and last contention is that "the court has misdirected the jury" in that the court refused to give an instruction proposed by defendant that "Upon an accusation of murder, the jury has a right to bring in a verdict of manslaughter. * * *"

The first question put to defendant on direct examination was "Did you shoot your wife?" to which he answered "No sir, I did not." He was then asked to tell exactly what happened on March 14, and gave a lengthy and detailed answer. He testified that his son left the apartment around 9:40 p. m. and that he left right after; that he returned home about 10:10 p. m., and assuming that his wife had gone to bed he sat and read the paper "not knowing that she was on the floor. I had no idea." He testified that in the bedroom "there was my gun, laying on the double bed on the right side of the bed there, crossways of the bed, and she was lying behind it, between there and the wall." And continued:

"Well, I was so shocked, I didn't know what to do. It looked like she had vomited and she was still alive. So naturally I reached down to pick her up and put her on the bed. I had to pick up the gun and move it out of the way, because it was laying straight across the bed where I wanted to lay her. When I tried to pick her up, she said, 'Don't Ernest don't, it hurts me.' I had to leave her lay there.

"Well, I just didn't know what to do. I didn't know how she was hurt. I saw the gun there and I picked it up and threw the bolt back on it and that is when that shell flew out and hit on the bed. It was not supposed to be a shell in the firing chamber. I never kept a shell in the firing chamber, but I always kept the bullets in the magazine."

[7, 8] As was said recently in People v. Carmen, 36 Cal.2d 768, 772, 228 P.2d 281, 284 (wherein the question of manslaughter instructions in a murder case is fully discussed), "It is a settled rule that jury instructions must be responsive to the issues. The issues in a criminal case are determined by the evidence." However, there is nothing in defendant's testimony or in that of any other witness, which warranted or called for a manslaughter instruction. People v. Mitchell, 14 Cal.2d 237, 93 P.2d 121; People v. Mandell, 48 Cal.App.2d 806, 817, 120 P.2d 921. In the first place he denied shooting his wife, and the rest of his testimony simply relates to what he did after discovering her lying on the floor. He also testified that when questioned by the police officers he "told them that I didn't know a thing about it."

The doctor was questioned by the defense at considerable length with respect to the time that would elapse between wounding and death. He said "She might have died as shortly as half an hour or it might have been as long as two hours. * * * I would guess probably around an hour. That is an estimation. * * * I can say it depends on things which I have no way of knowing, such as the circulation time of the patient at the time, the blood pressure, how much exertion the patient had had prior to death, and all that would make a difference in how rapidly a person would bleed. I would just guess a half hour to two hours would be the limit." This examination was addressed to the subject of alibi, for it is apparent from the record that the defense stressed that at the trial. In other words, appellant left the apartment soon after his son left at 9:40, visited neighbors around the corner and returned about 10:10 and the wound might have been inflicted during that half-hour absence. But the doctor's testimony was necessarily only an estimate, dependent, as he was careful to say, on at least three unknown factors, which, he said "would make a difference in how rapidly a person would bleed." He frankly called his testimony respecting bleeding time a "guess". Assuming the doctor's half-hour minimum, the jury had before it the timing of the scream and the thud at anywhere from 10 to 20 minutes after appellant's return from the neighbors and they had, also, the testimony that Mrs. Johnson was still alive at 10:45 and Gracey's estimate of the time of death as 11 p. m., all of which is consistent with the doctor's minimum of half an hour, when taken in connection with the timing of the fall or thud at somewhere between 10:20 and 10:30. The Deputy Coroner, whose record showed death at 10:40 p. m., was not present at the time of death and his record must have been necessarily the result of inquiries he made of others who may or may not have observed the time accurately.

Appellant admitted that he had been drinking all that day, and that when he was questioned by the officers his tongue was thick. Several witnesses testified that around the time he returned to the apartment (about 10 p. m.) he appeared to be intoxicated.

The case was carefully tried by the judge, and the rights of the defendant were safeguarded throughout. We find no merit in any of the several contentions presented on appeal.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

In re LINGENFELTER'S ESTATE.

Civ. 7896.

District Court of Appeal, Third District, California.

July 12, 1951.

As Modified on Denial of Rehearing Aug. 10, 1951.

Hearing Granted Sept. 7, 1951.[*]

Proceedings in the matter of the estate of Vivian Lingenfelter, deceased, wherein Madge and E. F. Tucker proposed for probate a purported will of the deceased, and Lenore DeArmond contested the probate thereof. The Superior Court, Yuba County, Arthur Coats, J., rendered judgment denying probate and entered an order denying the proponents' motion for judgment notwithstanding the verdict, and the proponents appealed. The District Court of Appeal, Van Dyke, J., held, inter alia, that the trial court had committed prejudicial error in admitting hearsay testimony concerning declarations of the testatrix's husband touching his attitude toward one of the proponents, his feelings toward the contestant, and his own testamentary intentions.

Reversed and remanded with directions.

1. Wills 🔑166(1)

In will contest, evidence was insufficient to sustain jury's finding that will had been result of undue influence exercised by one of the proponents.

2. Wills 🔑163(2)

A presumption of undue influence arises from proof of exercise of confidential relation between testatrix and beneficiary, coupled with activity on part of latter in preparation of will, but such confidential relation alone is not sufficient and there must be activity on part of beneficiary in matter of preparation of will.

3. Wills 🔑155(1)

In action to set aside will on ground of undue influence, it is necessary to show that influence was such as, in effect, to destroy testatrix's free agency and substitute for her own another person's will, and evidence must be produced that pressure was brought to bear directly upon testamentary act, and mere general influence, however, strong and controlling, if not brought to bear upon testamentary act, is not enough.

4. Wills 🔑52(1)

Testamentary capacity is presumed to exist and burden of proving its lack is upon contestant, and such lack of capacity must be shown to have existed at very time of testamentary act.

5. Wills 🔑50

A person has testamentary capacity if she is able to understand nature of testamentary act, is able to recall and bear in mind nature and extent of her property, and to remember those persons who have claim upon her bounty.

6. Wills 🔑21

A capacity to transact important business is not the criterion of fitness to make a valid will, and a man may be capable of making a good will after he is so far gone into imbecility and mental darkness as to be no longer capable of making valid deed or transacting business generally.

7. Wills 🔑324(2)

In will contest, jury could infer that testatrix did lack testamentary capacity at very time she executed her will.

8. Wills 🔑54(1), 165(1)

Testimony as to declarations by decedent bearing upon question of his testamentary capacity and whether undue influence was exerted upon him is admissible, although hearsay, not as proving or tending to prove truth of statements made, but as showing state of mind of decedent in so far as material to determination of such issues.

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[*] Subsequent opinion 241 P.2d 990.

9. Wills ⚷292

In will contest, trial court erred in admitting statements reported by witnesses as having been made by testatrix's husband touching his attitude toward one of proponents, his feelings toward contestant, and his own testamentary intentions, and fact that testatrix had been present when certain of these statements were made afforded no excuse for admitting such declarations of her husband.

10. Wills ⚷292

In will contest, wills of testatrix's husband were immaterial and should not have been received in evidence, where wills of husband and testatrix were not joint wills and there did not exist on that account any necessity of bringing his testamentary acts because inextricably bound up with hers.

11. Wills ⚷53(4)

In will contest, certified copy of record in insanity proceedings involving testatrix's brother was inadmissible without preliminary proof showing that there was something about insanity of brother which would afford inference that from same inheritable cause testatrix was either affected with like insanity or predisposed thereto, and burden of making such preliminary showing of relevancy was upon contestant asserting lack of testamentary capacity.

12. Wills ⚷400

In will contest, where testimony was meager and barely sufficient for purpose of supporting jury's finding in respect of testatrix's absence of testamentary capacity, trial court's errors in admitting improper evidence relevant to such issue were prejudicial to degree that required reversal.

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Hewitt & McBride, Yuba City, Brobeck, Phleger & Harrison, San Francisco, for appellant.

Ray Manwell, Robt. W. Steel, Marysville, for respondent.

VAN DYKE, Justice.

Appellant Madge Tucker, having proposed for probate the purported will of Vivian Lingenfelter, deceased, the respondent, Lenore DeArmond, contested the probate thereof. The contest was upon the grounds of incompetency, and of undue influence alleged to have been exercised by appellants. Trial of the issues posed by the contest was had to a jury which returned a verdict in favor of respondent as to both grounds of contest. From the judgment thereafter entered denying probate of the proposed will and from the order made denying the motion of the proponents for judgment in their favor notwithstanding the verdict the proponents have appealed.

The husband of testatrix, Homer Lingenfelter, now deceased, was an attorney at law and Mr. Arthur Powell was his law partner. They practiced in Marysville. The Lingenfelters had resided there for a long time. Mr. Powell was called by both parties, first by proponent upon the preliminary proof, and then by contestant in support of her contest. As the contestant's witness he testified fully concerning the execution of the will in his office. At that time Homer Lingenfelter was seriously ill and in the hospital. In the forenoon of June 23, 1949, testatrix, accompanied by Madge Tucker, a sister of Homer Lingenfelter, appeared together at the office of the partnership. Mr. Powell was out at the moment, but came in as the women were sitting in the reception room. Testatrix went into Mr. Powell's office with him. Appellant remained in the reception room. After some preliminary talk concerning the condition of Homer Lingenfelter, testatrix handed Powell an instrument in her handwriting and asked him if it was a good will legally. They read the document together and discussed its provisions. There were bequests to a number of friends and acquaintances and as these were read Mrs. Lingenfelter gave brief explanations as to why she had made these people beneficiaries. The document contained a provision for the care of a pet cat and she explained that she wanted the animal cared for, and since he was "mean" she thought such care would have to be paid for in order to obtain it. The residuary clause gave the residue of the estate to Madge Tucker and her husband, E. F. Tucker. No provision was made for Homer Lingenfelter and this feature was discussed, testatrix explaining that her husband was very ill, that she "didn't expect him to make it," and that in any event she had very little property of her own. Thereupon the two entered into a discussion of her property and of her husband's property. Powell asked about her separate property and she stated that she had received nothing from her mother's estate, whereupon Powell stated that she could also will away half of the community property of herself and of her husband. He asked about the marital home and was told that it was held in joint tenancy. Powell said evidently her husband had explained that to her because "she understood if anything happened to one first the other would get it." She told him that she had no bank account of her own and they talked about the insurance in force on the life of Homer. She stated she had a joint bank account with Homer for household purposes. Further, in connection with the omission to mention her husband in the will, Powell said that the two of them had "written poor Homer off", explaining that since January of that year Homer's physician had told the witness that he was in bad condition with practically no heart reserve left and would go any minute. He had had several attacks during one of which, three or four weeks before, a neighbor, Mrs. Dimond, had given him a "hypo" just before he "passed out", and two weeks before he had gone to the hospital in a coma; though he managed to come out of that he had another attack later and had gone to the hospital the day before the will was made. Homer died the day after the will was made.

As to the residuary clause in favor of appellants testatrix gave her reasons for thus favoring them, saying that while they were only in-laws, yet they had helped her husband and her when help was needed most and had done more for her than her own family ever had. Testatrix, after the holographic document had been examined and discussed, asked Powell to have it typed as an attested will. She directed that proponent be made executrix, and Powell dictated a formal will, using the handwritten document in the way of a memorandum, together with notes he had taken while talking with testatrix. The formal will was then prepared and while this was being done testatrix and Madge Tucker left the law offices and walked about in the town, returning at an appointed time, when again the appellant remained in the reception room while testatrix went into Mr. Powell's office and executed the will. Powell acted as one witness and a Mr. Galbreath, another attorney associated with him, acted as the other.

In support of the jury's findings, the respondent here points to the testimony of a number of witnesses. Giving their testimony full credence, as we are required to do, it may be summed up as follows: Testatrix was a highly emotional and very unstable person who would become upset on the slightest provocation; when thus upset she would "disintegrate emotionally", would scream and yell, her eyes would often become glassy, she would weep uncontrollably and be beyond the reach of reason; she could have her mind diverted from whatever at the moment was bothering her by talking of something else; she was a person of very weak will, easily led and very susceptible to suggestions; she was almost completely dependent upon her husband and unable to manage for herself her own shopping and ordinary routine of life; in 1937 the testatrix had executed a will naming her husband as principal beneficiary, and in the event of his death before hers then making the residual beneficiaries the Sister Superior of the College of Notre Dame of Marysville, Marie Countryman and respondent Lenore De Armond; at the same time her husband had executed a will, naming his wife as principal beneficiary and respondent as the sole contingent beneficiary if his wife predeceased him; in 1946 the testatrix made a will, the contingent beneficiaries, if her husband predeceased her, being the same as in the 1937 will, save that Pauline Garewal was contingent beneficiary in place of Marie Countryman;

testatrix had often stated that she considered appellant domineering and greedy, that she had gotten the best of a deal with Homer in reference to their mother's estate; that two weeks before his death testatrix had said she did not want appellant to come to her home because she was too domineering. Much the same picture of intermittent outbursts of hysteria and nervous makeup was given by several witnesses. It was shown that certain subjects particularly seemed to upset the testatrix, such as relatives, politics, Franco of Spain and Stalin of Russia and the stability of the economic system of the world and of the United States; many of her outbursts had to do with her husband's playing of the game of rummy, his health, and the doctors' responsibility therefor; when upset she would become extremely excited and abusive to anyone who didn't share her views; she had said that she hated all her own relatives and that the Tuckers consistently were trying to get the Lingenfelter money, conniving and scheming to that end; she declared that appellant wanted some of her furniture, but that she would burn it before she gave it to her. A Doctor Bone, who had treated testatrix as late as June 17, 1949, said she was an unwell person from the time he first knew her; was an advanced psychoneurotic and a border-line case between sanity and insanity in a medical sense; that she could be of unsound mind under the stress of excitement, anger or fear; that in the past she had been addicted to the use of narcotics and had once left him a hypodermic case. She had told him shortly before her death that she was going to ask her physician to have the Tuckers leave her home. She had had many surgical operations, one witness saying that her stomach was so scarified that a dime could not be placed between the scar tissues. She blamed the doctors for making a guinea pig out of her. She took medicine for her nervous condition, would cry at the least little thing and would go to pieces over nothing. She was extremely jealous of her husband and on one occasion went into a terrible tantrum and got a gun. Her husband left the apartment and stayed for several days at a hotel, during which period testatrix would phone the witness frequently asking if she knew how to take the safety off the gun. After four or five days she went to the witness' place of business and upon request gave up the gun. It took her weeks to get over the episode. Once she showed this same witness a rock she had placed in a sock for the purpose of hitting over the head some woman of whom she was suspicious. Her suspicions of her husband's infidelity were groundless. When in a tantrum she would talk "awfully" without realizing what she said. She often spoke to intimate acquaintances concerning the testamentary provisions that she and her husband had made in their various wills, saying that they had their wills fixed just the way they wanted them. She expressed her dislike of appellant, screaming and yelling. A Doctor Kimmel, who had for a long time taken care of testatrix, while saying she was of sound mind, said she was psycho-neurotic to the extent she was barely able to manage her household and whenever anything unusual, such as illness, came along that demanded extra energy or demanded assuming more responsibility, then she couldn't cope with the situation and had to have help brought in. He said that during the stress of emotional upset and just following her husband's death he thought she was of unsound mind. Her brother had been committed to an institution for the insane as an insane person. A few days after her husband's death the testatrix shot herself and died from the effects of the wound, her death occurring July 1st, eight days after she had made her will. Shortly before her husband's death she had said that if her husband died she would kill herself, as there would be nothing left for her to live for, adding to the witness, respondent here, "Homer and I have our wills and everything fixed just the way we want them and there is no reason for me to live. * * * I can't live without Homer because of my nervous condition." Although appellant had visited the Lingenfelters occasionally during the years preceding the death of the testatrix, and she and Homer had corresponded, there is no evidence of constant association. It was shown that on several occasions during Homer's illnesses appellant came to their home at their request and helped out in the care of Homer and of the household while he was hospitalized. It was the testatrix herself who telegraphed appellant to come to them for that purpose. On June 14th appellant did so and remained until June 28th, leaving the day before testatrix shot herself. Respondent had for many years been the confidential legal secretary of Homer Lingenfelter and his various law partners and it appears that both he and his wife were very fond of her. If the contested will is not the will of testatrix then respondent takes under her preceding will.

[1–3] Turning first to the appellant's contention that the evidence is insufficient to sustain the jury's finding that the will was the result of undue influence exercised by appellant we hold that this contention must be sustained. The evidence signally fails to measure up in any degree to the legal definitions of undue influence. Notwithstanding the testimony that the testatrix was a person of weak will and easily influenced, that the appellant was living with her when the will was made and accompanied her to the office of the attorney, where the will was drawn, that the will in her favor departs from a long-continued plan of testamentary disposition, as evidenced by previous wills and the many statements of the testatrix expressing antagonism toward appellant, nevertheless, the legal test considered, there is no proof of undue influence. First, there was no proof of confidential relationship, coupled with activity in the preparation of the will, which would support the jury's finding; and even if it be assumed that the jury might have found a confidential relationship, still there was no proof whatever of activity on the part of appellant. Respondent points to the fact of her dwelling with the testatrix during the period when it may be assumed the holographic document presented to Mr. Powell was prepared and written by the testatrix and to her having accompanied the testatrix to Mr. Powell's office when she went there for the purpose of making her will. But that is not the sort of activity with which we are concerned when the question of undue influence arises. As said in the Estate of Arnold, 16 Cal.2d 573, 581, 107 P.2d 25, 29:

"Conceding, simply for the purpose of argument, that a confidential relation was proved to have existed between Mrs. Logan and Arnold, proof of that fact alone did not cast the burden of proof upon her that the will was not obtained by her through undue influence. Estate of Purcell, 164 Cal. 300, 303, 128 P. 932. In that case it was held that proof of a confidential relationship did not bring into play a presumption of undue influence in the absence of evidence that the beneficiary suggested the terms of the will. In the Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 563, we find the applicable rule stated in the following concise language: 'As suggested in the Estate of Higgins, 156 Cal. [257] 261, 104 P. [6] 8, a "presumption of undue influence" arises from proof of the exercise of a confidential relation between the testator and such a beneficiary, *"coupled with activity on the part of the latter in the preparation of the will."* The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will.'

"In an unbroken line of decisions of this court, the above statement of law has been approved."

We think the foregoing disposes of any contention that the record here will sustain the jury's findings that the will in question was the product of the undue influence of the proponent. There was opportunity, to be sure, but there was no proof whatever of its exercise and on the contrary the circumstances attending the preparation and execution of the will itself, heretofore narrated, weigh heavily against any claim that at the time she executed her will she was under the influence of appellant. She was in the presence of her attorney and appellant was absent.

"In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that *pressure was brought to bear directly upon the testamentary act.* [Italics added.] In re McDevitt, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not [brought] to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614." Estate of Arnold, supra, 16 Cal.2d 577, 107 P.2d 27.

The evidence here does not support the jury's finding of undue influence.

[4–7] Turning now to the question of testamentary capacity, there is little, if any, disagreement between the parties as to the applicable law. Testamentary capacity is presumed to exist and the burden of proving its lack is upon the contestant. Estate of Arnold, supra; Estate of Schwartz, 67 Cal.App.2d 512, 519, 155 P.2d 76. It is settled beyond question that a person has testamentary capacity if he is able to understand the nature of the testamentary act, is able to recall and bear in mind the nature and extent of his property, and to remember those persons who have a claim upon his bounty. Estate of Arnold, supra. Further, such incapacity as is evidenced must be shown to have existed at the very time of the testamentary act.

"It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question. * * *

"'In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld.' Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130, 133.

"'Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside of the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will. Says the Iowa Supreme Court (Perkins v. Perkins, 116 Iowa 253, 90 N.W. 55): "While, as every lawyer knows, a man may be capable of making a good will after he is so far gone into imbecility and mental darkness as to be no longer capable of making a valid deed or of transacting business generally, the very opposite conclusion seems to pervade the lay mind, and the making of a will is, to its apprehension, the one item of business which requires the presence of all one's faculties in their normal strength."' Estate of Sexton, 199 Cal. 759, 768, 251 P. 778." Estate of Arnold, supra, 16 Cal.2d 585–586, 107 P.2d 32.

The parties do not dispute the validity of these rules, but confine their argument to the precise question as to whether or not such showing was made as would justify the jury in inferring that the testatrix did not at the time she executed her will have testamentary capacity within the scope of the foregoing definition of our highest courts. Appellant points out that the testimony of respondent's witnesses centers around a long series of emotional outbursts and calls attention to the testimony of several of respondent's witnesses that in between such outbursts they considered her to be of sound mind. Thus Mr. Powell, when testifying as a witness for respondent, gave it as his opinion that decedent was a person of strong will, not easily influenced, and of sound mind when she made her will, and he further said that she was a woman of unusual intelligence, well read, with positive views as to current affairs, particularly in the political field. Another of respondent's witnesses, giving it as her opinion that decedent was of unsound mind, and stressing the same emotional outbursts, said that she was not insane, though definitely unsound, that there were times when she didn't know what she was doing, but these times were when she was in one of these emotional disturbances or was in pain. In this connection appellant points to the testimony of Mr. Powell that during the considerable time she was engaged in discussing and in executing her will she was, according to him, calm and undisturbed. Another witness for respondent, as appellant points out, after describing emotional and unreasonable actions, said she did not mean that the decedent "was insane or anything like that", but that she was very nervous and excitable, although also a very intelligent woman; that outside of these "tirades" she could discuss matters like any other person, but it didn't take much to set her off; that except for these occasions she was very normal and acted normally. But all this creates conflict only. And coupled with these periodic, but frequent, emotional outbursts, when, if we accept what respondent's witnesses said, as we must, it could be said that reason fled from its throne, there was evidence that during the period immediately surrounding the making of this will she was subjected to the very stresses and strains which had always produced emotional upsets. Her husband's illnesses had always disturbed her and he was so gravely ill when the will was made and for sometime prior thereto that, according to Mr. Powell, while making the will and discussing its provisions, the testatrix and he had just about "written poor Homer off". She was threatening suicide if he died and was possessed of the gun with which she soon shot herself. She had declared that she had nothing to go on for and could not live without him and so strong was this compulsion to suicide that she carried out her declared intentions four days after his death, and within hours after appellant had left to return to her own home. During the time between her discussions with Mr. Powell she went down town, while the will was being typed, and the witness who talked to her then said that her conversation didn't make sense in anyway, that she was talking in circles, that her eyes looked glassy, and she believed her to be of unsound mind at that time. We hold that from the testimony, taken as a whole, the jury could infer that the testatrix did lack testamentary capacity at the very time she executed her will. We are aware that it may well be the picture which these witnesses drew of the condition of the testatrix was a distorted one. But it cannot be said that it does not furnish support for the jury's verdict. The jury had a right, if they chose, to reject conflicting evidence and to conclude that this woman, at the very time of the testamentary act, was so torn with emotion, grief and despair and so mentally disturbed as to render her incapable of making her will.

[8–10] Appellants contend that the trial court erred prejudicially in the admission of statements reported by witnesses as having been made by Homer Lingenfelter touching his attitude toward his sister, one of the appellants, his feelings toward the contestant, and his own wills and testamentary intentions. All of this testimony was admitted over objection that it was incompetent and hearsay. One witness testified that he had heard Homer say the Tuckers were "money minded", another that Homer had said appellant was domineering and completely mercenary and that he made such statements frequently, including the statement that between himself and his sister it was a case of "dog eat dog". Respondent was permitted to testify that she had often heard Homer say that his sister had "hogged their father's estate". One witness testified as to a conversation between herself and both the Lingenfelters, in which Homer stated that he was very bitter because of his sister's treatment of their mother, that she had killed his mother, that he hated her husband especially and would not allow him to benefit in any way, that Mr. Tucker was a low blank, blank, had influenced his sister, and that she in turn had done a lot of things against the Lingenfelters; that she was a money grabber and crazy over Mr. Tucker, that she tried to get everything she could and he for one was not going to have it and that they would never get a penny of his. Concerning Homer Lingenfelter's attitude toward respondent, one witness was permitted to testify that he said respondent had worked for him when he first came to Marysville, had helped him get started, had worked at a very small salary and deserved everything he could do to help her and that the testatrix felt the same way. Another witness said she heard Homer state that respondent had been very valuable to him, that she had never been paid enough for her services and that he and his wife had their wills fixed so that she would be taken care of, that she had her little boy to educate and would need more than she needed when she worked for him. Respondent testified that Homer had told her how he had missed her since she left his employ, how he had difficulty with her successors, that she had done a great deal for him and that he realized that over the years he had underpaid her. Concerning Homer's own testamentary plans, there was admitted into evidence a will under which he had made the respondent a principal beneficiary and witnesses were permitted to testify that he had said she deserved everything he could do to help her and that he and his wife had provided for her in their wills. Respondent was permitted to testify that she had been sole contingent beneficiary and ecutrix of a will which he had executed in the latter part of the thirties.

When this testimony was admitted, there was two ultimate issues; one whether when she made her will the testatrix had the mental capacity required under the law to make valid testamentary disposition of her property, and the other whether or not the appellant had unduly influenced her in the making of that disposition. Testimony as to declarations by a decedent with respect to such issues is admissible, although hearsay, not as proving or tending to prove the truth of the statements made, but as showing the state of mind of the decedent in so for as that is material to a determination of the issues. This was recognized by the trial court and the jury were so instructed as to evidence that had been received of declarations made by the testatrix. But the state of mind of Homer Lingenfelter was immaterial to the determination of any issue before the court or the jury. The evidence received was admittedly hearsay, could not be received for the purpose of proving the truth of the statements made and testified to, and, since Homer Lingenfelter's state of mind was immaterial, the evidence as a whole was inadmissible and ought not to have been admitted at all. As noted, one of the conversations in which Homer was reported as having made these declarations was participated in by the witness and by the testatrix. But the fact that the testatrix was present afforded no excuse for admitting the declarations of her husband; it was not necessary. If respondent wished to prove statements made by the testatrix in that conversation she could do so, but the fact that what the testatrix said was part of the conversation between herself, her husband and the witness gave no right to respondent to have the whole conversation reported by the witness. Of course, if, the testatrix' declarations having been testified to, the appellant desired the whole of the conversation, it would have been her right to introduce it, but it was not for the respondent to do so. The wills of Homer Lingenfelter also were immaterial and should not have been received. Their purpose was, of course, to show that he had made wills which favored respondent, but what he had done in that regard was not material in testing the testamentary capacity of the testatrix or the alleged undue influence of appellant. Homer's wills and the wills of the testatrix were not joint wills so that there existed any necessity of bringing in his testamentary acts because inextricably bound up with hers. Early in the trial this question of the admissibility of declarations and testamentary dispositions made by Homer Lingenfelter arose. Prompt and full objections were made and repeated many times. It was declared to be the intent of respondent to introduce this general line of testimony. Therefore, we have here no inadvertent admission of inadmissible testimony, but the erroneous admission of testimony over repeated objections in the carrying out of a plan of improper proof.

Respondent seeks to justify the admission of this hearsay testimony by saying that they had a right to prove declarations of the testatrix for the purpose of showing her state of mind, and that these spouses were so close that proof of the state of mind of Homer would be proof of the state of mind of his wife. The argument is unsound. It does not follow that because a husband thinks thus and so, even though he declares his thoughts in the presence of his wife, that she, therefore, and for that reason thinks the same. Close as the relations of husband and wife may be they are still two individuals and one is not the other. We note that there is no instruction by the trial court, as was given with respect to the declarations of the testatrix, that the declarations of Homer had been admitted solely for the purpose of proving his state of mind or of proving her state of mind. We think it clear from this record that the purpose of this testimony was to show to the jury that appellant was a greedy and mercenary woman, that she had robbed her brother in the past, that her husband was a man of little worth, that the two of them were schemers, intending to get the property of their relatives, that they were domineering, greedy and avaricious, and that, on the other hand, the respondent was deserving of a share in the Lingenfelter property, had in fact earned it by long years of faithful and underpaid labor, and that if, through some means, she did not acquire property from the Lingenfelters, she would in effect be cheated and defrauded.

[11] Appellants contend that the trial court committed prejudicial error in admitting into evidence, over objection, a certified copy of a record of the probate court of Ada County, Idaho, from which it appeared that Earl F. Eby, a brother of testatrix, had on November 17, 1945, appeared before that court for examination on the charge of insanity; that testimony had been taken; that the court was satisfied that Earl F. Eby was insane and so far disordered in mind as to injure health, person or property; and that it had been adjudged that he be confined in the United States Veterans Hospital at American Lake, Washington.

When this record was offered appellants objected to its admission into evidence unless preliminary thereto, and as a condition thereof, it be shown that the insanity of testatrix' brother so adjudged was of an inheritable or transmissible type. The objection was overruled, the record was admitted and in its instructions to the jury the court told the jury, "If it be established by the evidence that a brother of the testatrix is or was insane, then this is a circumstance which may be considered by you in determining whether or not she [testatrix] was of sound mind at the time of making the will."

Before discussing the rule of evidence involved it should be noted that the record introduced clearly shows the Idaho court was neither concerned with the cause of insanity nor adjudged anything in relation thereto but was concerned solely with and only adjudicated the existing fact of the brother's insanity. Therefore, the record does not tend to prove that the insanity from which the brother suffered arose from any source that was transmissible to the testatrix. For all that the record shows, the brother's insanity may have been caused by any one of a great number of happenings peculiar to himself alone, such as trauma or disease.

We think that the objection ought to have been sustained and that this record was inadmissible without preliminary proof showing its relevancy, for unless there was something about the insanity of the brother which would afford an inference that from the same inheritable cause testatrix was either afflicted with a like insanity or predisposed thereto the record was not relevant to the issues being tried. This burden of preliminary proof to show relevancy was upon respondent for she could not introduce the bare record and cast upon appellant the burden of presenting proof of irrelevancy. That would be to assume relevancy without reason for the assumption.

The exact point here under discussion has not been squarely ruled upon by our appellate courts, so far as research of counsel or of this Court has served to disclose. The subject is treated by annotation to Commonwealth v. Dale, 264 Pa. 362, 107 A. 743, 6 A.L.R. 1482, under the heading, "Necessity of showing that insanity of relatives was of a hereditary or transmissible type in order to render evidence thereof admissible." It appears therefrom and from other discussions we have read that the appellate courts of other states are not in harmony upon this matter. Respondent refers us to People v. Smith, 31 Cal. 466, People v. Harris, 169 Cal. 53, 145 P. 520; Estate of Lenci, 106 Cal.App. 171, 288 P. 841; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, and In re Redfield, 116 Cal. 637, 48 P. 794. But those cases do not pass upon the precise question here presented. They go along the line that where there is direct testimony tending to prove that the person in question is insane, evidence as to insanity of his blood relatives is admissible in corroboration of such direct testimony, but they do not expressly hold, and we do not think they necessarily mean, that it is unnecessary to show that the insanity was hereditary or transmissible. In accordance with this Court's holding are such cases as Riechenbach v. Ruddach, 127 Pa. 564, 18 A. 432; Re Myer's Will, 184 N.Y. 54, 76 N.E. 920; People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490; State v. Van Tassel, 103 Iowa 6, 72 N.W. 497, and Hawley v. Griffin, Iowa, 82 N.W. 905.

[12] We have hereinbefore held that the evidence in this record was sufficient to support the jury's finding in respect of the testamentary capacity of the testatrix. We think it apparent from a recital of that testimony that the support so afforded is meager and barely sufficient for that purpose. This being so, we hold that the errors in admitting the hearsay testimony concerning the declarations of Homer Lingenfelter, the introduction in evidence of his previous testamentary dispositions, and the admission of the insanity record of testatrix' brother were prejudicial to a degree that requires reversal.

The judgment appealed from is reversed. That part of the order denying proponent's motion for judgment notwithstanding the verdict as to the issue of undue influence is reversed. The cause is remanded to the trial court for a retrial of the issue of testamentary capacity. As to the issue of undue influence the trial court is directed to grant the motion for judgment thereon notwithstanding the verdict and to enter appropriate orders to that effect.

ADAMS, P. J., and PEEK, J., concur.

105 Cal.App.2d 586

YORK et al. v. STROMMEN et al.

STROMMEN v. YORK et al.

Civ. 17809.

District Court of Appeal, Second District,
Division 3, California.

July 24, 1951.

Rehearing Denied Aug. 14, 1951.

Hearing Denied Sept. 20, 1951.

Barry M. York and another sued M. T. Strommen and another for breach of a contract by alleged failure to use due diligence in promoting the sale of lipstick applicators, for which plaintiffs owned inventions, and to sell and pay plaintiffs a specified sum for each of a specified number thereof. Named defendant filed a cross-complaint for reformation of the contract. From a judgment of the Superior Court of Los Angeles County, Otto J. Emme, J., awarding plaintiffs damages as against named defendant and dismissing the cross-complaint, named defendant appealed. Appellant applied for permission to produce additional evidence in the District Court of Appeal. The District Court of Appeal, Wood, J., held that plaintiffs were not required to prove that they owned letters patent on the inventions and that the evidence supported the trial court's finding that defendants agreed to pay plaintiffs a specified minimum amount for a two year period.

Application denied and judgment affirmed.

1. Patents ⚷219(4)

In action for breach of contract to sell, and to pay plaintiffs specified sum for each of stated number of lipstick applicators, where complaint alleged and plaintiffs represented in contract that they owned applicator inventions, some of which were described in patent applications, but evidence did not show and court did not find nor agreement recite that letters patent had been issued and defendant did not plead, prove or offer to prove that exclusive selling license granted him by plaintiffs was revoked, impaired or interfered with, plaintiffs were not required to prove that they owned letters patent in order to show their full performance of agreement.

2. Patents ⚷219(5)

In action for breach of contract by failure to sell certain number of lipstick applicators and pay plaintiffs stated sum for each, evidence supported trial court's finding that defendants agreed to pay plaintiffs stated minimum sum at such rate per applicator for specified minimum number thereof during two year period.

3. Patents ⚷212(1)

A provision of contract granting exclusive license to sell lipstick applicators that party aggrieved by either party's breach of contract might terminate agreement, whereupon all drawings, blueprints, etc., used by licensee, should become licensors' property, did not provide exclusive remedy for licensee's breach of agreement by failure to sell and pay royalties on specified minimum number of applicators, but merely afforded additional remedy not inconsistent with licensors' right, under other provisions of contract, to seek damages for such breach.

4. Appeal and error ⚷891

On appeal from judgment for plaintiffs in action for breach of contract granting defendant exclusive license to sell lipstick applicators, inventions of which plaintiffs owned, by failure to sell and pay plaintiffs specified sum for each of specified number of applicators, appellant was not entitled to produce additional evidence in District Court of Appeal that plaintiffs did not own letters patent on inventions and hence were not owners thereof, as plaintiffs were not required to prove that they owned letters patent.

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A. G. Van Deventer, Pasadena, for appellant.

Kaplan, Livingston, Goodwin & Berkowitz and Monte E. Livingston, all of Los Angeles, for respondents.

WOOD, Justice.

Action for damages for breach of written contract. Defendant Strommen filed a cross-complaint for reformation of the contract. Judgment was as follows: That, upon the complaint, the plaintiffs recover from defendant Strommen $49,916.36 and $1,500 as attorney's fees; and that the cross-complaint is dismissed. (The action was dismissed without prejudice as to defendant Barker, who was out of the state.) Defendant appeals.

It was alleged in the complaint that plaintiffs are the owners of certain lipstick applicator inventions, some of which are described and claimed in patent application Serial No. D-131,033 heretofore filed in the United States Patent Office; on April 25, 1947, plaintiffs entered into a written agreement with defendants Strommen and Barker whereby plaintiffs granted to defendants the exclusive right to manufacture and sell said applicator inventions throughout the United States for five years after the date of the agreement, and it was provided in said agreement that defendants agreed to use due diligence in promoting the sale of said applicators, and they further agreed to sell, during the first two years, a minimum amount of 2,000,000 applicators and to pay plaintiffs 2½ cents for each of said applicators sold by defendants; that defendants failed to use due diligence in promoting the sale of the applicators and failed to sell 2,000,000 applicators in accordance with the terms of the contract or at all, except 3,346 for which defendants paid $83.64; that plaintiffs have performed the terms of the contract on their part to be performed; and that as an approximate result of the failure of defendants to perform the terms of the contract, plaintiffs were damaged in the sum of $49,916.36.

In the answer of defendant Strommen it was alleged that said inventions are not owned by the plaintiffs and are not patented; that said agreement, "as same was executed by the parties," was erroneous, mistakenly and imperfectly drawn, in that, prior to its execution all parties agreed that the only detriment or penalty which should be suffered by the licensees, in the event they should not be able to sell the agreed minimum number of 2,000,000 applicators during the first two years, would be the loss of the purported exclusive license and all drawings, blueprints, dies and special tools used by licensees in the production of the applicators, which said articles should become the property of the licensees (licensors) upon such failure; that said defendant was informed by plaintiffs at the time of executing the agreement that the agreement "did so provide"; that said defendant did not have advice of counsel, did not then read the agreement, and until this action was filed "and served upon" said defendant he had never concerned himself in reading the agreement; he would not have executed the said agreement had he known that "same did not so provide"; that since summons was served upon him he has learned for the first time of such mistake and imperfection in the agreement; that in a cross complaint he will seek to have the agreement reformed to provide for the release of the licensees (defendants) in the manner above stated in the event of failure to sell the minimum number of applicators; that said defendant has paid to plaintiffs all sums due to them; and that plaintiffs were not damaged in any sum.

Defendant Strommen alleged, in his cross complaint, that cross defendants claimed to be the owners of certain lipstick applicator inventions; that shortly prior to April 25, 1947, cross defendants, cross complainant and one Barker held many discussions and negotiated for the exclusive rights to be granted by cross defendants to cross complainant and Barker to manufacture and distribute said inventions; that said parties verbally agreed that cross defendants should grant a license to cross complainant and Barker to manufacture and distribute the applicators for a period of five years after April 25, 1947, upon the condition that licensees should pay to licensor 2½ cents for each applicator sold by licensees; that licensees should expend certain vast sums in producing and advertising said product, and licensees should agree to sell 2,000,000 applicators during first two years of said term and an average of 1,000,000 per year during said five years; that it was agreed that in the event licensees should be unable to sell "said agreed numbers of such products in said times," licensors should have the right to cancel the rights of licensees under such license and that, upon such cancellation, licensors should become the owners of all drawings, blueprints, dies, and special tools used by licensees in the production of said applicators, and licensees should in no event assume any liability beyond the loss of said articles, except the duty to pay said 2½ cent royalty "or [on] such of said lipstick applicators as Licensees did in fact sell"; that said parties agreed that the terms of their said agreement should be reduced to writing and signed by them; that a writing was then prepared and submitted to cross complainant for signature; that the cross complainant asked cross defendants if said writing was in all respects in line with the preliminary oral agreements, and they were assured by cross defendants that said writing was in all respects in line with such agreements; cross complainant believed such statements of cross defendants and relying upon such statements "signed the same"; said writing, as prepared and signed by all parties, contained a mistake or imperfection, in that, it did not provide that licensees' liability should be limited, in the event of their inability to sell the agreed minimum quantities of applicators, to the loss of said drawings, blueprints, dies and special tools and to the loss of their rights to such territorial exclusive distribution; that cross complainant first learned that said written agreement contained such mistake or imperfection on

May 3, 1949, when he was served with summons in this action; and that said written agreement does not truly reflect the intent of the parties and should be reformed by adding the provisions which were erroneously omitted.

The court made findings to the effect that the allegations of the complaint were true, including a finding that in said written agreement the defendants agreed to sell during the first two years a guaranteed minimum of 2,000,000 applicators, and agreed to pay to plaintiffs therefor 2½ cents each or a minimum guaranteed sum of $50,000 on or before the expiration of the two-year period.

On April 25, 1947, plaintiffs York and Schnack, as licensors, and the defendants Strommen and Barker, as licensees, entered into a written agreement,[1] which is set forth in part in the margin hereof.

Also, on said April 25, 1947, at the time of signing said writing, the said parties executed a supplement [2] to said paragraph

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[1] "*Whereas, Licensors* are the owners of certain lipstick applicator inventions described and claimed in patent application Serial No. D–131,033 heretofore filed in the United States Patent Office, and in an additional patent application * * * which said application has been signed and is about to be mailed to the Patent Office, and

"*Whereas, Licensees* represent that they have the facilities for manufacturing and nationally distributing said inventions and are desirous of obtaining the exclusive right and license so to do,

"*Now, Therefore,* in consideration of the foregoing and of the covenants and conditions hereinafter recited, the parties hereto agree as follows:

"1. License:

"Subject to the due performance of this agreement by *Licensees,* the *Licensors* hereby give and grant unto *Licensees* the exclusive right under all patents issuing on said inventions, to manufacture and sell lipstick applicators embodying said inventions, hereinafter referred to as 'said applicators', throughout the United States of America, its territories and possessions, for a period of five (5) years from and after the date of this agreement and subject to the provisions for renewal hereinafter set forth.

"2. Royalties:

"*Licensees* agree to pay to *Licensors* the sum of two and one-half (2-1/2¢) cents for each of said applicators sold by *Licensees* hereunder, and to pay to *Licensors* the sum of one (1¢) cent on *in* each tablet or cake of lipstick sold as a re-fill for said applicators. An item shall be considered sold when it has been invoiced by *Licensees.*

"3. Performance:

"*Licensees* agree that within six (6) months from the date of this agreement they will be tooled up and in commercial production of said applicators ready to supply the market therefor, will have placed a reasonable amount of national advertising which shall have been published by said date, and will have paid out for said tooling and advertising not less than Ten Thousand ($10,000.00) Dollars as direct charges therefor.

"*Licensees* further agree to use due diligence and their best efforts in promoting the sale of said applicators throughout the territory licensed hereunder and in supplying the market therefor, and agree that during the first two (2) years of this contract they will sell two million (2,000,000) of said applicators, and during said five (5) year term their said sales will average one million (1,000,000) per year.

"4. Payments and Reports:

"Royalties shall be paid quarterly to *Licensors* on or before the Fifteenth (15th) day of the month following the close of the preceding calendar quarter. Each royalty payment shall be accompanied by a report prepared by a certified public accountant showing in detail the number of said applicators and re-fills sold during the preceding quarter and the amount of royalty due thereon.

"5. Books and Inspection:

"*Licensees* agree to keep accurate and complete books and records showing in detail the quantities of said applicators and re-fills manufactured and sold by them, * * *.

"6. Improvements

"It is agreed that all improvements, modifications, and substitutions of said inventions, hereinafter referred to as 'improvements', made or acquired by any of the parties hereto shall be and become the property of *Licensors* subject to all of the terms and conditions of this agreement, and shall be included in the term 'said inventions' whenever used herein. All patents issuing on said improvements shall be included in the term 'said patents' as used herein. * * *

"7. Marking:

"*Licensees* agree to place upon each and every one of said applicators made or sold by them hereunder the statutory patent

14, which is set forth in part in the margin hereof.

[1] Appellant (defendant Strommen) contends that the evidence was insufficient to support the finding that plaintiffs fully performed all the terms and conditions of said agreement on their part to be performed. He argues that under the pleadings there was a material issue as to whether there had been performance on the part of plaintiff, especially with reference to obtaining letters patent. There was no evidence that letters patent had been issued. As above stated, it was alleged in the complaint that plaintiffs are the owners of certain lipstick inventions, some of which are described and claimed in a certain patent application. The court found that said allegation was true, that is, that plaintiffs were owners of inventions described and claimed in an application. It did not find that letters patent had been issued. The representations of plaintiffs in the agreement were also to the effect that plaintiffs were owners of certain inventions described and claimed in a certain patent application filed in the patent office, and in an additional patent application about to be mailed to that office. It was not recited in the agreement that letters patent had been issued. Under the circumstances here it was not necessary for plaintiffs (licensors) to prove they were owners of letters patent. The defendant (licensee) did not plead, prove, or offer to prove, that the exclusive license granted to him by plaintiffs was revoked, impaired, or interfered with, or that there was anything

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notice incorporating data as specified by *Licensors*.

"8. Patent Information:

"*Licensors* agree to supply *Licensees* with true copies of all patent applications filed by them on said inventions and all patents issuing thereon.

"9. Disability of Licensees:

"If *Licensees* shall be declared bankrupt or insolvent, * * * such act or event shall be considered a breach of this agreement.

"10. Foreign Patents: * * *.

"11. Termination:

"If either party hereto shall breach any of the terms of this agreement and shall not cure such breach within sixty (60) days after written notice thereof, then the aggrieved party may, by written notice, terminate this agreement forthwith; provided, however, that *Licensees* may sell all of said applicators as they may have on hand or on order upon the date of such termination. Termination of this agreement shall not relieve *Licensees* from paying the full royalties herein provided on all of said applicators sold by them either before or after the date of such termination. Failure by either party to terminate for any breach of the other party shall not be construed as a waiver of the right so to do for any continuation of said breach or for any subsequent breach of the same or *dis*similar nature.

"Upon any termination of this agreement all drawings, blueprints, dies, jigs, templates and special tools used by *Licensees* or either of them in the production of said applicators shall be and become the property of *Licensors* and shall be delivered to them promptly by *Licensees*.

"12. Attorneys' Fees:

"It is mutually agreed that in any litigation between the parties hereto involving this agreement or any monies payable hereunder, the court may award to the successful party in such litigation as and for attorneys' fees such sum as the court may deem reasonable, and such award shall become a part of the judgment in said suit.

"13. Renewal:

"*Licensors* agree that if the *Licensees* shall not be in default in any of the terms of this agreement upon the expiration of its term *Licensees* may renew this agreement for additional five (5) year periods under the same terms and conditions as herein set forth. * * *

"14. Succession:

"This agreement shall inure to the benefit of and be binding upon the heirs, successors and assigns of *Licensors*, but may not be assigned in whole or in part by *Licensees* without the written consent of *Licensors*."

2. "Supplementing paragraph fourteen (14) of the agreement by and between the following: Barry M. York * * * Van Nuys, California, Carl H. Schnack * * * Los Angeles, and M. T. Strommen of Arcadia, California and H. Lawrence Barker of New York dated April 25, 1947. In the event that the *Licensors* should terminate the agreement with the *Licensees*, if they wish to continue to use the name *Originelle-Trulip* after such termination of the agreement, they are to pay a royalty to the *Licensees*."

in the nature of an eviction with respect to his right to manufacture and sell the applicator. In Wyman v. Monolith Portland Cement Co., 3 Cal.App.2d 540, 39 P.2d 510, the plaintiffs sought to recover royalties for the use of a process in making cement; and it was alleged in the complaint that on a certain date the plaintiffs and one Olson were owners of the right to manufacture and sell cement under certain letters patent issued to Olson. The defendant therein contended that even if it be assumed that plaintiffs were the owners of such right on the date alleged in the complaint, there was no allegation that they were owners of such right at the time the royalties accrued or at the time the complaint was filed. The court therein said, 3 Cal. App.2d at page 543, 39 P.2d at page 511: "[I]t clearly appears from the evidence that the right of appellant [defendant], the cement company, to manufacture and sell the patented product was never revoked nor interfered with, and until appellant can show 'something in the nature of an eviction' no cause of action arises. The allegations in the complaint, therefore, were superfluous, and whether or not it alleges ownership in respondents [plaintiffs] at the time of the filing of the complaint was immaterial. It was not necessary for plaintiffs to either plead or prove their title, and appellant is estopped from denying plaintiffs' title unless it pleads and proves that it has failed to receive that for which it contracted. * * *

"The following cases support the contention of respondents that in an action to recover royalties under a license defendant cannot defend by denying the title of plaintiff 'without pleading and proving something in the nature of an eviction,' as was said in * * * [Citations]." It does not appear that plaintiffs failed to perform any of the terms or conditions on their part to be performed.

[2] Appellant also contends that the evidence was insufficient to support the finding to the effect that defendants (licensees) agreed to pay plaintiffs a minimum of $50,000 for the two-year period. He argues to the effect that the agreement is ambiguous, in that, the provisions of paragraphs 2 and 3 thereof are contradictory. Paragraph 2 states in substance that the licensees agree to pay to licensors 2½ cents for each applicator sold, and an item should be considered sold when it is invoiced by licensees. Paragraph 3 states in substance that the licensees agree that during the first two years of the contract they will sell 2,000,000 of the applicators, and during the five-year term of the agreement their sales will average 1,000,000 per year.

Respondents (plaintiffs) argue that paragraphs 2 and 3 are not inconsistent, that each covers a subject matter of a separate and distinct nature—that paragraph 2 establishes the contract rate of payment per item and a definition of the items to which such rate shall apply, namely, the licensees agree to pay 2½ cents for each applicator sold and invoiced, as distinguished from items manufactured or delivered; that paragraph 3 establishes the obligation undertaken by the licensees to sell a guaranteed amount of 2,000,000 applicators during the first two years of the license period. They argue further in effect that the fact that licensees agree to pay a certain amount for an article sold does not conflict with the obligation to sell a specified minimum number of articles.

Appellant argues further that all discussions had prior to the making of the agreement were to the effect that no minimum guarantee was to be made insofar as a guaranteed payment of money was concerned and that in the event the minimum number of sales could not be made that the appellant would lose his franchise and dies and the money he had invested therein. Defendant Strommen testified that he did not intend unqualifiedly to pay $25,000 per year irrespective of whether he sold any applicators, that the "only thing I agree to pay was 2½ cents royalty on each case sold, and if I didn't live up to my contract, my contract was to terminate and I would lose the money and the equipment that I had made up"; that plaintiffs "agreed to that in my office before they even took their notes up to their lawyer." (The notes referred to were memoranda regarding the proposed transaction.) Plaintiff Schnack testified that he was present in the office of Mr. Fulwider, plaintiffs' patent attorney, when the plaintiffs and defendants and Mr. Fulwider were discussing the proposed agreement which was to be prepared by Mr. Fulwider; that defendant Barker suggested different things about the amount that would be sold over a period of two years "because Mr. York [one of plaintiffs] wanted cash, he wanted cash so that we—of course I had a lot of time in it and I also had some cash of my own and we thought it would be equitable if we had that cash out and let them operate as they wanted. But they didn't agree to that because they wanted to run over a period of two years before we received anything, but we were to have a report, a quarterly report. So Mr. Fulwider sat back and suggested this and Mr. Barker said no, and Mr. Fulwider, 'Well, will this be all right,' and Mr. Barker and Mr. Strommen said 'Yes, that will be all right.' That is the way the contract was written up.

"Q. What, if anything, do you recall about this minimum guarantee of two million to be sold in the first two years? What discussion was had about that particular phase of the contract? A. Well, we wanted at least 5 or 6 per cent and they would not agree to that because they thought it would reach pretty high and all this and that sort of thing, that the production cost would run up too high. So then I said, 'We will make it a straight figure.' They said, 'Well, 5 cents, because if you sold it for a dollar and one-half why the royalty would reach 12½ cents.' So I said the only fair way to do that then is to make it a straight rate, make it 2½ cents apiece, and Mr. Fulwider said, 'Well, is that agreeable with you gentlemen,' and they said, 'Yes, that is agreeable with us.'

"Q. And it was agreed, was it, that two million were to be sold in the first two years? A. That is right.

"Q. So that it was your understanding in the conversation that you were to receive $25,000 a year for the first two years? A. That was my understanding."

Mr. Fulwider testified, regarding the conversation preliminary to the preparation of the agreement, as follows: "There was a lot of discussion about what the licensees would sell, they would sell so many each year and they would do this and they would do that, they would pay royalties, and they would sell them. That much I am sure of. Now, then, what the particular words were, whether somebody raised a point and said, 'Now, if we don't sell them do we have to pay royalties on the difference,' I don't know. But I wrote the agreement on that assumption and my notes bear me out.

"Q. You wrote the agreement on what assumption? A. On the assumption that there was a firm commitment there to sell one million of these things a year and pay a royalty, and if they didn't sell them they still had to pay a royalty.

"Q. As a patent attorney, then, you are testifying in this case, Mr. Fulwider, that in your practice that you at that time believed that Mr. Strommen and Mr. Barker intended to pay $25,000 a year if they never even sold any, is that what we are to understand you as testifying to? A. That is correct."

He also testified as follows:

"Q. Mr. Fulwider, you have testified that it was your impression from something that you must have seen or heard that day that Mr. Strommen and Mr. Barker intended by signing this agreement which you prepared that they should be penalized the sum of $25,000 even if they didn't sell any of these things, is that your statement? A. Yes.

"Q. Now, you base that opinion or that impression upon what? A. On the notes I made and the contract I drew and my recollection of the general discussions. I wouldn't have written it down there if it hadn't been said."

He also testified:

"Q. Mr. Barker then told you very glibly that he expected to sell millions of them, is that correct? A. That is right.

"Q. Now, did you pin him down as to this minimum? Did you reduce that or interpret that in money, or did you always speak of it in terms of 2000 [2,000,000] lipstick applicators? A. Well, I was thinking along the line—I was translating it in my own mind to dollars. I can say positively it was transferred into dollars in our discussions."

Plaintiff York testified that he was present in Mr. Fulwider's office when plaintiffs and defendants and Mr. Fulwider discussed the proposed agreement; that Mr. Fulwider made notes of the conversation; that plaintiffs demanded a cash consideration payable on execution of the agreement but defendants did not agree to that. "Q. Was there any discussion about the fact at the end of two years that two million were to be sold during the first two years? Was that agreed to? A. Yes, it was because Mr. Barker said it would be very easy to sell after they got rolling five million instead of a million." He also testified that it was always his understanding that at the end of two years plaintiffs were to receive a minimum of $50,000.

Plaintiff Strommen testified that he was not in Mr. Fulwider's office prior to the time the contract was prepared; that he was in Mr. Fulwider's office only once and at that time the agreement had already been typed; that he could not read the contract at Mr. Fulwider's office because he did not have his glasses; the contract was read to him in that office; each party was given a copy of the proposed agreement and then they returned to defendant Strommen's office; he (Strommen) did not read the contract then but he listened while defendant Barker read it; they discussed the contract and it was signed in his office; he signed the contract without reading it. He received a copy of the contract after it was signed by all the parties.

Plaintiff York testified further that after the parties had returned to defendant Strommen's office with copies of the proposed agreement, the agreement was read aloud by defendant Barker; that after the contract had been read defendant Barker dictated a supplement to paragraph 14 of the agreement, and the supplement was also signed by the parties at that time. The said supplement is hereinabove referred to.

It does not appear that the agreement was ambiguous. The defendants agreed to pay a royalty of 2½ cents for each applicator sold, and they agreed to sell 2,000,000 applicators during the first two years. Even if the agreement should be regarded as ambiguous, the trial court resolved the conflicts in the testimony, regarding the intent and understanding of the parties, in favor of plaintiffs. The evidence was sufficient to support the finding to the effect that defendants agreed to pay plaintiffs a minimum of $50,000 for the two-year period.

[3] Appellant contends also in effect that paragraph 11 of the agreement provided the exclusive remedy of plaintiffs in the event of a breach of the agreement by defendants. That paragraph provides that if either party shall breach any of the terms of the agreement and shall not cure such breach within 60 days after written notice thereof, then the aggrieved party may terminate the agreement; that termination of the agreement shall not relieve the licensee from paying full royalties on all applicators sold; and that upon any termination of the agreement all drawings, blueprints, dies and special tools used by licensees shall become the property of the licensors. The termination of the agreement was an additional remedy afforded either party in the event of a breach of the agreement by the other party and is not inconsistent with a right to seek damages for a breach of the agreement.

By reason of the above conclusions, it is not necessary to discuss other contentions of appellant.

[4] Appellant has made an application for permission to produce additional evidence in this court. The additional evidence consists of photostatic copies of two Patent Office "file wrappers and contents," which wrappers and contents, according to appellant's affidavit, "trace two applications for Letters Patent from time of filing until rejection." By the additional evidence, appellant asserts that he seeks to prove that plaintiffs were not the owners of the lipstick applicator inventions. As above

stated, it was not necessary for plaintiffs to prove that they were owners of letters patent. The application to produce additional evidence should be denied.

The application to produce additional evidence in this court is denied. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

105 Cal.App.2d 671

ANDERSON et al. v. TORREY.

Civ. 14572.

District Court of Appeal, First District, Division 2, California.

July 27, 1951.

Action by Sophie Anderson, an incompetent person, by Central Bank, her guardian, against Edward L. Torrey to set aside deeds which plaintiff had made to defendant on ground that plaintiff was incompetent and was subjected to undue influence. The Superior Court in and for the county of Alameda, O. D. Hamlin, Jr., J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeals, Goodell, J., held that evidence sustained findings of the incompetency of grantor and of undue influence.

Judgment affirmed.

1. Deeds 🔑203

In action to set aside deeds made by grantor to defendant on ground that grantor was mentally incompetent at time of conveyance, evidence of conduct tending to show mental condition a reasonable time before hearing is admissible on question of competence and broad discretion is left to trial court as to character of such testimony and period of time over which it may extend.

2. Insane persons 🔑2

Evidence of conduct of alleged incompetent tending to show mental condition a reasonable time before hearing to have alleged incompetent declared incompetent, is admissible on question of competence.

3. Appeal and error 🔑994(3)

In proceeding to set aside deeds made by grantor to defendant on grounds that grantor was incompetent at time of execution of deeds, trial judge was entitled to consider grantor's behavior on stand and as he observed her and manner in which she testified, trial judge was in better position to pass upon her mental condition.

4. Deeds 🔑211(1)

In action to set aside deeds made by grantor to defendant on ground that grantor was incompetent, evidence sustained finding of incompetency of grantor at time deeds were made.

5. Deeds 🔑211(4)

In action to set aside deeds made by grantor to defendant, evidence sustained finding that grantor was subjected to undue influence.

Caldecott & Caldecott, Oakland, for appellant.

E. H. Christian, John Jewett Earle, Oakland, for respondent.

GOODELL, Justice.

This action was brought on behalf of Sophie Anderson by Central Bank, guardian of her estate, to set aside four deeds which she had made to appellant. The complaint alleged the incompetency of the grantor and undue influence exerted by the grantee. The answer denied these allegations and by a separate defense alleged that three of the parcels were conveyed to appellant because during a period of over ten years he had rendered to respondent "material aid, assistance and services in matters financial, business and personal, all without reward, consideration or reimbursement", and that the other parcel had been conveyed as payment in full for certain funds lent by him to respondent prior to her acquisition of that parcel.

The court found that for more than fifteen months (preceding August 26, 1949) respondent had been mentally incompetent, also that for more than ten years there had existed a confidential relationship between the parties; that appellant induced and persuaded respondent to make all four deeds, and that there was no consideration for any of them. The court also found against appellant on his separate defense respecting the fourth parcel. The judgment appealed from decreed that appellant reconvey the four parcels to respondent.

Parcel one as described in the complaint is situated in the City of Oakland, while parcels two, three and four are in the City of Alameda.

On June 3, 1948, respondent executed a grant deed conveying parcel four to appellant.

On July 9, 1948, she executed a gift deed conveying to appellant parcel two, and another gift deed conveying parcel three.

On July 19, 1948, she executed a gift deed conveying to appellant parcel one.

On the incompetency ground plaintiff alleged that "for more than four years * * * the mind of said Sophie Anderson has been and now is impaired to such an extent that she is mentally incompetent and unable, unassisted, to properly manage her property, or to take care of herself or her property; and by reason thereof she has been deceived and imposed upon by artful and designing persons, which facts were at all times herein mentioned well known to said defendant, Edward L. Torrey."

The answer denied this allegation generally and specifically. It will thus be seen that the incompetency issue tendered and joined in this action was (with the exception of the last quoted 16 words) essentially the same as that presented by the two earlier petitions for adjudication, see Guardianship of Walters, 37 Cal.2d 239, 231 P.2d 473 since the complaint substantially followed the language of § 1460, Probate Code and invoked the same test.

In its finding in favor of plaintiff on this issue the court followed the language of plaintiff's allegation, but fixed the duration of the mental impairment at "more than fifteen months" preceding the findings.

Appellant's contention on the incompetency issue is that the evidence is insufficient to support the findings.

Guardianship of Walters, supra, decided since the submission of this case was an appeal from an order which adjudicated incompetency, while this is an appeal from a judgment setting aside deeds on the ground, inter alia, of incompetency of the grantor. However, the rules governing both situations should be the same for reasons already given.

[1, 2] In this case the files and records of the underlying guardianship proceedings were introduced in evidence (although not brought up on this record). It appears that the petition therein was filed by appellant on June 3, 1948, the hearing held on July 7–8, the minute order of adjudication entered on July 8 and the formal order on July 19, 1948. This case was tried about 13 months later and respondent was examined respecting a 1947 transaction. With respect to this time element the court in the Walters case said, 37 Cal.2d 239, 231 P.2d 473, 479, "Evidence of conduct tending to show mental condition a reasonable time before the hearing is admissible on the question of competence [citations], and broad discretion is left to the trial court as to the character of such testimony and the period of time over which it may extend [citations]". In the same case, 37 Cal.2d 245, 231 P.2d 477, the court also said: "All conflicts and any reasonable doubt as to the sufficiency of the evidence must be resolved in favor of the order [citations]. In cases of this type, as in any other, we must uphold the findings of the trial court if there is any substantial evidence which, together with the aid of all inferences reasonably to be drawn from it, tends to support the judgment [citations]."

On June 3, 1948, the day on which the first deed was made, appellant filed in the

Superior Court of Alameda County a verified petition for letters of guardianship of the estate of Sophie Anderson, alleging that she was incompetent. A cross petition was then filed by Evelyn Pirro, the adopted daughter of Mrs. Anderson, seeking the appointment of Central Bank as guardian of the alleged incompetent. After a two-day hearing a minute order was made on July 8 denying appellant's petition for appointment as guardian but granting the Pirro petition for the appointment of Central Bank.

Five days later, on July 13, appellant and respondent intermarried.

The formal order adjudicating incompetency was signed on July 19 (from which no appeal was taken) and on that same day the fourth deed was made.

Evelyn Pirro and Martin Pirro, her husband, testified for the respondent, but the court characterized Mrs. Pirro's testimony as "very unsatisfactory." Appellant was then called by plaintiff under § 2055, Code Civ.Proc. *Respondent testified as a witness for appellant,* and appellant testified again on his own behalf.

The daughter testified that her mother, who gave her age as 72, was really 82 or 83. Appellant is somewhat younger.

Appellant had been a roomer in respondent's home continuously since 1926 and they had been close friends all those years. The judge carefully examined appellant respecting the verified petition which he had filed on June 3, wherein he alleged that "the mind of Sophie Anderson is impaired to such an extent that she is mentally incompetent and unable, unassisted, to properly manage her property or to take care of herself." Appellant's explanation was that he had signed the petition under duress and on the advice of his former attorney (who had died before the trial) and that he had vigorously protested against the allegation therein alleging incompetency. He answered that that allegation was untrue; that respondent was competent at all times herein involved.

In the latter part of 1947 respondent borrowed from a San Francisco bank $12,000 which, according to her son-in-law, respondent on her own suggestion had lent him wherewith to go into business. He testified that it was being repaid at the rate of $120 a month as he had promised. When questioned respecting this transaction respondent testified that she had not borrowed any money from any bank within the past two or three years. When asked if she had lent any money to the Pirros in 1947 she answered "I didn't lend them, but they went to help themselves." Her testimony, judging from the record, indicated a confused mental condition. Respondent's testimony, and the manner in which she gave it, and particularly her forgetfulness of the $12,000 transaction, undoubtedly weighed heavily in the court's decision.

With respect to the examination of an alleged incompetent the Supreme Court said in Guardianship of Walters, supra, 37 Cal.2d 239, 231 P.2d 473, 479: "In addition the trial judge was entitled to consider appellant's behavior on the stand. He observed her and the manner in which she testified at the hearing and was in a better position than we are to pass upon her mental condition. See Estate of Cowper, 179 Cal. 347, 348–349, 176 P. 676; Estate of Schulmeyer, 171 Cal. 340, 343–344, 153 P. 233; Estate of Coburn, 165 Cal. 202, 214–217, 131 P. 352; Guardianship of McConnell, 26 Cal.App.2d 102, 106, 78 P.2d 1043."

Guardianship of Walters and the four cases just cited were all appeals from order adjudicating incompetency, while this is an appeal decreeing reconveyances because the transfers had been made by an incompetent person. There is no reason, however, why the rule should not be the same in both instances. These cases emphasize the importance of the opportunity of the trier of fact to observe the appearance and behavior of the alleged incompetent on the stand. In the Coburn case, supra, 165 Cal. 202, at page 217, 131 P. 352, at page 358 the court points to § 1763, Code Civ.Proc. which required that the alleged incompetent "must be produced at the hearing". Section 1461, Probate Code now requires that "Such person, if able to attend, must be produced at the hearing * * *."

[3] No problem is now presented respecting the production of the incompetent as a witness, since she was called to the stand by her husband, the appellant. But since the principal issues were substantially the same as they had been on the hearing for adjudication, there is no reason why the rule with respect to her behavior on the stand and the court's opportunity to observe her, should not be the same as in guardianship cases.

The testimony of Martin Pirro respecting the mental capacity of his mother-in-law is characterized by appellant as worthy of but little weight, since he based his opinion almost entirely on the fact that there had been an adjudication, and it must be conceded that his testimony alone would probably not have supported a judgment for plaintiff. The testimony of his wife was characterized by the court as "very unsatisfactory", and it seems clear from the record that the plaintiff's case was in precarious shape until appellant was called by plaintiff as an adverse witness. His examination under § 2055 has been already described, and the court then had before it the person who, because of his intimate relationship with respondent knew more about her mental condition than any other person. It was he who initiated the incompetency proceedings (before their marriage), and the fact that on the same day that the first deed was made, appellant started those proceedings and alleged under oath that she was then incompetent, must have weighed heavily with the court. That it did, appears from the court's remarks in deciding the case from the bench immediately on its submission. Appellant's testimony that respondent was at all times of sound mind, when compared with his verified charge on June 3, 1948, that she was so mentally impaired that she needed a guardian, was, judging from the outcome, entirely discarded by the court. This, of course, was a conflict wholly within the trial court's province.

There remained, then, no witness on appellant's side from whose testimony any conclusion could be drawn, one way or the other, except respondent herself, and we have already commented on that, and particularly on the court's observation of her.

[4] These two pieces of evidence, namely, appellant's own sworn allegation of June 3 treated as an admission and his conduct in connection therewith, plus the testimony given by respondent as appellant's witness, were, in our opinion, ample to sustain the finding of incompetency at the times when the four deeds were made.

It is not necessary to decide herein whether the adjudication of incompetency became effective at the time when the minute order was entered on July 8, so that thereafter respondent had not the legal capacity to make a conveyance, § 40, Civ. Code, or whether its effective date was July 19, 1948, when the formal adjudication was signed and entered. This for the reason that if the trial court decided that respondent was incompetent on June 3, 1948, the date of the first deed, and the date on which appellant himself alleged her incompetency, a finding of her incompetency on July 9 when the next two deeds were made and on July 19 when the last deed was made, would have ample support, in the absence of evidence of some intervening change of mental condition, of which there was none. Moreover the files and records in the guardianship proceedings were before the trial court, but just what they showed is not before us.

On the issue of undue influence, as in the case of the incompetency issue, appellant attacks the findings as unsupported by sufficient substantial evidence.

Appellant testified that he was a business associate of respondent; that she reposed great confidence in his judgment, and that whenever she requested it he advised her on her business affairs. In his verified answer he alleged that for over ten years he had rendered to respondent "material aid, assistance and services in matters financial, business and personal, all without reward, consideration or reimbursement." Thus by his own testimony and admissions of record in his pleading, there is to be found at least some evidence of a confidential relationship. Respondent's daughter testified that her mother did not discuss business with her, and that discussion of business affairs by respondent with appellant were carried on "behind closed doors." The evidence of a confidential relationship by no means stops there, since appellant made an admission, referred to in respondent's brief and on oral argument, which, perhaps furnished a sufficient basis for a presumption of a confidential relationship of more than five years duration under the holding in Holmes v. Holmes, 98 Cal.App.2d 536, 538[2], 220 P.2d 603, which cites Fieg v. Gjurich, 163 Cal. 740, 127 P. 49; see, also, 12 Cal.Jur. p. 716, note 16.

Appellant concedes "that the law presumes a confidential relationship to exist between a husband and wife" citing § 158, Civ.Code, but adds that "there is no such presumption prior to the marriage and the existence of a confidential relationship for that period must be proved as a fact." That concession would place the deed of July 19 in one category (since the marriage took place 6 days before) but would place the deeds of June 3 and July 9 in another, since they were made before the marriage. If the rule of Holmes v. Holmes, supra, is applicable herein then a confidential relationship presumably had existed for more than five years before July, 1948, which would place all four deeds in the same category.

Subdivision 2 of § 1575, Civ.Code says that undue influence consists "In taking an unfair advantage of another's weakness of mind" which provision, of course, links the two issues in this case, bringing to bear on the undue influence issue all the testimony discussed earlier on incompetency including, of course, that of the respondent herself and her behavior and appearance while testifying.

[5] There can be no question that there was abundant evidence to sustain the findings respecting undue influence.

It is suggested that respondent had independent advice because a Notary Public was called in by respondent (not by appellant) to draw the deeds. The Notary was not called as a witness, hence there is no evidence of what was said by respondent or by himself, and respondent's testimony does not shed any light on that subject. She could not even remember the Notary's name. Appellant testified that he was not present when the deeds were made, hence he could not testify as to independent advice. There is nothing in the record to show that the Notary did anything beyond drafting the conveyances, taking the acknowledgments, affixing his certificates, and impressing his seal.

Moreover, on the issue of undue influence the court could take into consideration, and doubtless did, the coincidences in dates, i. e., the first deed synchronizing with the institution by appellant of the guardianship proceeding which eventuated in respondent's adjudication; the next two deeds on July 9, executed a day after the close of the hearing and the entry of the minute order, but before the formal order of adjudication, and the last deed on the same day as the formal order. All were made while the guardianship proceedings were pending or just completed and while appellant occupied a fiduciary relationship toward the grantor.

In deciding the case the court said: "I think that the confidential relationship has been established and * * * I think the law is that if there is a confidential relationship established and activity of the grantee in connection with getting a deed, that there is a presumption that they were obtained by reason of undue influence." The court correctly stated the law, Cover's Estate, 188 Cal. 133, 204 P. 583; § 2235, Civ.Code, and with no evidence to rebut the presumption the court's conclusion inevitably followed.

The judgment is affirmed.

DOOLING, J., concurs.

105 Cal.App.2d 705

GRISSOM v. SUPERIOR COURT OF STATE, IN AND FOR TEHAMA COUNTY.

Civ. 8013.

District Court of Appeal, Third District, California.

July 27, 1951.

Proceeding by Lee Grissom against the Superior Court of the State of California, in and for the County of Tehama, for a writ to prohibit the court from proceeding further upon an information charging him with manslaughter. An alternative writ was issued. The District Court of Appeal, Van Dyke, J., held that committing magistrate was justified in holding petitioner for trial.

Writ discharged.

1. Homicide ⚷236(1)

Evidence was sufficient to justify finding by committing magistrate that accused had struck deceased, that blow had felled him, and that death followed as result of blow. Pen.Code, §§ 872, 1487, subd. 7.

2. Criminal law ⚷240

Term "sufficient cause" as used in statute providing that defendant must be held to answer if it appears from examination that public offense has been committed and there is sufficient cause to believe defendant guilty thereof, means no more than reasonable or probable cause as used in statute which provides that party is entitled to discharge upon habeas corpus proceedings where he has been committed on a criminal charge without reasonable or probable cause. Pen.Code, §§ 872, 1487, subd. 7.

See publication Words and Phrases, for other judicial constructions and definitions of "Sufficient Cause".

3. Habeas corpus ⚷21

"Reasonable or probable cause" means such a state of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of guilt of accused. Pen. Code, §§ 872, 1487, subd. 7.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

4. Prohibition ⚷5(4)

Where it appeared that committing magistrate was justified in holding accused for trial after examination wherein it appeared that public offense had been committed and that there was sufficient cause to believe accused guilty thereof, accused was not entitled to discharge in a proceeding to prohibit court from proceeding further on theory that accused had been committed on a criminal charge without reasonable or probable cause. Pen.Code, §§ 872, 1487, subd. 7.

◆

Harrison W. Call, Oakland, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Petitioner seeks a writ from this Court prohibiting the Superior Court of Tehama County from proceeding further upon an information charging him with manslaughter. An alternative writ was issued and the matter has been briefed, argued and submitted for decision.

The petition alleges that on July 31, 1950, the District Attorney of Tehama County filed a criminal complaint in the Justice's Court of Red Bluff, accusing petitioner of the crime of manslaughter in that petitioner did on or about July 30th wilfully, unlawfully, feloniously and without malice kill one Warren Shermmer; that, on August 16th following, a preliminary examination was conducted by the Justice's Court; that said court then ordered petitioner to be held to answer for the offense charged; that no evidence was introduced at said preliminary hearing tending to prove, or in any way proving, that the crime of manslaughter had been committed by petitioner or at all; that over petitioner's objection the committing magistrate erroneously admitted into evidence an extrajudicial statement of petitioner. Petitioner concludes that the order of commitment was made without reasonable or probable cause and that he is therefore entitled to the writ prayed for. Before he filed his petition here, petitioner's motion presented to the Superior Court to vacate and set aside the information upon the foregoing grounds was denied.

The record of the preliminary examination shows the following: On the night of July 30, 1950, the deceased, Warren Shermmer, entered a bar in Tehama County, called "The Mint". The petitioner and his companion, Claude Lee, had arrived at the bar some twenty minutes earlier. There were six or seven people in the barroom, including petitioner and the deceased. When Shermmer entered the barroom he took a position at the bar near the entrance. Petitioner and Claude Lee were at the other end of the bar some thirty feet away. The bartender was just across the bar from Shermmer. Claude Lee testified that when Shermmer came in petitioner saw him and said, "Watch me get a drink." Lee replied, "Don't cause any trouble", and petitioner said he was going to get a drink out of it. The bartender observed that Shermmer appeared to be intoxicated to such an extent that when requested he refused to serve liquor to him, whereupon Shermmer asked the bartender to "give the rest of them a drink". Petitioner came up to where Shermmer was standing and took a position at the bar just to Shermmer's right. Shermmer greeted him, saying, "Hello, Lee, come on I will buy you a drink", to which petitioner replied, "I know damn well and good you will; I will take it" and he slapped the bar as he spoke. The bartender turned to get a drink for petitioner and as he stood with his back to the two men he heard a sound which he described as that of a blow being struck, though he did not see the blow. He turned and observed that Shermmer was down on the floor on his back; petitioner was trying to get him up, saying at the same time, "Get up, God damn you, and I will kick your ribs out." The bartender succeeded in getting petitioner down to the other end of the bar. He was acting belligerently and appealed to the owner of the bar to fire the bartender. He then told the bartender to come outside "and he would give me [the bartender] some of it." As Shermmer and petitioner stood at the bar no other person present except the bartender was closer to Shermmer than four or five feet, the nearest of them sitting on stools. Shermmer died without regaining consciousness and the examining physician testified that the cause of death had been a ruptured blood vessel at the base of the brain which was of traumatic origin.

[1] From what has been said we cannot say that the committing magistrate could not have inferred that petitioner had struck the deceased, that the blow had felled him, and that death followed as the end result. That was enough to meet the requirements of the statutes and the cases which have interpreted them.

[2-4] Section 872 of the Penal Code provides that the defendant must be held to answer if "it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof". Section 1487 (7) further provides that a party is entitled to discharge upon habeas corpus proceedings where he has "been committed on a criminal charge without reasonable or probable cause." The term "sufficient cause", as used in Section 872, means no more than "reasonable or probable cause" as used in Section 1487 (7). People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344, 347; People v. Putnam, 20 Cal. 2d 885, 129 P.2d 367; Cleugh v. Strakosch, 9 Cir., 109 F.2d 330; In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. "'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable or probable cause' may exist although there may be some room for doubt." People v. Nagle, supra. It is clear that the committing magistrate was justified in holding petitioner for trial and that no reason exists for prohibiting the respondent court from proceeding under the information there-

after filed charging the crime of manslaughter.

It is not necessary to discuss the petitioner's contention concerning the alleged erroneous admission of the extrajudicial statement for the statement was not necessary to make out probable cause.

The writ is discharged.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 734

TEDDER v. JOHNSON et al.

Civ. 18036.

District Court of Appeal, Second District,
Division 1, California.
July 30, 1951.

Action by Ivy Tedder, formerly Ivy T. Stanley, against Otto Johnson and another, to quiet title to certain realty. The defendants filed a cross-complaint. The Superior Court of Los Angeles County, George Francis, J. assigned, entered judgment quieting title to a one-half interest in defendants, whose claim was based on a sale under execution, issued pursuant to a judgment against husband of plaintiff at a time when realty stood of record in names of plaintiff and her husband as joint tenants. The District Court of Appeal, White, P. J., held that evidence sustained finding that plaintiff was not the sole owner of the disputed realty.

Judgment affirmed.

1. Appeal and error 🔑996, 1011(1)

It is province of trial court to resolve conflicting evidence and conflicting inferences which might be drawn therefrom, and its conclusion will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto.

2. Appeal and error 🔑989, 996

The power of District Court of Appeal begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support findings, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

3. Husband and wife 🔑268(2)

Statutory exemption of wife's earnings from debts of her husband may be waived and is waived where such earnings are so mingled with community property as to lose their identity. Civ.Code, § 168.

4. Appeal and error 🔑1010(1)
Husband and wife 🔑264

Statutory presumption that when any real or personal property is acquired by married woman by an instrument in writing, same is her separate property, is a disputable one, in form of evidence, and may be controverted by other evidence, and whether it is so controverted is a question of fact for trial court, its conclusion, unless manifestly without sufficient support in evidence, being conclusive on appeal. Civ.Code, § 164.

5. Husband and wife 🔑264

In action brought by wife to quiet title to certain realty in which an interest was claimed by defendants based on a sale under execution, issued pursuant to a judgment against husband of plaintiff at time when realty stood of record in names of plaintiff and her husband as joint tenants, evidence sustained finding that entire consideration for realty did not come from plaintiff's own funds and that defendants were entitled to have title quieted to a one-half interest in the realty. Civ.Code, § 168.

◆

Denio, Hart, Taubman & Simpson, By George A. Hart, Long Beach, for appellant.

Clifton A. Hix, San Pedro, for respondents.

WHITE, Presiding Justice.

This is an appeal by plaintiff from an adverse judgment in an action brought by her to quiet title to certain real property, by which judgment title to a one-half interest was quieted in defendants and cross-complainants, whose claim was based upon a sale under execution, issued pursuant to a judgment against the husband of plaintiff. At the time of the institution of the action against plaintiff's husband and the levy of an attachment against the property it stood of record in the names of plaintiff and her husband as joint tenants.

It is appellant's contention that the judgment is wholly without support in the evidence. It is argued that the evidence indisputably shows that the funds used to purchase the property in question came solely from the earnings and separate estate of appellant, and that such funds were not liable for the debts of her husband. Section 168 of the Civil Code provides as follows: "The earnings of the wife are not liable for the debts of the husband; but, except as otherwise provided by law, such earnings shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together." Concededly, the debt which led to the execution sale here attacked was not a debt for the necessities of life furnished the wife or husband.

Epitomizing the facts, as shown by the record, it appears that Ivy Tedder (appellant herein) and R. G. Stanley were married in Texas in December, 1939, at which time appellant was employed, had an automobile and approximately $1,000 in bonds and cash. In August, 1940, she received a gift of $400 from her brother. Stanley and appellant lived together as husband and wife in Texas until June, 1943, when they came to California and continued to live together in this state as husband and wife. Appellant spent her $1,000 for furniture which she has retained. After coming to California appellant worked at various occupations and her husband engaged in the building contracting business. In addition to the property here in question, appellant and her husband owned the home in which they lived, which was also purchased as husband and wife, in joint tenancy. In November, 1943, appellant and her husband entered into a contract to purchase as joint tenants four lots, constituting the real estate which is the subject of this action. On February 2, 1945, the contract was paid in full and in April, 1945, a deed was delivered and recorded conveying the property to appellant and her husband as joint tenants.

In February, 1946, respondents herein brought an action against appellant's husband, R. G. Stanley, based upon his failure to complete a contract to build a home for respondents. A writ of attachment was issued against the aforesaid property on February 20, 1946, and on February 24, 1946, appellant's husband conveyed his interest in the lots to appellant. In March or April, 1947, respondents recovered judgment against appellant's husband, caused execution to be levied, and the property sold to respondents in June, 1947. The present action by appellant to quiet title was brought in July, 1949.

Appellant argues that the record "is full and complete" to the effect that the entire consideration for the property involved came from her earnings and the money she received from her brother, and that there was no evidence introduced by respondents to the contrary. In this respect reliance is placed upon the testimony of appellant that she made the installment payments on the contract out of her earnings and made the final payment of $318.85 out of the funds which had been given to her by her brother when he went overseas in 1940. Appellant further testified that her husband never supported her, and that in 1942, they "made an agreement that I would keep all my earnings and he would keep all his earnings for our own separate property".

It is noteworthy in connection with the discussion hereinafter to be had, as respondents point out in their brief, that on February 17, 1946 (before the writ of attachment was issued), respondent Lela Johnson called upon Mrs. Stanley in Mr. and Mrs. Stanley's home, "to try to see Mr. Stanley and find out why he didn't complete his job of building a home for the Johnsons, or do some work on it, and tried to find out from Mrs. Stanley what had become of the $1,382.80 that the Johnsons had given to Mr. Stanley for him to start the construction of the home for which he had been employed. Mrs. Stanley was familiar enough with the work that Mr. Stanley was doing that she got some bills and showed them to Mrs. Johnson that Mr. Stanley had paid for materials to be used on the Johnsons' house and Mrs. Johnson informed Mrs. Stanley that she was going to sue Mr. Stanley for the return of her money, and Mrs. Johnson at that time also informed Mrs. Stanley that she was going to run an attachment on the lots. * * * The Johnsons then did sue Mr. Stanley on the 18th day of February, 1946, the day following the conversation between Mrs. Johnson and Mrs. Stanley. The four lots, the subject of this action, were attached on February 20, 1946. * * * Apparently no claim was made by Mrs. Stanley adverse to the title the Johnson had acquired, nor to the validity of the record title so far as R. G. Stanley (her husband) was concerned, and apparently she permitted the Johnsons to proceed with the execution sale and purchase the interest of R. G. Stanley for the full amount of the judgment, and apparently did nothing to assert her claim of ownership and claim that the property was her separate property until she filed the present action on July 18, 1949."

[1,2] Despite the fact that in many respects the testimony of appellant stands without any direct contradiction in the record, it cannot be held on appeal that the findings are without support in the evidence or that the judgment is against law. It was the province of the trial court to resolve conflicting evidence and conflicting inferences which might be drawn therefrom, and its conclusion will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto. See Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550; Hicks v. Reis, 21 Cal.2d 654, 659, 660, 134 P.2d 788. The power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings, and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[3] The record herein discloses that the property was taken by husband and wife as joint tenants. The exemption of the wife's earnings under section 168 of the Civil Code may be waived and is waived where such earnings are so mingled with community property as to lose their identity. Truelsen v. Nelson, 42 Cal.App.2d 750, 754, 109 P.2d 996, 998; Pfunder v. Goodwin, 83 Cal.App. 551, 257 P. 119. In Truelsen v. Nelson, supra, it is said: "It is well settled in this state that where separate and community property are so commingled that they cannot be traced, and the identity of each has been lost, the whole will be treated as community property since the burden is upon the party claiming that the property is separate to establish that fact. Fountain v. Maxim, 210 Cal. 48, 290 P. 576; Estate of Fellows, 106 Cal.App. 681, 289 P. 887. And where separate and community property is thus mingled a wife may not thereafter claim an exemption as to a sum which equals the amount of her earnings which she has theretofore placed in the common fund. Street v. Bertolone, 193 Cal. 751, 226 P. 913."

[4] Much of the assertedly undisputed testimony of appellant was self-serving and replete with her conclusions as to the legal effect of her alleged arrangements with her husband. The factual problem was not simplified by the absence of documentary evidence as to bank accounts or payments by check, the appellant testifying that after arriving in California she kept her funds on her person. Moreover, her version of their arrangements was inconsistent with the fact that not only the real estate in question, but the home occupied by her and her husband before their separation had been held in joint tenancy until some time in 1945. The trial court was entitled to draw conclusions from the fact that the property here in question remained in joint tenancy until after it was attached. Further, with reference to the function of the trier of fact in the situation presented and the credence to be accorded the testimony of appellant, the language of the court in

Nichols v. Mitchell, supra, 32 Cal.2d 598, 605, 606, 197 P.2d 550, 555, is here applicable:

"Section 164 of the Civil Code provides, in part, that 'whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property.' However, 'such presumption is a disputable one, in the form of evidence, and may be controverted by other evidence, direct or indirect (Stafford v. Martinoni, 192 Cal. 724, 221 P. 919); and whether or not it is so controverted is a question of fact for the trial court, its conclusions, unless manifestly without sufficient support in the evidence, being conclusive on appeal.' (Citing cases.)

"Defendants argue that no evidence was introduced to dispel the presumption raised by section 164 of the Civil Code and to establish the community character of the property standing in the name of Mrs. Mitchell. To this end they cite their 'uncontradicted testimony' that the purchase was made upon Mrs. Mitchell's delivery of her securities and the proceeds of a loan negotiated by her as her independent obligation * * *. But the trial court was not concluded by defendants' testimony as to the source of the consideration for the purchase of the property. It was entitled to consider the situation of the parties at the time of the purchase in 1937, the circumstances that may have occasioned the placing of the title in Mrs. Mitchell's name, and the legitimate inferences arising therefrom which precipitated into essential conflict the issue as to the separate or community character of the property. This province of the trial court to resolve 'conflicting evidence or conflicting inferences' and to reach a conclusion that will not be disturbed 'on appeal if some substantial evidence or reasonable inference' lends support thereto (Security-First National Bank v. Bruder, 44 Cal.App.2d 767, 772, 113 P.2d 3) was forcefully declared in the recent case of Hicks v. Reis, 21 Cal.2d 654, at pages 659, 660, 134 P.2d 788, at page 790: '*The trier of the facts is the exclusive judge of the credibility of the witnesses.* § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that "This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence." In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (Citing authority.) *Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted.* (Citing cases.) * * * (as) the court, in Market Street Ry. Co. v. George, 116 Cal. App. 572, 576, 3 P.2d 41, 43, stated: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted."' (Emphasis added.)"

[5] So in the instant case, while the evidence might be held to have supported findings in favor of appellant, this court is without power to disturb findings adverse to her which are founded upon substantial evidence or upon reasonable inferences from the evidence. This is particularly true in the instant case, when the testimony is reviewed in the light of section 1847 of the Code of Civil Procedure and the holding of the court in Nichols v. Mitchell, supra, 32 Cal.2d at pages 605, 606, 197 P.2d 550.

The judgment is affirmed.

DRAPEAU, J., and HANSON, J. pro tempore, concur.

105 Cal.App.2d 663

BAKER v. CURTIS.

Civ. 7887.

District Court of Appeal, Third District, California.

July 26, 1951.

H. J. Baker brought action against E. J. Curtis to recover broker's commission. The Superior Court, Merced County, R. R. Sischo, J., entered judgment on verdict in favor of plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., pro tem., held that where owner, after time limit in listing contract within which broker was to sell listed property had expired, urged and encouraged broker to continue efforts to find purchaser, and broker did so with knowledge and approval of owner, and, as result of broker's efforts, purchaser was produced to whom owner sold property, time limit in contract was waived and broker was entitled to commission.

Affirmed.

1. Appeal and error 🔑930(1), 996

On appeal from judgment entered on verdict, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences must be indulged in to support the judgment.

2. Appeal and error 🔑930(1)

On appeal from judgment entered on verdict in favor of plaintiff, implied finding of jury must be considered as a finding of facts as shown by the record.

3. Brokers 🔑50

Time limitation in listing contract within which broker is to sell listed property may be waived by the parties. Civ. Code, §§ 1624, subd. 5, 3513.

4. Brokers 🔑50

Where owner, after time limit in listing contract within which broker was to sell listed property had expired, urged and encouraged broker to continue his efforts to find purchaser, and broker did so continue with knowledge and approval of owner, and as a result of broker's efforts, a purchaser was produced to whom owner sold the property, time limit in contract was waived and valid listing contract existed between owner and broker. Civ. Code, §§ 1624, subd. 5, 3513, 3521.

5. Brokers 🔑57(2)

Where broker, with whom property was listed, informed prospective purchaser that property was for sale, and purchaser was interested and discussed financing plans with broker's salesman, who informed owner that purchaser was a good prospect and would probably contact him, broker was procuring cause of sale and was entitled to commission, though purchaser thereafter purchased direct from owner at price less than that in listing contract.

6. Brokers 🔑71

Where owner sold property directly to purchaser at price less than that in listing contract whereunder broker's commission was to be 5% of list price, broker who procured purchaser was entitled to 5% commission on sale price.

◆

Ray W. Hays, Fresno, for appellant.

C. Ray Robinson by James Cobey, Merced, for respondent.

SCHOTTKY, Justice, pro tem.

Plaintiff and respondent commenced an action to recover a broker's commission of $2,500 on the sale of a 1080-acre ranch in Mariposa County. The jury's verdict was in favor of plaintiff and this appeal is from the judgment entered on each verdict.

In arguing for a reversal of the judgment defendant and appellant makes two main contentions: 1. That at the time of the sale there was no valid contract between the parties; and, 2. That the court erred in its instructions to the jury.

[1] We shall first summarize briefly the factual situation as disclosed by the record, bearing in mind the familiar rule that all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences must be indulged in to support the judgment.

On April 21, 1947, appellant listed his ranch with respondent, a real estate broker with an office in Merced, respondent's authority being evidenced by an agreement in writing, which, so far as material here, reads as follows:

"Authority to Sell. In consideration of the services of H. J. Baker hereinafter called the agent, I hereby list with said agent, exclusively and irrevocably, for a period of 30 days from date hereof, the following described property, situated in the County of Mariposa, State of California, to-wit: 1080 acres located in White Rock district known as Walter Hickey Place, and I hereby grant said agent the exclusive and irrevocable right to sell the same within said time for Fifty-eight thousand & no/100 ($58,000.00) Dollars and to accept a deposit thereon.

"Terms cash or terms to suit seller..

"I hereby agree to pay said agent as commission 5% of the selling price herein named whether said property is sold by agent or by me or by another agent or through some other source, whether said property is transferred or conveyed or withdrawn from sale during the time set forth herein.

"In case a sale is made within 30 days after the termination of this listing to parties with whom said agent negotiated during its life and said agent notifies me personally or by mail, in writing, of such negotiation, I agree to pay the said agent the commission hereinabove provided."

Respondent advertised the property for sale in the local Merced newspapers and wrote letters to various cattlemen offering it for sale, but was unable to effect any sale of it during the listing period. In September, 1947, appellant told respondent, through respondent's salesman, Frank P. Montgomery, to keep the ranch on the market and respondent continued in his efforts to sell the ranch for appellant during the remainder of 1947 and the first eight months of 1948. The record shows that appellant was aware of these efforts and that he approved and encouraged them, that he told respondent to keep on trying to sell the ranch, and that he at no time requested that the listing be withdrawn. About September 8, 1948, a Thomas J. Booth came into respondent's office to inquire about a listing that had appeared in the local newspaper. He was not interested in the property that had been listed, but was informed that appellant's ranch was for sale. Booth showed that he was interested and discussed with Montgomery, respondent's salesman, ways and means of financing the purchase. Montgomery advised Booth where appellant could be located when he returned to Merced within 10 or 12 days. On September 18th Montgomery informed appellant that he had "a darned good prospect * * * by the name of Booth" and that appellant would probably be contacted by him. About September 20, 1948, Booth entered into direct negotiations with appellant for the purchase of the ranch, and on September 30, 1948, purchased it from appellant for the price of $50,000, appellant reserving the use of approximately 200 acres for the current grazing season. Respondent demanded a commission of 5% of said sale price of $50,000, and upon appellant's refusal to pay same commenced this action.

Appellant first contends that "this case is governed by sub-section 5 of section 1624 of the Civil Code, which provides that an agreement employing a broker to sell real estate for compensation is invalid unless in writing subscribed by the party to be charged. It is true in this case that there was a valid original agreement, but our contention is that it had expired." Respondent, in reply, does not dispute the rule of law stated by appellant, but contends that the time limitation in the written agreement has been waived by appellant. In his closing brief appellant states: "Of necessity, we must concede that under proper circumstances the stipulation as to time for performance may be waived"; but appellant argues that no waiver was shown by the facts and circumstances of the instant case.

In a very illuminating and well-considered annotation in 140 American Law Reports on "What amounts to waiver of termination of real estate broker's contract" it is stated at page 1020:

"* * * And where a definite time is specified for performance of the contract of brokerage, the broker is not entitled to the agreed compensation unless he achieves the result within such time, except where the principal in bad faith has prevented him from doing so (see 8 Am. Jur. 1086, Brokers, sec. 169). Where the termination of the contract has been waived, however, a different result may be reached, and the broker may be allowed to recover his compensation although in the absence of conduct amounting to a waiver of the contract's termination he would not have been entitled to recover because his performance occurred after the brokerage relation had been dissolved.

"In a number of instances the view has been taken that where, after the apparent termination of a brokerage agreement, the broker has continued negotiations with a prospective purchaser, or his efforts to find such a purchaser, with the knowledge and consent of the principal, the termination of the contract will, particularly where it appears that the principal accepted and retained the benefits of the broker's efforts, be considered waived.

"Thus in Stiewel v. Lally, 1909, 89 Ark. 195, 115 S.W. 1134, a suit to recover commissions for the sale of appellant's coal properties under a contract establishing a time limit for the procurance of a purchaser, it was held that the evidence was sufficient to sustain the finding of the jury that plaintiff was the procuring cause of the sale of the properties made by defendant and was consequently entitled to recover the agreed commissions. In overruling the contention that plaintiffs were not entitled to recover because the sale in question had been made after the expiration of the time limit provided in the contract, the court pointed out that appellant knew that plaintiffs were continuing their efforts to find a purchaser after the time limit had expired and offered no objections thereto but, on the contrary, encouraged them to continue, and said: 'He [appellant] waived the time limit in the contract, and the second instruction, given to the jury at the instance of appellees, of which appellant complains, correctly stated a familiar principle of the law that a party to a contract containing a limitation as to time for performance, who induces the other party after the expiration of the time limit to continue in the performance of the contract, will not be permitted to withhold the fruits of the contract because it was not performed within the specified time.'"

Appellant cites a number of California cases in support of his contention. Among these is Lisle v. E. B. & A. L. Stone Company, 103 Cal.App. 409, at page 411, 284 P. 680 at page 681: where the court said: "* * * the rule is well settled that to entitle an agent to a commission he must make a sale within the time limited by his contract of agency. If he fails to do so, he is not entitled to the commission even though he made efforts to sell and first caused the property to be called to the attention of the person who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner. Zeimer v. Antisell, 75 Cal. 509, 17 P. 642; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354."

Appellant also cites Rice Lands, etc., Co. v. Blevins, 61 Cal.App. 536, 215 P. 402, and Sweeley v. Gordon, 47 Cal.App. 2d 381, 118 P.2d 14.

Appellant quotes also from Herzog v. Blatt, 80 Cal.App.2d 340, at page 343, 180 P.2d 30 at page 32: "Neither is there any merit in plaintiff's contention that the contract was fully performed on the part of plaintiff by defendant's sale to plaintiff's customer, and that thereby the bar of the statute of frauds was removed. The law is settled that the procurement of a purchaser is not such performance as will entitle a broker to recover a commission in the absence of a compliance with the requirements of subdivision 5, section 1624 of the Civil Code. (See Crawford v. Kennedy, 64 Cal.App. 719, 222 P. 644; Sweeley v. Gordon, supra [47 Cal.App.2d 381, 118 P.2d 14].)"

Respondent, in reply, does not dispute the general principles stated by appellant and in the authorities cited by him. Respondent, however, asserts that a party may waive both contractual and statutory provisions made for his benefit, citing Section 3513 of the Civil Code, and that in the instant case the time limit in the written agreement has been waived by appellant.

Respondent argues, and we think correctly, that the factual situations in the cases cited by appellant differ from the facts of the instant case. Respondent points out that no cases have been cited by appellant in which it was held that the broker was not entitled to recover his commission, where, after the expiration of the time limit provided in a broker's contract, the broker was told by the owner to continue in his efforts to sell the ranch and that the broker did so continue with the knowledge, approval and encouragement of the owner, and that as a result of the broker's efforts the purchaser to whom the owner sold the property was produced. Respondent asserts:

"The controlling facts in this case, which clearly distinguish it from the foregoing authorities, are that:

1. There was a valid, written agreement to pay respondent a commission;

2. The appellant not only knew of, but encouraged, respondent's continued efforts to sell the property and induced him to believe that the time limit in the written agreement was waived;

3. The respondent procured a prospective purchaser to whom the appellant sold the property so that he accepted the benefits of respondent's services (see Civ. Code, sec. 3521).

"The Statute of Frauds in no way prohibits the waiver of a provision in a written agreement. A term or condition of any contract may be waived regardless of whether or not it is subject to the requirements of the Statute of Frauds."

Respondent has cited the annotation from 140 A.L.R. from which we have hereinbefore quoted, and has also cited a number of California cases to support his contention that the time limit was waived by respondent. Among these are Fuller v. Mann, 119 Cal. App. 568, at page 572, 6 P.2d 999, at page 1001, where it is said:

"Appellant contends that the trial court erred in denying her motion to strike out certain portions of the testimony of the respondent, which were in conflict with the terms of the original agreement. This testimony related to the waiver of the 90-day period within which the first 25 units were to be sold, and also to the oral agreement between the parties to divide the 70 units.

"We think the evidence clearly shows that appellant waived the 90-day period within which the first 25 units were to be sold.

"The law is well settled that performance under such contract could be waived by appellant, who was the party entitled to performance."

Also cited by respondent is Umphray v. Hufschmidt, 73 Cal.App. 140, at page 144, 238 P. 749, at page 751 where the court said: "Under those circumstances it must be held that appellant waived the limitation of time fixed by respondent's contract of agency for the sale of the property."

Respondent also quotes from Estes v. Hotchkiss, 63 Cal.App. 284, 289, 218 P. 605, 607, as follows: "It is attempted to avoid payment of the commission on the grounds that the writing of June 14, 1917, limited the right of the broker to recover his earned commission to the contingency that the principals in the transaction would consummate their contract within 60 days. This might have been true if the defendant, upon failure of the purchaser to complete the purchase within that time, had refused to go on with the transaction; but this was not the case, and the fact that he did go on with the negotiations with Estes and his associates must be held to have amounted to a waiver on his part of that condition in the broker's contract."

[2] Appellant in his reply brief points out correctly that the factual situations in the California cases cited by respondent are somewhat different from the facts in the instant case. However, appellant concedes "that under proper circumstances

the stipulation as to time for performance may be waived." The question, therefore, that we must determine is whether or not under the facts and circumstances of the instant case the time limitation in the written agreement was waived. We have hereinbefore set forth the factual situation as shown by the record, and while there may be some conflicts in the record, the implied finding of the jury must be considered as a finding of such facts.

[3, 4] As we construe the authorities, the time limitation stated in such a contract may be waived and where, as here, the owner, after the time limit provided in the contract had expired, urged and encouraged the broker to continue his efforts to find a purchaser for the property, and the broker did so continue with the knowledge, approval and encouragement of the owner, and, as a result of the broker's efforts, a purchaser to whom the owner sold the property was produced, under such circumstances the time limit in the written contract must be considered as having been waived and the broker is entitled to his commission. To hold otherwise would in our opinion permit the use of the Statute of Frauds to perpetrate a fraud. Such a holding would not only be inequitable, but is not required or justified by either reason or authority.

[5] In his closing brief appellant, for the first time upon this appeal, urges the point that the mere calling of the purchaser's attention to the property in the case of a real estate broker, is not sufficient to entitle the agent to compensation, and that the agency contract called for a price of $58,000 and the sale was consummated for $50,000. This point has no merit, and in the same brief appellant quotes from Pray v. Anthony, 96 Cal.App. 772, at page 779, 274 P. 1024, at page 1027, where the court said: "Defendant's second contention is that Mrs. Pray was not the procuring cause of the sale, but this contention is completely negatived by the evidence already set forth, for it appears therefrom that the seller and the buyer were brought together through the efforts of the broker, who had been duly employed as such; that while the contract of employment was still in force, never having been abandoned by the broker nor rescinded by the seller, the sale was consummated by the seller with the buyer the broker had procured, on terms and for a price acceptable to the seller. Under such circumstances the broker is entitled to the payment of the full commissions. Pryor v. McGuire, 59 Cal.App. 234, 210 P. 532; Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 206 P. 653; Bail v. Glantz, 78 Cal.App. 49, 248 P. 258, and cases cited therein."

Appellant urges that the court erred in giving the following instruction: "The fact that the property was sold for a lower price by the owner, Curtis, than he had listed it with the broker, Baker, does not in its self bar Baker's right to a commission from Curtis but it does reduce the amount of that commission from $2,900.00 to $2,500.00."

[6] There is no merit in this contention as the instruction correctly states that if respondent was entitled to judgment he was entitled to 5% commission on the purchase price of $50,000.

Appellant urges also that the court erred in giving the following instruction: "It is alleged in this case that Baker was employed by Curtis on or about April 21, 1947, to sell the realty here involved for a commission by a written agreement to that effect signed by Curtis. Although such employment was limited by said agreement to thirty days from April 21, 1947, if you find from the evidence that notwithstanding such time limitation upon Baker's employment, Baker continued his efforts to sell the realty in question throughout 1947 and the first nine months of 1948 and that Curtis knew Baker was continuing in his efforts to sell Curtis' property and Curtis either affirmatively consented to such efforts or acquiesced in them by making no objection thereto, you may then find that Curtis waived the aforementioned time limitation upon Baker's employment and that throughout the month of September, 1948, Baker was still employed by Curtis to sell the realty in question.

In this connection since the evidence shows without contradiction that Frank Montgomery was Baker's agent when I speak of Baker's efforts I mean to include those of Frank Montgomery."

If we are correct in our interpretation of this law, as hereinbefore set forth, there is likewise no merit in this contention.

No other points raised by appellant require discussion.

In view of the foregoing, the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 765

BELL et al. v. GRAHAM et al.

Civ. 18167.

District Court of Appeal, Second District, Division 3, California.

July 31, 1951.

Juanita M. Bell and another brought action of deceit against William M. Graham, doing business as William M. Graham Motor Sales, and another. The Superior Court, Los Angeles County, William S. Baird, J., found that defendants had misrepresented an automobile to be new and awarded actual and punitive damages and defendants appealed. The District Court of Appeal, Shinn, P. J., held the evidence sufficient and assessed penalty for vexatious appeal.

Judgment affirmed with addition of damages.

1. Fraud 🔑58(1, 2, 4)

In deceit action by buyer against seller of automobile who allegedly represented used automobile to be new, evidence sustained findings of deceit, reliance, and actual damages.

2. Fraud 🔑50

When deceit is charged and evidence and inferences are evenly balanced, court will not find fraud against presumption of fair dealing.

3. Fraud 🔑58(1)

Only a preponderance of evidence is required to establish fraud.

4. Appeal and error 🔑1010(1)

A finding of fraud in sale of used automobile as new will not be disturbed if substantially supported by evidence.

5. Fraud 🔑62

When seller of automobile driven around 7,000 miles fraudulently represented it to be new, an award of $361 actual damages to buyer was exceedingly moderate and $750 punitive damages was not excessive.

6. Costs 🔑263

Where buyer of used automobile represented to be new was awarded $361 actual damages and $750 punitive damages for deceit and seller appealed manifestly for purpose of delay on ground of insufficiency of evidence, $100 penalty would be assessed.

◆

George E. Cannady, Los Angeles, for appellants.

Pollock & Pollock, David Pollock, and Milton Jay Davidson, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Defendants Wm. M. Graham and Simie Statom appeal from a judgment in a nonjury trial awarding plaintiffs $361 actual damages, and $750 punitive damages, in an action for deceit. The ground of the appeal is insufficiency of the evidence to sustain the findings. Although defendants answered jointly, Statom had no part in the transaction. We shall refer to Graham as the defendant.

[1] The following facts were revealed by the evidence: On or about July 20, 1948, plaintiffs purchased from defendant a 1948 Cadillac Club Coupe for a price of $5,611.44; Defendant was a used car dealer; before the sale was arranged plaintiffs had told defendant that they did not want to buy a used car; defendant represented to

plaintiffs that the car in question was "brand new"; he opened the trunk and exhibited the spare tire and the tools still wrapped in paper; he called attention to the "brand new tires" and it looked to Mr. Bell like a new car; he noticed that the speedometer registered around 70 miles and inquired about this and defendant told him that this mileage had been registered while he showed the car to one other person, but that the car was absolutely new and had been shipped out from Detroit. Plaintiffs believed these statements. In the ensuing six months plaintiffs drove the car 1800 miles; it gave trouble and defendant made some repairs; when more trouble developed defendant, on plaintiffs' insistence, took the car to a Cadillac agency where plaintiffs were told by a mechanic that it was not a new car, but had been driven far more than 1800 miles. The mechanic testified that in his opinion it had been driven at least 5,000 miles. Plaintiffs then learned that the car had been sold originally in Detroit on or about March 30, 1948.

Defendant Graham testified he had bought the car from a man named Britt, a used car dealer in Little Rock, Arkansas, and that after it was shipped to him in July, 1948, he used it for several weeks. When asked if the speedometer registered more than 7,000 miles at the time he received it, he answered, "I presume so. I don't know. I can't recall at the present time what mileage was on the car." Graham testified that he told plaintiffs the car was "just like new" but that he did not represent it to be a new car. He also testified that the prices of secondhand Cadillacs were considerably higher than the dealers' prices for new cars.

The court found that defendants represented to plaintiffs that they were selling them "a brand new automobile" and that in so doing they were guilty of wilful and fraudulent deceit; also that the difference between the price paid by plaintiffs and the market value of the car on the date of the sale was $361. Damages in that amount were awarded and in addition, $750 as punitive damages. The record contains ample evidence to support the findings of deceit, reliance upon the representations of defendants, and actual damage.

[2-4] Defendants summarize their argument as follows: "A mere suspicion of fraud is never sufficient. Consequently when a plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not reasonably be drawn, he has failed to establish his charge." The argument evidences a misconception of the law. The statement in the brief, which is only a partial quotation from Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753, means only that if the evidence and inferences are evenly balanced the court will not find fraud against the presumption of fair dealing. But it has been held, times without number, that no more than a preponderance of evidence is required to establish fraud. Edmonds v. Wilcox, 178 Cal. 222, 172 P. 1101. The rule on appeal is the same as in other cases; a finding of fraud will not be disturbed if it has substantial support in the evidence. Noll v. Baida, 202 Cal. 98, 259 P. 433; Divani v. Donovan, 214 Cal. 447, 6 P.2d 247.

In his testimony Graham did not deny that he had concealed the fact that the car had been in use for four months before he bought it. It was a logical inference that his concealment and his actual misrepresentations, as testified to by plaintiffs, were activated by a purpose to deceive plaintiffs. Intent to deceive is usually proved by inference, rather than by direct evidence. The finding that deceit was intended is sufficiently supported.

In their briefs defendants do not question the award of punitive damages apart from their contention that the finding of fraud was unjustified.

[5, 6] We are of the opinion that the award of actual damage was exceedingly moderate; it means that plaintiff will have paid for a car that had been driven around 7,000 miles only $361 less than a new car would have cost him on the secondhand market, to say nothing of the excess of this price above a dealer's price for a new car. The award of $750 as punitive damages was not excessive. The appeal

was manifestly taken for the purpose of delay. It is so clearly without merit as to deserve a penalty of $100.

The judgment is affirmed with the addition of $100 damages.

PARKER WOOD and VALLÉE, JJ., concur.

105 Cal.App.2d 638

WALLACK v. BASS et al.

Civ. 4242.

District Court of Appeal, Fourth District, California.

July 25, 1951.

Hearing Denied Sept. 20, 1951.

Action by Melton S. Wallack against Raymond Bass, and others, and Barnard Engineering Company, Inc., for damages caused by flooding of a basement. The Superior Court, San Diego County, C. M. Monroe, J., after a jury verdict in favor of last named defendant, rendered judgment thereon, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that instructions given relating to foreseeability, and to burden of proof were proper.

Judgment affirmed.

1. Trial ⚷145

In sublessee's action against contractor, owner of building, and lessee for damages sustained when water from heavy rain passed through a hole in basement wall, through which an automatic sprinkler system supply pipe was being installed, and flooded basement, withdrawing from jury, question whether contractor was negligent in opening hole in basement wall, in absence of evidence that would have supported a finding of negligence in opening this hole as distinguished from permitting it to remain open, was not error.

2. Negligence ⚷58, 59

To establish liability for negligence there must appear that injury was a natural and probable consequence of the wrongful act, and also one that might reasonably have been foreseen, under the circumstances, by a person using ordinary care.

3. Negligence ⚷140

In sublessee's action against contractor for damages sustained when water from heavy rain passed through a hole in basement wall, in which an automatic sprinkler system supply pipe was being installed, and flooded basement, instruction in respect to foreseeability as an element of proximate cause, to effect that it was necessary that probability of damage be foreseeable, or that injury "would" result, instead of instruction to effect that it was necessary only that injury "might" result, was sufficient to apprise jury of rule to be applied and did not mislead by use of word "would".

4. Negligence ⚷138(3)

Where contractor, installing an automatic sprinkler system supply pipe in basement, opened hole in basement floor and thereafter excavated under sidewalk to curb at which point city was to take main supply line and connect it with city main, and city connected, and covered excavation from curb to main with dirt and layer of cold asphalt, and after a hard rain motorist's automobile wheel crushed in top of asphalt causing water to pass into excavated ditch through hole in basement and do water damage, in basement lessee's subsequent action against contractor, instruction on intervening cause or act, was applicable, and properly given.

5. Trial ⚷296(7)

In negligence action, where instruction on burden of proof stated in effect that jury consider which party had burden and consider evidence, and determine whether greater weight of evidence was in favor of issue under consideration, and whether it had produced "conviction" in jury's mind, even though quoted word was not correctly used, in view of fact that court told jury several times that issues were to be decided by preponderance of evidence, and correctly defined and explained that term and apparently used quoted word in interest of brevity, instruction was not fatally defective.

Edgar B. Hervey, San Diego, Henry F. Walker, Los Angeles, for appellant.

Gray, Cary, Ames & Driscoll, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages caused by the flooding of a basement. The owner of a building in San Diego leased the ground floor to one Bass, who subleased one storeroom and its basement to the plaintiff.

In February, 1949, the corporate defendant, which will be referred to as the defendant, was engaged, under a contract with the owner of the building, in installing an automatic sprinkler system. In doing this work it was necessary to run a 4" feed pipe through the wall of this basement, under the sidewalk and curb and beneath the pavement to the city's water main, which was near the other side of the street. It was also necessary to put another drain pipe and two smaller copper tubes through this wall. The defendant was to install the 4" pipe and the drain pipe as far as the curb line. The city was to install the 4" pipe from the curb line to its water main on the other side of the street, and was also to install the two copper tubes running from a meter box underneath the sidewalk, at the curb line, through the wall and to a detector check on the inside of the basement wall.

For these purposes, the defendant opened a hole about a foot square in this wall, and opened a trench about the same size under the sidewalk and to the curb line. On the afternoon of February 10, it finished the installation of the 4" pipe and the drain pipe as far as the curb line, having connected both pipes to the sprinkler system inside the basement wall. When the defendant's foreman left on that day the city's crew had a ditch opened across that half of the street, and was engaged in installing the 4" pipe from the water main and connecting it with the one installed by the defendant. When the foreman returned the next day, February 11, he observed that the 4" pipe had been connected and that the ditch dug by the city had been refilled, with a layer of asphalt over the top, apparently in the usual manner. He did not fill in the trench under the sidewalk, or stop up the hole in the wall, since the city had not yet installed and connected the copper tubes. These were not installed by the city until three days later.

It had been raining intermittently for several days, and began to rain hard about 6:00 o'clock on the evening of February 11. About 11:30 that night, while a man was parking his automobile at this curb, a rear wheel "just dropped out from under" and went into the ditch dug by the city. It left a large hole in that ditch, about two feet from the curb. A stream of water coming along the curb flowed into this hole, through the trench under the sidewalk and the hole in the wall, and flooded the basement, causing the damage complained of.

The plaintiff brought this action against the owner of the building, the lessee of the ground floor and the defendant, alleging that the defendant "did negligently open and cause to remain open a hole through the brick wall of said basement" in such a manner as to permit water to flow into the basement. The city was not made a defendant. During the trial, the action was dismissed as against the lessee of the ground floor, and a judgment of nonsuit was entered in favor of the owner of the building. A jury returned a verdict in favor of the defendant, and the plaintiff has appealed from the judgment. Four points are raised, all relating to claimed errors in the instructions. The plaintiff requested no instructions, and most of those given were supplied by the court.

After giving the usual general instructions the court stated that the allegation that the hole was negligently opened might be disregarded, since the opening of the hole was essential to the work, and that the material issue here was as to whether or not the defendant had negligently allowed the hole to remain open, and whether this was a proximate cause of the damage. The court then clearly defined and explained negligence; told the jury to consider all the existing conditions as shown by the evidence, including the state of the work, what reasonable steps should have been taken, and what a reasonable person should have anticipated; and stated that negligence, if established, must be a proximate cause of the injury. After explaining the meaning of proximate cause at some length, the court said:

> "In passing on the question of proximate cause, one of the tests to determine it and one of the essentials is that the result or the probability of damage was foreseeable. In other words, that a person doing the act in question, either did foresee or, in the exercise of ordinary care, should have foreseen that injury or damage would result from that act. It doesn't necessarily follow that he is required to have foreseen the particular act, but generally that he—it is required, before it can be held that negligence is the proximate cause of the damage, that he should have foreseen that injury or damage would result from that act.
>
> "You will note that we have also stated that there should be no independent intervening cause. The mere fact that a person does an act which renders something possible or some damage possible is not sufficient of itself, and if there be some independent intervening act or negligence on some other—on the part of someone else following thereafter and which results in producing the damage or injury, then that independent intervening act is held in law to be the proximate cause of the injury and not the original act. The exception to that is, of course, that if the person who does the original act should in the exercise of ordinary care have foreseen the probability of the intervening act, then his original act still remains the proximate cause."

The court then told the jury that it should first determine whether or not the the defendant had failed to use ordinary care, by not closing up this hole; and that if it found there was any negligence in this regard it should then determine whether or not the defendant should have, in the exercise of ordinary care, anticipated the probability that some such a chain of events would follow as would result in injury to property in the basement. The court then said: "Now, those briefly stated are the issues of fact for you to determine; the question to be determined from the evidence that is introduced before you. The person who has the affirmative of an issue has the burden of establishing that issue by a preponderance of the evidence. In this case, the burden is upon the plaintiff to establish by a preponderance of the evidence all the essential elements of the cause of action. In other words, he must prove first by preponderance of the evidence that the defendant was negligent. He must prove further that such negligence, if established, was a proximate cause of the damage that he suffered, and if he has proved those matters, then he should prove by a preponderance of the evidence the amount and extent of his damage. When we use the term 'preponderance of the evidence,' we refer to the greater weight of the evidence, the evidence which is more than, or preponderates over or has more probative value than the evidence offered in contradiction thereto. The term has to do purely with the probative value of the evidence to its effect upon the mind of the jury and not necessarily the number of witnesses that may testify on any issue; so that sometimes it follows that the testimony of a greater number of witnesses that does not produce conviction in the minds of the jury may be overcome by the testimony of a lesser number of witnesses or of one witness which does produce conviction in the minds of the jury. If upon any issue you find that the evidence is evenly balanced, with the result that you find yourself in doubt as to whether the issue has or has not been proven, then in such event the person that has the burden of the proof of that issue has failed to meet the burden and you should decide the issue against him. You will find in considering several cases that one of the most useful tools that you can use in an endeavor to arrive at the correct answer is to bear in mind the burden of proof in considering the evidence; consider which party has the burden of proving it and consider the evidence, determine whether or not you feel that the greater weight of the evidence is in favor of that issue; whether it has produced conviction in your mind. If so, then the party has met that burden; otherwise not."

[1] It is first contended that the court erred in withdrawing from the jury the question as to whether defendant was negligent in "opening" the hole in the basement wall. There was no evidence which would have supported a finding of negligence in opening this hole, as distinguished from permitting it to "remain" open. The only real issue was left to the jury, and no prejudice appears.

It is next contended that the instruction with respect to foreseeability as an element of proximate cause was erroneous. It is argued that the jury was told that it was necessary that it be foreseen, or should have been foreseen, that the injury *would* result, instead of being told that it was necessary only that injury *might* result; that the jury could have found that the defendant knew that the city had covered this trench with a soft asphalt covering; and that the jury could well have found that the defendant should have foreseen that "there might be a risk of harm to plaintiff."

[2, 3] There was no evidence that defendant knew that the city had filled in or covered this trench in an improper manner. In such a case it must appear that the injury was a natural and probable consequence of a wrongful act, and also one that might reasonably have been foreseen, under the circumstances, by a person using ordinary care. Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 87 P.2d 917. The real question in this connection was whether or not an injury of some sort was to be anticipated; whether the probability of such an injury was reasonably foreseeable. The instruction when read as a whole, while not technically perfect, was sufficient to apprise the jury of the rule to be applied. It would be unreasonable to assume that the jury could have been misled by the use of the word "would", or that it gave to the instruction as a whole a meaning other than that intended by the court, that the probability of damage was foreseeable. The instruction could not have been prejudicial in view of the circumstances shown by the evidence.

[4] It is further contended that the instruction about an intervening cause or act was inapplicable under the facts of this case, and that no instruction on that theory should have been given. It is argued that, having created the dangerous condition, the defendant could not rely on someone else to correct it; and that any possible negligence of the city in failing to properly close the ditch could not operate as an intervening cause so as to relieve the defendant from its own negligence.

The defendant did not at any time create a condition that in and of itself threatened any injury to the plaintiff or his property. The city opened the ditch in the street, without which the injury would not and could not have occurred, and then failed to properly close it. Water from this source could not have entered this basement had the street, beyond the curb, not been opened and improperly closed. The defendant had nothing to do with that, and without that independent act no injury could have resulted. There was evidence of an intervening act of negligence which resulted in the injury, and there was no evidence that the defendant should have foreseen the probability of that intervening act. The case was largely tried on this theory and there was considerable, if not controlling, evidence in support thereof. While there was evidence that the defendant's foreman knew that the city customarily filled such ditches with dirt and a layer of cold asphalt on top, and that he knew that this was usually allowed to settle for a time before applying a more permanent top, and that it would settle some, there was no evidence that he knew or should have known that this particular work had been done in such a manner that it would disintegrate and cave in after only one day's use. The question was one of fact for the jury and an instruction on this subject was called for by the issues presented. Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872.

[5] Finally, it is contended that the instruction last above quoted was fatally defective because it told the jury that "conviction in the minds of the jury" was required. It is argued that the jury was thus told that, in deciding whether or not the plaintiff had met the burden of proof, if should be governed by whether the evidence produced conviction in its mind and not by a preponderance of the evidence.

Obviously, the word "conviction" was not correctly used here, but it does not necessarily follow that it was so misleading as to have been prejudicial. The specific meaning that will be accorded to words naturally depends on the way in which they are used, and is largely controlled by the context. The court here told the jury several times that the issues were to be decided by a preponderance of the evidence, and correctly defined and explained that term. It then explained that the number of witnesses was not controlling, and, apparently, used the word "conviction" in the interest of brevity. After covering the matter of burden of proof, it then stated that the test in that regard was still "the greater weight of the evidence", and added that the explanatory clause "whether it has produced conviction in your mind." The second clause in the same sentence would naturally be taken as a part of and as related to the first clause; as telling the jury that it should satisfy itself, or be convinced, as to where the preponderance of the evidence lay; but not as referring to a new and higher degree of proof which should be taken as controlling. It is not to be supposed that the jury would ignore the greater part of this long instruction and give to the word "conviction" the strict technical meaning which it has when used under some circumstances. Moreover, immediately after giving that instruction the court again told the jury that the issues of negligence and proximate cause were to be determined upon "a preponderance of the evidence."

In passing on a motion for a new trial the judge pointed out that this was not a close case, and said that the jury's finding that the defendant was not negligent "was one that I would probably be compelled to make myself." It must be held that any inaccuracies or errors which here appear are not sufficient to justify a reversal.

The judgment is affirmed.

MUSSELL, J., concurs.

105 Cal.App.2d 763

WARNER v. WARNER.

Civ. 18150.

District Court of Appeal, Second District, Division 3, California.

July 31, 1951.

Divorce action by Jeanne De Kolty Warner against Caryl Warner. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered an order requiring defendant to pay plaintiff $250 as attorney's fees, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that, where plaintiff moved to vacate interlocutory divorce decree granted to plaintiff but did not move for attorney's fees for prosecution of motion to vacate until after expiration of time for presenting plaintiff's answering points and authorities on motion to vacate, the services for which fees were sought had been fully performed and the court was therefore without authority to make an allowance.

Order reversed.

Divorce 🔑222

Where plaintiff moved to vacate interlocutory divorce decree granted to plaintiff but did not move for attorney's fees for prosecution of motion to vacate until after expiration of time for presenting plaintiff's answering points and authorities on motion to vacate, the services for which fees were sought had been fully performed and the court was therefore without authority to make an allowance. Code Civ.Proc. § 473.

◆

Caryl Warner, in pro. per.

Betty & Campbell and Marion P. Betty, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeal by defendant from an order requiring him to pay plaintiff $250 as attorneys' fees, ostensibly for the purpose of enabling plaintiff to prosecute a motion to set aside an interlocutory decree of divorce which had previously been granted to her. The ground of the appeal is that the services for which the allowance was made had been fully performed before application was made therefor. The various steps in the proceeding were the following: September 22, 1949—plaintiff granted an interlocutory decree; March 11, 1950—plaintiff gave notice of motion to vacate the decree pursuant to section 473, Code of Civil Procedure; March 17, 1950—motion to vacate argued and ordered submitted upon the filing of points and authorities ten, five and five days; (April 6, 1950, last day for filing points and authorities) April 18, 1950, plaintiff gave notice of motion for attorney's fees for prosecution of her motion to vacate; motion set for April 24, 1950; April 24, 1950—motion to vacate denied in Department 35; motion for attorneys' fees transferred and on the same day granted in Department 8.

Upon the hearing of the motion for attorneys' fees defendant objected upon the ground that the services for which the fees were sought had been fully performed and the court was therefore without authority to make an allowance. It was a good objection. The time for presenting plaintiff's answering points and authorities on the motion to vacate had expired 12 days prior to the notice of motion for fees. No further services were contemplated. Since the services had been fully performed the court was without jurisdiction to make an award for fees. Beaulac v. Beaulac, 84 Cal.App.2d 649, 191 P.2d 478. The facts differ materially from those in Puckett v. Puckett, 21 Cal.2d 833, 843, 136 P.2d 1, relied on by plaintiff. It was there held that fees were properly allowed the wife for resisting the husband's motion to modify a decree by reducing the monthly allowance payable to plaintiff where the wife had given notice of a motion for fees prior to the hearing of defendant's motion, although the order for fees was not made until after the conclusion of the hearing. It is immaterial here that plaintiff gave her notice of motion prior to the decision of the motion to vacate, since the notice was given after the services had been completed. The last act of her attorneys consisted of the filing of their reply points and authorities.

The order is reversed.

WOOD and VALLÉE, JJ., concur.

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105 Cal.App.2d 683

JAEHNE v. PACIFIC TEL. & TEL. CO.

Civ. 18042.

District Court of Appeal, Second District,
Division 3, California.
July 27, 1951.

Rehearing Denied Aug. 14, 1951.

Hearing Denied Sept. 24, 1951.

Olive E. Jaehne brought an action against Pacific Telephone and Telegraph Company, a corporation, for injuries allegedly suffered by plaintiff telephone switchboard operator when plaintiff's finger was pricked by strand of wire when she pulled the cords from switchboard in hotel. The Superior Court of Los Angeles County, William S. Baird, J., entered a judgment pursuant to an order granting a motion for a judgment to be entered in accordance with a prior motion for a directed verdict, and plaintiff appealed. The District Court of Appeals, Vallée, J., held, inter alia, that whether defendant failed in defendant's duty to maintain switchboard in reasonably safe condition and was negligent in its maintenance of switchboard, and whether such negligence was proximate cause of plaintiff's injuries, were for jury.

Reversed.

1. Trial 🔑159, 168

The rules governing the determination of a motion made under statute providing that when a motion for directed verdict, which should have been granted, has been denied, and jury for any reason, has been discharged without having rendered a verdict, court may order judgment to be entered in accordance with motion for directed verdict, are the same as those applicable to motions for a judgment of nonsuit and a directed verdict. Code Civ. Proc. § 630.

2. Appeal and error 🔑927(7)

On plaintiff's appeal from judgment entered in personal injury action pursuant to order granting a motion for judgment to be entered in accordance with motion for directed verdict, evidence was reviewed in light most favorable to plaintiff, and all reasonable inferences in favor of plaintiff would be indulged and all conflicting and contradictory evidence disregarded. Code Civ.Proc. § 630.

3. Telegraphs, telephones and radio 🔑15(2)

Telephone company which had exclusive control of maintenance and repair of telephone switchboard located in hotel, had duty to use ordinary care to maintain switchboard in reasonably safe condition for switchboard operators employed by hotel, and to exercise reasonable care in protecting switchboard operator from injury through negligence of telephone company. Civ.Code, §§ 1708, 1714, 3281.

4. Telegraphs, telephones and radio 🔑20(7)

In action by operator of switchboard which was located in hotel, against telephone company which had duty to maintain and repair switchboard, to recover for injuries allegedly suffered by plaintiff when plaintiff's finger was pricked by strand of wire when plaintiff pulled cords from back of switchboard, whether defendant was negligent in its maintainance of switchboard and whether its negligence in that respect was proximate cause of plaintiff's injury, were for jury.

5. Negligence 🔑28

Everyone is responsible for an injury occasioned to another by want of ordinary care in management of his property. Civ. Code, § 1714.

6. Negligence 🔑9

Each person who suffers detriment from unlawful omission of another may recover from person in fault. Civ.Code, § 3281.

7. Telegraphs, telephones and radio 🔑15(1)

Relationship between telephone company and hotel employee whose job was that of operating telephone switchboard which was located in hotel and which was installed and maintained by telephone company, was that of "inviter and invitee."

See publication Words and Phrases, for other judicial constructions and definitions of "Inviter and Invitee".

8. Negligence 🔑20

One who undertakes to furnish an appliance for use of others ordinarily assumes a duty to furnish a proper and reasonably safe appliance, and is liable for injuries which may result to one using appliance from his negligence. Civ.Code, §§ 1708, 1714, 3281.

9. Negligence 🔑26

A person in control of an instrumentality on property of another which may cause injury, owes to persons rightfully using the instrumentality the duty of inspecting it to see that it is in a reasonably safe condition.

10. Telegraphs, telephones and radio 🔑20(5)

In action by operator of switchboard which was located in hotel, against telephone company which had duty to maintain and repair switchboard, to recover for injuries allegedly suffered by plaintiff when plaintiff's finger was pricked by strand of wire when plaintiff pulled cords from back of switchboard, trial court improperly limited testimony of all witnesses called by plaintiff, except plaintiff's testimony, to condition of switchboard at position at which plaintiff was working when injured, where switchboard was one unit, and since its condition as whole would throw some light on its condition at place where plaintiff was injured and on question of whether defendant exercised ordinary care in its maintenance and repair.

11. Telegraphs, telephones and radio ⚷20(5)

In action brought by operator of switchboard which was located in hotel against telephone company which had duty to maintain and repair switchboard, to recover for injuries allegedly suffered by plaintiff when plaintiff's finger was pricked by strand of wire when plaintiff pulled cords from back of switchboard, plaintiff was entitled to introduce evidence that other switchboard operators had been injured at the switchboard in substantially the same manner as described by plaintiff, in order to prove existence of a defective or dangerous condition, to prove negligence, to prove notice, and to disclose cause of accident in question.

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Steiner A. Larsen, Garvin F. Shallenberger, Los Angeles, for appellant.

Lawler, Felix & Hall and Leslie C. Tupper, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment entered pursuant to an order granting a motion for judgment to be entered in accordance with a prior motion for a directed verdict, Code Civ.Proc. § 630, in an action for damages for personal injuries. A motion by defendant for a directed verdict was denied. The jury disagreed and a mistrial was declared. Thereafter defendant's motion under section 630 was granted and judgment entered.

[1] The rules governing the determination of a motion made under section 630 of the Code of Civil Procedure are the same as those applicable to motions for a judgment of nonsuit and a directed verdict. Cf. Neel v. Mannings, Inc., 19 Cal.2d 647, 649, 122 P.2d 576; Estate of Arnold, 16 Cal.2d 573, 576, 581, 107 P.2d 25.

[2] Viewing the evidence in the light most favorable to plaintiff, indulging in all reasonable inferences in her favor, and disregarding all conflicting and contradictory evidence, the facts are these.

Defendant installed, maintained, and repaired a telephone switchboard in the Ambassador Hotel in Los Angeles. The board, about 30 feet long, was made up of nine switchboard units bolted together. The units adjoined each other, and the operators at times worked a half section on either side of a unit. Each unit, called a position, was given a number. The face of the board contained rows of holes, called jacks. Each position had a key shelf in which there was a dial, two rows of cords with 15 cords in each row resting in holes in the shelf, and control keys for the cords. The cords were weighted so that when taken from a connection they fell back into the shelf.

Each cord had a plug attached to it. From the plug, extending over a portion of the cord, were three layers of outer braid. Underneath the braid were three electrical conductors insulated with double-wound cotton around them, all twisted together.

Each conductor was made up of six copper strands. Each strand was made up of two ribbons of copper wrapped around a string. The strands were in ribbon form for flexibility and pliability.

Each plug was made of brass with a jacket of fiber or plastic. The cord was attached to the plug by being screwed into it so that the outer braid extended into it about three-eighths of an inch.

To establish a connection the cords were lifted by taking hold of the plug resting in the shelf and inserting it into the jack. To disconnect, the operator took hold of the plug and pulled it out of the jack, letting it fall of its own weight into the shelf.

Plaintiff was employed by the Ambassador Hotel as an operator on the switchboard in December, 1946. She worked on all nine positions. The board was a very busy one. Plaintiff testified that all the cords in all nine positions were bad; some were frayed at the connection between the plugs and the cord, some as much as six to eight inches from the plug; on some of them the jackets of the plugs were cracked; all of the cords were frayed more or less; all of the cords at position 8 were frayed as described. The condition of the cords was approximately the same from December, 1946, when she was first employed, until the day of the accident, February 4, 1947. There was other evidence with respect to the condition of the cords, particularly on position 8, to the same effect. The chief operator testified that cords on position 8 had been frayed for two months or longer prior to February 4, 1947; that during that time repairmen employed by defendant had occasion to inspect them at least twenty times. Miss Weston, an operator, testified that about two weeks prior to February 4, 1947, she reported to defendant that several of the cords on position 8 were in bad condition, "some of them all frayed out," and that none of them was repaired or replaced.

On February 4, 1947, while working at position 8, plaintiff reached slightly above the level of her shoulder and pulled two plugs out of jacks at the same time, her middle finger on one and her index finger on the other. She had to tug a little because the plugs were in tight and because of other cords around those she was pulling out. As she was pulling the plugs out she felt pain, "a pricking, a pinch" toward the front of the middle and index fingers of her left hand. She yelled. The operator on position 9 turned and looked and plaintiff told her she had pinched her finger. Plaintiff continued to work.

The chief operator testified that on February 4, 1947, plaintiff complained to her about the condition of the cords and that she relayed the complaint to defendant's wire chief. A few days later some of the cords on position 8 were replaced. Miss Weston testified that on February 4, 1947, while working on position 8, she drew her hand off a cord and got a piece of wire in the little finger of her left hand.

Two or three days after February 4, plaintiff had pain in her middle and index fingers and noticed they were infected at about where she felt the pinch. The index finger was infected to just below the pad; the middle finger at the tip of the pad. She received medical attention in the course of which her index finger was probed and she "saw the very last piece of metal that was taken from my [her] finger." The piece of metal taken out "was shiny, very shiny and very thin and very small"; it stuck up from one side of the infection. A short time thereafter her middle and index fingers were amputated close to the joint nearest her hand.

The physician who first treated plaintiff testified that the condition of her index finger when he first saw her was consistent with her claim of injury. Another physician testified that the factor of injury was necessary to the infection in plaintiff's fingers; that any injury, such as a cut on the finger, was sufficient to start the infection which resulted in the amputation.

One Allen, an employee of defendant, had the responsibility of inspecting the cords, and repairing and maintaining the switchboard.

[3, 4] The evidence recited was sufficient to require the trial judge to submit the cause to a jury. Defendant had exclusive control of the maintenance and repair of the switchboard. It was defendant's duty to use ordinary care to maintain it in reasonably safe condition. The evidence was such that a jury could reasonably infer that defendant failed in its duty; that it was negligent in its maintenance of the switchboard; and that its negligence in that respect was the proximate cause of the injuries sustained by plaintiff. The cause of the injury was not left to conjecture, suspicion or speculation. The evidence was sufficient to show what caused plaintiff's injury. She was not required to prove what caused the injury to the point of demonstration. Probability is all the law demands.

[5–9] Defendant argues that it owed no duty to plaintiff. Everyone is responsible for an injury occasioned to another by want of ordinary care in the management of his property. Civ.Code, § 1714. Each person who suffers detriment from the unlawful omission of another may recover from the person in fault. Civ.Code, § 3281. The relationship between defendant and plaintiff was that of inviter and invitee. Johnston v. Long, 30 Cal.2d 54, 70, 181 P.2d 645; Oettinger v. Stewart, 24 Cal.2d 133, 136, 148 P.2d 19, 156 A.L.R. 1221; Young's Adm'r v. Farmers & Depositors Bank, 267 Ky. 845, 103 S.W.2d 667, 669; 19 Cal.Jur. 619, § 54; 65 C.J.S., Negligence, § 43(1), page 508. Plaintiff was working on the switchboard in answer to the express or implied invitation of defendant on its business and to their mutual advantage. Defendant owed plaintiff the duty of maintaining its property in a reasonably safe condition, and of exercising reasonable care in protecting her from injury through its negligence. Butcher v. Queen City Iron & Metal Co., 99 Cal.App.2d 25, 27, 221 P.2d 265. One who undertakes to furnish an appliance for the use of others ordinarily assumes a duty to furnish a proper and reasonably safe appliance, and is liable for injuries which may result to one using the appliance from his negligence. Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 229, 209 P.2d 1; Biondini v. Amship Corp., 81 Cal.App.2d 751, 763, 766, 185 P.2d 94; 65 C.J.S., Negligence, § 99, page 618. The doctrine is placed on the ground of the failure of the former to exercise ordinary care which is due to everybody under the principles declared in sections 1708, 1714 and 3281 of the Civil Code. Dahms v. General Elevator Co., 214 Cal. 733, 737–742, 7 P.2d 1013; Lozana v. Pacific Gas & Elec. Co., 70 Cal.App.2d 415, 420, 161 P.2d 74; Cowles v. Independent Elevator Co., 22 Cal.App.2d 109, 114, 70 P.2d 711; Anno. 6 A.L.R.2d 284. A person in control of an instrumentality on the property of another which may cause injury, owes to persons rightfully using the instrumentality the duty of inspecting it to see that it is in a reasonably safe condition. Polk v. City of Los Angeles, 26 Cal.2d 519, 525, 159 P.2d 931; 65 C.J.S., Negligence, § 87, page 596. There was abundant evidence that defendant knew, or should have known, the condition of the switchboard. Whether defendant was negligent was a question of fact. Butcher v. Queen City Iron & Metal Co., supra, 99 Cal.App.2d 25, 27, 221 P.2d 265.

Defendant argues that its failure to repair was not a proximate cause of plaintiff's injury. Whether there was a causal connection between the alleged negligence of defendant and plaintiff's injuries is a question for the jury. Finnegan v. Royal Realty Co., 35 Cal.2d 409, 419, 218 P.2d 17; Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132. The jury could reasonably infer from the evidence that plaintiff's injuries were caused by the defective condition of cords on position 8. It cannot be said, as a matter of law, that such inference cannot be drawn.

We conclude that the court erred in granting the motion made under Code of Civil Procedure, section 630.

Plaintiff complains of other alleged errors which should be discussed in view of the necessity of a retrial.

[10] The court limited the testimony of all witnesses called by plaintiff, except her own, to the condition of the switchboard at position 8. In this we think the court erred. The switchboard was one unit, owned, controlled, maintained and repaired by defendant. Its condition as a whole throws some light on its condition at the place where plaintiff was injured and on the question whether the defendant exercised ordinary care in its maintenance and repair.

[11] The court refused to permit plaintiff to prove that other operators had been injured at the switchboard in substantially the same manner as described by plaintiff. The court did allow Miss Weston to testify that she was injured at position 8 on the same day that plaintiff was injured. Otherwise plaintiff was restricted as indicated. In so limiting the evidence the court erred. Evidence of prior accidents which occurred under substantially the same general circumstances as the accident in question, is admissible to prove the existence of a defective or dangerous condition, to prove negligence, to prove notice, and to disclose the cause of the accident in question. Robinson v. Western States Gas & Electric Co., 184 Cal. 401, 407, 408, 194 P. 39; Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, 311, 314, 200 P.2d 814; City of Oakland v. Pacific Gas & E. Co., 47 Cal.App.2d 444, 448, 118 P.2d 328; People v. Lang Transportation Corp., 43 Cal.App.2d 134, 141, 110 P.2d 464; Long v. John Breuner Co., 36 Cal.App. 630, 639, 172 P. 1132.

Other alleged errors are not likely to occur on a retrial and need not be discussed.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

105 Cal.App.2d 615

HACKLER v. WARD et al.

Civ. 18052.

District Court of Appeal, Second District, Division 2, California.

July 25, 1951.

Action by V. D. Hackler against Clarence C. Ward and others for damages for wrongful removal from public office. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., gave judgment for the defendants and the plaintiff appealed. The District Court of Appeal, McComb, J., held that where the city council, under statute, employed the plaintiff as chief of police to hold office at its pleasure, it could dismiss him without cause, and without notice or hearing.

Judgment affirmed.

1. Municipal corporations ⚿182

Under statute providing that chief of police of city of sixth class should be appointed by city council and hold office during council's pleasure, a chief of police employed under oral agreement for a tenure of "during good behavior" could be dismissed by council at any time without cause and without notice or hearing. Gen.Laws, Act 5233, § 852.

2. Conspiracy ⚿18

A complaint which contains nothing more than bare allegations that defendants entered into a conspiracy and committed certain acts in furtherance thereof does not state a cause of action unless the acts are connected with a showing of fact which if true would support the charge that such acts were wrongful.

3. Conspiracy ⚿18

Under statute providing that appointment to hold office of chief of police is during pleasure of city council and can be terminated at any time without notice or hearing, count of complaint of chief of police which stated that defendants conspired and induced councilmen, wrongfully and without notice or hearing, to remove him from public office, did not allege any specific act or acts which were wrongful, and failed to state a cause of action. Gen.Laws, Act 5233, § 852.

Ernest E. Emmons, Jr. and Philander Brooks Beadle, San Francisco, for appellant.

Kaetzel & Kaetzel, San Luis Obispo, Clarence C. Ward, Santa Barbara and Richard F. Harris, San Luis Obispo, for respondents.

McCOMB, Justice.

Plaintiff filed a complaint entitled "Action for Damages for Wrongful Removal from Public Office." Thereafter he filed an amended complaint to which a general demurrer was sustained and plaintiff allowed 20 days within which to amend. After plaintiff declined to amend, a judgment was entered in favor of defendants. From this judgment plaintiff appeals.

In the first cause of action of the amended complaint it is alleged in substance that plaintiff was a resident of the city of Fair Oaks, County of San Luis Obispo; that the city of Arroyo Grande is a city of the sixth class existing under and by virtue of the laws of this state; that five named defendants were the duly elected councilmen of the city of Arroyo Grande; that on or about April 27, 1948, pursuant to an alleged oral contract of employment plaintiff was appointed chief of police of such city by the council to serve a probationary period of six months and thereafter during his good behavior in the performance of his duties as chief of police; that on or about February 18, 1949, defendant councilmen without notice or the preference of charges against him and without a hearing of any kind, removed plaintiff from office fraudulently, wrongfully, unlawfully, maliciously and without cause to do so.

In the second cause of action of the amended complaint plaintiff incorporated the allegations of the first cause of action by reference and alleged that on or about November 22, 1948, the remaining defendants wrongfully conspired to unlawfully bring about plaintiff's removal from public office and to prevent him from obtaining further employment elsewhere as a police officer; that thereafter said defendants, in accordance with said conspiracy, did wrongfully and maliciously induce and prevail upon the five defendant councilmen to, and they did on February 18, 1949, wrongfully, maliciously and without notice or hearing remove plaintiff from his public office as chief of police without cause so to do.

[1] *Questions:* First: *Where a city council of a city of the sixth class purports to enter into an oral agreement whereby they employ a chief of police of such city for a tenure of "during good behavior", may the city council thereafter dismiss the person so employed without cause, without notice and/or hearing?*

Yes. At the times here in question, the provision of law concerning the tenure of office of a chief of police of a city of the sixth class was contained in Deering's General Laws, Act 5233, section 852, where it reads in part as follows: "The city council shall appoint the chief of police * * * and said officers * * * shall hold office during the pleasure of said city council."

In view of the foregoing provision the period during which a chief of police of a city of the sixth class should hold office was at the pleasure of the city council.

In dealing with a similar situation where a school district had entered into a contract to employ a superintendent for 36 months, and before the expiration of such period discharged him, the Supreme Court of Minnesota in Jensen v. Independent Consolidated School District No. 85, 160 Minn. 233, 199 N.W. 911, 913, said:

"This right which the board has to release the superintendent at its pleasure is a public right, and exists for a public purpose. The school board cannot by contract deprive itself of such right. Under our statute the district has in its discretion the inalienable power to remove the superintendent at any time. It cannot contract to keep him in office for any time certain. It cannot renounce or agree not to exercise its power of removal at pleasure. (Citing Cases.) Under such condition it is rather inconsistent to contract for a fixed term. Yet if there is a fixed term it is impliedly subject to recall, and the fixed term is the time the superintendent will hold his office if the power to recall is not exercised. (Quoting cases.)

"To hold that the contract in question is binding for the fixed term would be to allow the school board to deprive itself and its successors of governmental powers which have been granted to it by the Legislature for public purpose. We are led to the conclusion that the Pinney contract for three years is not binding for the fixed term but is subject to recall. He may be employed as superintendent only during the pleasure of the board. *These rules of law incorporated themselves into and became a part of his employment by the board, and he was, in law, bound to take notice thereof.* He has been discharged, and the board was within its legal rights [in doing so]." (Emphasis added.) (See also Parsons v. Breed, 126 Ky. 759, 104 S.W. 766; Potts v. Morehouse Parish School Bd., 177 La. 1103, 150 So. 290, 91 A.L.R. 1097, and authorities therein cited.)

In Boyd v. Huntington, 215 Cal. 473, 479, 11 P.2d 383, our Supreme Court held that where a term for which an officer is to hold office is fixed by law the appointing power can neither enlarge nor diminish it by fixing a greater or lesser term than that fixed by the statute.

The cases relied on by appellant, such as Barendt v. McCarthy, 160 Cal. 680, 118 P. 228; Matter of Carter, 141 Cal. 316, 74 P. 997; Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713; Spader v. Rolph, 29 Cal.App. 774, 156 P. 977 and Good v. Common Council, 5 Cal.App. 265, 90 P. 44, are not here applicable for the reason that each of the cases referred to merely held that an appointee whose term was to continue "during good behavior" or for a fixed term could not be removed except for cause and after notice. The same authorities recognize the rule that appointments to hold during the pleasure of the appointing power may be terminated at any time and without notice.

In view of the foregoing rule the first count of the complaint failed to allege a cause of action.

Second: *Did the second count allege a cause of action for civil conspiracy?*

[2] *No.* A complaint which contains nothing more than bare allegations that

defendants entered into a conspiracy and committed certain acts in furtherance thereof does not state a cause of action unless the acts are connected with a showing of fact which if true would support the charge that such acts were wrongful. (Rapaport v. Forer, 20 Cal.App.2d 271, 278, 66 P.2d 1242; Kinney v. Postal Telegraph-Cable Co., 123 Cal.App. 70, 75, 10 P.2d 1043.)

[3] Since the second count does not allege any specific act or acts which were wrongful, it likewise fails to state a cause of action.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

PEOPLE v. NYE.

Cr. 4601.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1951.
Hearing Granted Aug. 23, 1951.*

Frederick Leo Nye was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of assaults with intent to commit rape and he appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal law 🔑1159(2)

Verdict of jury will not be disturbed by reviewing court unless it clearly appears that upon no hypothesis is there sufficient substantial evidence to support verdict.

2. Criminal law 🔑1144(13)

Appellate court must assume every inference which jury could reasonably have drawn from established facts which is favorable to conclusion reached by jury.

3. Criminal law 🔑737(1), 742(1)

The determination of veracity of witnesses and facts of controversy are matters solely for intelligence and conscience of jury as triers of fact.

4. Rape 🔑16(7)

That one making assault with intent to commit rape thereafter abandons his purpose for any cause does not reduce quality or degree of crime of assault with intent to commit rape.

5. Rape 🔑16(1)

Where man entered room of sleeping woman and grasped her wrist and covered her mouth while she resisted, crime of assault with intent to commit rape was complete if at any moment from instant he laid hand upon his victim he intended carnal intercourse.

6. Rape 🔑53(2)

Evidence sustained conviction for assault with intent to commit rape.

7. Criminal law 🔑358

In prosecution for assault with intent to commit rape on two specific occasions in which defendant relied upon defense of alibi, testimony of state's witnesses which tended to rebut alibi by showing that defendant was not at home at hours on days specified was admissible.

8. Criminal law 🔑680(1)

Despite provision of statute which requires District Attorney to open cause and offer evidence in support of charge, court may in exercise of sound discretion so long as no prejudice to defendant results therefrom, depart from program outlined. Pen. Code, §§ 1093, 1094.

9. Criminal law 🔑200(7)

Where defendant was charged in one count with attempted rape and in subsequent count with assault with intent to commit rape, dismissal of charge of attempted rape was not tantamount to acquittal of assault with intent to commit rape, since two crimes are different in that proof of overt act towards commission of rape must be made for conviction of crime of attempted rape and not merely establishment of intent by proof of circumstances.

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* Subsequent opinion 237 P.2d 1.

10. Rape ⚷15

Proof of an overt act towards commission of rape is essential to conviction for attempted rape.

11. Rape ⚷53(3)

In crime of assault with intent to rape, intent may be proved by circumstances which do not necessarily include overt act towards consummation of rape.

12. Criminal law ⚷785(1)

In prosecution for assaults with intent to commit rape committed on two different occasions against two different women wherein prosecutrices were women of mature judgment and jury had been told to consider their verdict dispassionately and neither woman was acrimonious or overzealous to effect conviction, failure of court to give cautionary instruction as to weighing the testimony of prosecuting witnesses was not error.

◆

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

About 7:30 o'clock on the morning of May 7, 1950, Miss Wynie Ilene Williams, residing in a one-room trailer in Burbank, was aroused from her sleep to find appellant standing by her bed. When she inquired as to his wishes, he said nothing but pulled the cover from her and ripped her gown down to her knees. He then threatened to kill her if she screamed. She could not speak while he held his hand on her throat and he continued silent. He unbuttoned his clothing, got into bed, exposed his genital organs and tried to accomplish carnal intercourse while she resisted. She could breathe only with great difficulty because of his hold on her throat, but when the alarm clock rang at 8 o'clock he released her throat to turn off the alarm and took his departure, declaring that if she reported the incident she "would get it again or get killed." She had seen the miscreant the previous afternoon about 5 o'clock, right after the Burbank parade. She was then sitting in her trailer while he stood outside. Curious as to his intentions she stepped out and asked him whether she could help him, whereupon he ran away. Subsequently, she pointed him out at the police station and identified him in court as her assailant to whom she was never married and to whom she had never given permission to enter her abode. For such act appellant was indicted in two counts, to wit, count I for rape; count III for assault with intent to commit rape. For a similar performance he was indicted in counts II and IV for the crimes of attempted rape and assault with intent to commit rape upon the person of Mrs. Popplewell in the adjacent city of Glendale.

The Popplewells resided at a motel on May 27, 1950, with their two children, ages four and six, who slept in a room apart from their parents. Mr. Popplewell left home for work about 6:50 a. m. Clothed in her nightgown, his wife returned to her sleep. She was awakened to find appellant closing the door behind him. He was dressed in a blue polo shirt and blue levis. When she asked what he desired, he said nothing but came to her bed, covered her mouth and grasped her wrist. She bit his hand and began to scream, kick and scratch him. He hastily made his exit and Mrs. Popplewell closed the door. She then observed a streak of blood across her wrist.

Within four days after the last mentioned incident the Burbank police apprehended appellant who was free and voluble in answering their inquiries. From the testimony of officers Brannan and Loranger it was revealed that appellant admitted to them that he saw a woman enter a trailer on East First street; he followed her in where he found her lying in bed; he grabbed her throat, threatened to kill her if she screamed; got on her bed and performed an act of sexual intercourse after she had struggled briefly, but was too terrified to put up much fight; he then left the trailer. The officers accompanied him to the trailer camp where at their request to indicate the scene of his crime he pointed out the trailer that was formerly occupied by Miss Williams. When they asked his purpose in entering the motel he told them when he saw the prosecutrix he intended to have sexual intercourse with her. They took him to the motel. He told them he entered it on May 27, grabbed Mrs. Popplewell by the wrist, placed his hand over her mouth, forced her backwards onto her bed, but when she screamed he became frightened, released her and ran out of the motel.

At the trial appellant denied having seen either of the victims on the days they had fixed as the dates of his crimes and introduced excellent evidence of his asserted alibi. But the jury would have none of it. Counts I and II having been dismissed on motion of the District Attorney, verdicts of guilty were returned for appellant's assaults on the two women on different days with intent to commit rape.

Evidence Is Sufficient.

By virtue of his plea of an alibi, appellant denies all connection with the heinous act alleged in count III. However, in his zeal to escape the burdens of the judgment he argues now that there was no showing of an intent on his part to overcome all resistance that Mrs. Popplewell (count IV) might offer to his advances. That he entertained such intent could not with reason be doubted. He walks into the lady's boudoir at an early morning hour when she was lying on her bed in her night robe; he closes the door behind him, approaches her where she lies, grasps her wrist, covers her mouth, and holds it while she screams and kicks and until she bites his hand. What other motive could have prompted the exercise of such force on a solitary female. He made no effort to take any movable property and suggested no theme for entertainment or spiritual or mental uplift. Not only did the jury judge his motive by his acts and their knowledge of human nature but his intentions were illuminated by three other events shown by the testimony. He had attempted to ravish Miss Williams some three weeks before, had opened the door of Miss Foist's bedroom within a few minutes of his call on Mrs. Popplewell with whom, he had admitted to the police, he intended to copulate when he saw her in bed.

[1-6] With such proof in the record a denial of the appeal offers no serious problem. Before a reviewing court may disturb a verdict it must clearly appear that upon no hypothesis is there sufficient, substantial evidence to support the verdict while at the same time every inference which the jury could reasonably have drawn from the established facts must be assumed in favor of the conclusion reached by the jury. People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. The determination of the veracity of witnesses and of the facts of the controversy is solely for the intelligence and conscience of the trier of fact—the jury. Therefore, this court has no power to reverse the judgment so derived unless it concludes that the facts proved cannot reasonably furnish an inference that appellant intended to rape his victim. People v. Newland, supra; People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; see 22 Cal.Jur., sec. 16, pp. 368, 370. That appellant abandoned his wicked purpose for any cause, at any time after having set his heart upon it, does not relieve him of the debt his wilful and malignant assault upon Mrs. Popplewell incurred. As to his assault upon Miss Williams, his statement to the police places the effect thereof beyond question as the final link in the proof of his guilt under count III. When a man enters the room of a sleeping woman and grasps her throat or her wrist without any explanation he is guilty of an intent to rape. Miller v. State, 50 Tex.Cr.R. 589, 100 S.W. 398; State v. Boon, 35 N.C. 244. His hasty retreat when his advances were vigorously resisted by Mrs. Popplewell does not reduce the quality or degree of his crime. His intent had already been formed and his bodily movements constituted an assault. Moreover, his intent there was evidenced by the fact that the hour of day, his manner of entry and his method of attack were all similar to the time and events that occurred at the Williams' trailer. See People v.

Woods, 75 Cal.App.2d 246, 247, 170 P.2d 477. Appellant offered no refutation of his intent to commit rape. He relied wholly upon his alibi. In that state of the record he stands convicted on the evidence by virtue of the fact that he was connected with both crimes by the testimony of the women and his statement to the officers. His crime was complete if, at any moment from the instant he laid a hand upon his victim, he intended carnal intercourse.

Appellant invokes the decisions of People v. Fleming, 94 Cal. 308, 29 P. 647 and People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11. Both cases have been distinguished. See People v. Moore, 155 Cal. 237, 240, 100 P. 688, and People v. Cassandras, 83 Cal.App.2d 272, 277, 188 P.2d 546; People v. Schmidt, 66 Cal.App.2d 253, 257, 152 P.2d 1021; People v. Bumbaugh, 48 Cal.App.2d 791, 796, 120 P.2d 703. The logic of the last four cited decisions applies with equal force here to the Fleming and Mullen opinions. The former used no force or threats at all to effect his aim; he used only promises and arguments; the prosecutrix had no fear of personal violence. While the conduct of Mr. Mullen disclosed the violent ardor of an eager libertine, his conduct fell short of an assault with intent to rape. In a studio where the only furniture was a piano he embraced and tried to kiss the young lady, but finally released her and she departed. We there said, "The persuasions, caresses and embraces of the seducer are not evidences of a felonious intent." [45 Cal.App.2d 297, 114 P.2d 12.]

No Error in Rulings on Rebuttal Evidence

[7, 8] There was no error in permitting Miss Foist to testify she had seen appellant on May 7th and 27th. By the evidence of his alibi he had shown to his own satisfaction that he was not at the trailer on the 7th or at the motel on the 27th. Such proof required rebuttal by such witnesses as were available. Miss Foist was living in the motel of Mrs. Popplewell's residence on both days. On May 7th he entered her bedroom "shortly after 8:00 o'clock" and stood over her bed. Again on May 27th about 7:30 a. m. while she was still in bed he entered her room. The only objection to the evidence was that "it was the duty of the proponent to establish defendant's presence" by his testimony in chief. The state was properly allowed to rebut evidence of the alibi by testimony that appellant was not at home at the hours on the days he had specified. The same is true with reference to the testimony of officer Loranger to which objection was made on the same ground. Appellant had denied the testimony of officer Brennan. While section 1093 of the Penal Code requires the district attorney to "open the cause and offer the evidence in support of the charge" the court may in the exercise of a sound discretion depart from the program there outlined. Penal Code, sec. 1094. While a uniform procedure of trials is commendable, a variance therefrom may be preferable in some cases so long as no prejudice will result therefrom. People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626, is not pertinent. The State's counsel assumed that the defendant had made a confession to the officer but held the latter as a rebuttal witness who was called to the stand after the accused under cross-examination had denied confessing to the deputy sheriff but had been beaten. In making proof of the confession the prosecutor neglected to show that it had been made voluntarily. Due process of law had been denied the prisoner.

Dismissal of Count II.

[9–11] Appellant contends that after the proof was in and he was in jeopardy the court granted the motion of the district attorney to dismiss count II, attempted rape, and that such order was tantamount to an acquittal under count IV. But the two crimes alleged are different. In attempted rape, proof of an overt act towards the commission of rape must be made. Not only an intent to rape must be shown, but also an act toward its consummation must be proved. People v. Parker, 74 Cal.App. 540, 546, 241 P. 401. In the crime of assault with intent to rape (count IV) the intent may be proved by the circumstances; while in attempted rape the overt act makes proof of the intent but rape is thwarted by some force outside the accused. People v. Moore, 155 Cal. 237, 100 P. 688; People v. Jones, 112 Cal. App. 68, 296 P. 317.

As between counts I and III involving Miss Williams there is no reason why the prosecution should not have been allowed to choose upon which it should proceed. It is common practice in both criminal and civil actions for the pleader to declare his action in every form which his proof might reasonably establish with the understanding that he may elect upon which he will stand for judgment. In submitting count IV as the appropriate pleading on the incident in the home of Mrs. Popplewell the state's counsel appears from the facts recited herein to have chosen wisely. The entire proof and the admissions of appellant bear out the charge that while he exercised some force upon the prosecutrix with a fixed intent his acts were far short of an attempt to consummate a rape by force. (See Burdick's "The Law of Crime" sec. 491.)

Cautionary Instruction.

[12] Despite the fact that appellant did not bring the instructions here for review he demands a reversal on the ground that a cautionary instruction was not given as suggested in People v. Putnam, 20 Cal.2d 885, 129 P.2d 367 and People v. Rankins, 66 Cal.App.2d 956, 153 P.2d 399. Such doctrine does not apply where a woman of mature years has been assaulted by an unbridled Don Juan. It is pertinent and necessary only where the victim is a child of tender years whose mind may be misdirected by suggestion of persons concerned with the prosecution and where she has no substantial corroboration. Such instruction is unnecessary where the prosecutrix is a woman of mature judgment and the jury is told to consider of their verdict calmly and dispassionately. Neither was it necessary here where the unfortunate women were not acrimonious or overzealous to effect a conviction. People v. Ahsbahs, 77 Cal.App.2d 244, 175 P.2d 33; People v. Arechiga, 72 Cal.App.2d 238, 164 P.2d 503; People v. Williams, 55 Cal.App. 2d 696, 131 P.2d 851; People v. Putnam, 20 Cal.2d 885, 129 P.2d 367.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

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105 Cal.App.2d 581

PEOPLE v. POLLACK.

Cr. 4631.

District Court of Appeal, Second District,
Division 2, California.

July 24, 1951.

Rehearing Denied July 31, 1951.

Hearing Denied Aug. 23, 1951.

Ely Pollack was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of engaging in pool-selling or bookmaking and from an order denying his motion for a new trial, he appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to sustain defendant's conviction.

Affirmed.

1. Gaming 🔑102

In prosecution for engaging in pool-selling or bookmaking, instruction to effect that phrase "to engage" as used in statute, meant to conduct, to carry on, to operate, and that it was not necessary to show violation of any other subdivision of penal statute in a prosecution under first subdivision, and that offense designated by first subdivision was separate and distinct from that in any other subdivision, was proper. Pen.Code, § 337a, subd. 1.

2. Gaming 🔑73

The terms pool-selling and bookmaking are so well understood that no person of ordinary intelligence can misunderstand import and meaning of terms and scope of acts prohibited by penal statute into which they have been incorporated. Pen.Code, § 337a, subd. 1.

3. Gaming 🔑73

A "bookmaker" is one who makes a book of bets. Pen.Code, § 337a, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Bookmaker".

4. Gaming 🔑73

"Bookmaking" is the making of a book of bets. Pen.Code, § 337a, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Bookmaking".

5. Criminal law 🔑1159(2)

In criminal prosecution, an appellate court will examine record to determine only whether it contains sufficient evidence from which an inference of guilt is warranted.

6. Gaming 🔑98(3)

Evidence was sufficient to sustain defendant's conviction of engaging in pool-selling or bookmaking, with or without writing. Pen.Code, § 337a, subd. 1.

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Murray M. Chotiner, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From an order denying defendant's motion for a new trial after conviction of violating section 337a, subdivision 1, of the California Penal Code,[1] defendant appeals.

Facts: On May 10, 1950, police officers of the City of Los Angeles saw defendant leave a restaurant and enter a car. The officers followed him to a hotel which he entered. After about two minutes he returned to the car and drove to another part of the city where he parked and entered a residence. He remained on the premises about ten or fifteen minutes after which time he drove to another residence where he proceeded to the house holding in his hand a brown envelope. About two minutes later he was placed under arrest and taken inside the premises by the officers where they saw one Edwina Davis. In defendant's presence Miss Davis was asked why defendant was there. She answered that he had come to collect six dollars she had owed him for several weeks for bets previously made, and she told the officers she occasionally bet on horses and had telephoned in her last bet during the latter part of April.

Defendant, when asked why he was there, replied that he had merely come to see the occupants of the residence. He admitted leaving a Metropolitan Scratch Sheet. The brown envelope taken from appellant contained several papers upon which were ruled lines and notations in ink. There were also a number of cards bound with a rubber band and a paper with ink notations was found in defendant's pocket. Nine Metropolitan Scratch Sheets dated May 10, 1950, were found in the car driven by him as was a Daily Racing Form dated May 5, 1950.

Defendant told the officers the penciled notations were not in his handwriting but he had written the ink notations thereon. He further told them he "worked for a guy named Charley"; he had picked up the sheets that morning but refused to divulge the source; in tabulating the sheets he usually made his computations in the morning, and he had been working for some time. When asked to explain the owe sheet in his pocket he stated, "That is my sheet. Don't take it or you will foul me up." He was then asked if it was his owe sheet and he declined to answer. A handwriting expert testified at the trial that the ink notations appearing on the papers and cards found in defendant's pocket were written by defendant.

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[1] Section 337a, subdivision 1 of the Penal Code reads: "Every person,

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; * * *.

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

"This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive."

One of the arresting officers qualified as an expert on bookmaking activities in Los Angeles county, and described such bookmaking activities as follow:

"The bookmaker has numerous agents working for him. For instance an agent might work in a bar where he will accept wagers orally from the different bettors and he will either record them or he will call out to a Central location, to what is commonly referred to as a phone spot. They are then recorded at the phone spot.

"The following day the agent or collector will take the sheets from the bets that have been recorded the previous day and go to different locations throughout the city or the county and either collect from the bettors or the bettors will pay the bookmaker or the agent the amount that they owe him."

He stated that in his opinion the ruled papers taken from the brown envelope were A B C or professional type betting markers; that they were used to record the name of the bettor, the agent or bookmaker, the date, the index number of the horse bet upon, the amount of the bet, the result of the race and the amount won, if any, by the bettor. He also stated the sheets recorded wagers on horses running at various tracks throughout the United States, and the paper found in defendant's pocket was a "dope sheet" or "owe sheet" used to record the winnings or losses of the bettors.

On one of the betting markers appeared the name "Edwina" opposite which was the figure "6.85" indicating to the officer that Edwina Davis did in fact owe defendant at least six dollars.

The officer also testified that bookmaking may be defined as the accepting of bets or wagers on horses and balancing such bets or wagers so that the acceptor cannot lose.

[1] *Questions:* First: *Did the trial court err in instructing the jury as follows?*

"Every person who engages in poolselling or bookmaking with or without writing, at any time or place, is guilty of a crime.

"To engage as used in section 337a, subd. 1, means to conduct, to carry on, to operate.

"It is not necessary to show a violation of any other subdivision of Section 337a in a prosecution under Subdivision One.

"The offense designated by Subdivision One is separate and distinct from that in any other subdivision."

No. Defendant contends that the trial judge should have defined the term "to engage" as meaning activity continuous in nature and thus connoting more than a single act. Also he contends that the term "bookmaking" should have been defined further for the jury and the failure to do so was erroneous because of the instruction that it was unnecessary to show a violation of any other subdivision of section 337a.

These contentions are devoid of merit. The reading of section 337a, subdivision 1, makes it clear that a single violation of such section will constitute the offense proscribed. (People v. Bradford, 95 Cal.App. 2d 372, 379, 213 P.2d 37.

People v. Coppla, 100 Cal.App.2d 766, 224 P.2d 828, is not here in point. In such case there was no evidence that defendant had violated section 337a, subdivision 3 of the Penal Code, the court saying at page 769 of 100 Cal.App.2d, at page 830 of 224 P.2d, "There was no evidence that defendant was occupied or employed in pool selling or bookmaking in a single instance at any time or that he knowingly aided another in the making of a book of bets or in the sale or distribution of shares or chances in a wagering pool. There is no evidence that he knew the papers in the sealed envelopes were betting markers or owe sheets, or that he had any knowledge of the contents of the locked trunk. There is no evidence of the ownership of the automobile. There is no evidence that the writing on the envelopes, or on any of the material, was that of defendant. Without such evidence, it must be presumed that it was not in his handwriting. The prosecution having presented as a part of its case the statement of the defendant that he did not know what the sealed envelopes contained, is bound by that evidence in the absence of proof to the contrary."

[2] Neither is there any merit in defendant's contention that the trial judge should have given a further definition of the term bookmaking. Mr. Presiding Justice White, speaking for the court in People v. Bradford, supra, 95 Cal.App.2d at page 377, 213 P.2d at page 40, accurately stated the rule as follows:

"It requires no citation of authority in support of the proposition that when a statute is so vague and uncertain that a person of ordinary intelligence can not understand its meaning, it may not be upheld as a valid statute. However, we are persuaded that the subdivision of the Code section [Subdivision 1 of section 337a, Penal Code] here under attack can not be strictured as one, the provisions of which are so vague, uncertain, and ambiguous as to render it unconstitutional on that account.

"We are satisfied that the terms 'poolselling' and 'book-making' are so well understood that no person of ordinary intelligence can misunderstand the import and meaning of the terms and the scope of the acts prohibited by the Penal statute into which they have been incorporated. It would appear that these terms are of general use and that they have a well-accepted and recognized meaning throughout many jurisdictions, and especially among those dealing with the prohibition and regulation of betting on horse races or other contests of skill. * * *

[3, 4] "Webster's New International Dictionary, Second Edition Unabridged, published in 1948, defines the word 'bookmaker' as * * * 'One who makes a book of bets,' and it defines 'bookmaking' as 'the making of a book of bets.' * * *

"* * * we are convinced that the term 'bookmaking' here under consideration and as used in the statute must be held to clearly mean the making of a betting book. That although not defined in the statute the terms 'poolselling' and 'bookmaking' are commonly known and understood, and not therefore subject to the stigma of indefiniteness claimed by appellant. To hold otherwise would require the courts to shut their eyes and ears to the everyday happenings of contemporary life. This they can not and will not do."

Second: *Was there substantial evidence to sustain the conviction?*

[5] *Yes.* The rule is established in California that an appellate court will examine the record to determine only whether it contains sufficient evidence from which an inference of guilt is warranted. (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.)

[6] In the present case the evidence set forth above clearly supports the findings of the jury that defendant was guilty of violating section 337a, subdivision 1 of the Penal Code.

People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818, has been overruled by the Supreme Court in People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981. (See also People v. Hoffman, 94 Cal.App.2d 379, 382, 210 P.2d 885.) Neither is People v. Coppla, 100 Cal.App.2d 766, 224 P.2d 828, here in point, for, as we indicated above, in such case the court held there was not any evidence to sustain the finding that the defendant in such case had violated any provision of the Penal Code.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

105 Cal.App.2d 493

Ex parte RICE.

Crim. 4688.

District Court of Appeal, Second District,
Division 2, California.

July 17, 1951.

Proceeding in the matter of the application of Juanita M. Rice on behalf of Stanley C. Rice for a writ of habeas corpus to procure the release of petitioner on bail pending hearing in a superior court. The District Court of Appeal, McComb, J., held that petitioner was entitled to be released on bail pending the determination of whether he is a sexual psychopath.

Order in accordance with opinion.

Wilson, J., dissented.

Bail ⟹43

Party is entitled to be released on bail pending determination of whether he is sexual psychopath. Welfare and Institutions Code, §§ 5500 et seq., 5501.

◆

Robert O. Pfleger, of Tarzana, for petitioner.

S. Ernest Roll, District Atty., Ralph F. Bagley, Deputy District Atty., of Los Angeles, for respondent.

McCOMB, Justice.

This is an application for a writ of habeas corpus, seeking the release of petitioner on bail pending a hearing in the superior court to determine whether or not petitioner is a "sexual psychopath."

Facts: On June 22, 1951, petitioner was certified by the municipal court of the city of Los Angeles to the superior court of the State of California in and for the county of Los Angeles for a hearing and examination by said court as to whether or not petitioner is a "sexual psychopath" under the provisions of chapter 4, part 1 of division VI of the Welfare and Institutions Code of the State of California, as amended.

The superior court on said date set July 28, 1951, as the date for the examination and hearing of petitioner relative to such matter, and denied petitioner bail pending such hearing, remanding him to the custody of the sheriff of Los Angeles County.

He then filed the present application for a writ of habeas corpus and this court released him on bail in the sum of $500 pending a hearing upon such writ.

This is the sole question presented for our determination:

Is petitioner entitled to be released on bail pending the determination of whether or not he is a "sexual psychopath?"

Yes. When a petitioner is arrested pursuant to the provisions of section 5501 of the Welfare and Institutions Code,[1] he is entitled to bail pending his examination and hearing before the superior court. (In re Keddy, Cal.App., 233 P.2d 159.)

It is therefore ordered that petitioner be permitted to remain on bail pending the determination of the superior court as to whether or not he is a "sexual psychopath."

MOORE, P. J., concurs.

WILSON, Justice (dissenting).

I dissent for the same reasons stated in my dissenting opinion in Re Keddy, Cal.App., 233 P.2d 159. Petitioner should not be admitted to bail pending determination by the superior court as to his sexual psychopathy.

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[1] Section 5501 of the Welfare and Institutions Code as amended (Stats.1950, p. 439) reads in part:

"(a) When a person is convicted of a criminal offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter."

105 Cal.App.2d 530

PEOPLE v. CRAWFORD et al.

Cr. 4610.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1951.

Sidney D. Crawford and Santiago S. Atadero were convicted and Pedro Cabatuan was acquitted in the Superior Court, Los Angeles County, Edwin L. Jefferson, J., of conspiracy to commit grand theft and attempted grand theft, and from an order denying a motion for new trial, defendant Crawford appealed. The District Court of Appeal, White, P. J., held that the evidence supported a verdict against defendant who claimed entrapment.

Judgment and order affirmed.

1. Criminal law ⟹1144(13)

Following conviction, appellate court must view evidence in light most favorable to prosecution.

2. Criminal law ⟹37

Where officer of law induces accused to commit criminal act contemplated by him, conviction would be contrary to public policy.

3. Criminal law ⟹37

Where criminal intent originates in mind of entrapping person and accused is lured into commission of offense charged in order to prosecute him, no conviction may be had.

4. Criminal law ⟹37

Where accused has pre-existing criminal intent, fact that when solicited by decoy he committed crime raises no inference of unlawful entrapment.

5. Criminal law ⟹569

In prosecution for conspiracy to commit grand theft and for attempted grand theft, evidence supported verdict against defendant who claimed entrapment.

6. Criminal law ⟹1144(14)

Where instructions on entrapment given at trial were not brought up on appeal and were in no wise challenged, appellate court would assume that defendant's theory of entrapment was fully protected by trial judge in his instructions.

7. Criminal law ⟹1159(3)

Jury finding based on conflicting but substantial evidence may not be disturbed on appeal.

8. Criminal law ⟹730(8)

In prosecution for conspiracy to commit grand theft and for attempted grand theft, where trial judge properly instructed jury to disregard deputy district attorney's remark that witness was too clever for him in response to defendant's attorney's statement that witness was not as fluent with English language, there was no reversible error.

9. Criminal law ⟹1171(3)

In prosecution for conspiracy to commit grand theft and for attempted grand theft, remark of deputy district attorney that witness was too clever for him had no bearing upon guilt or innocence of defendant and was therefore not prejudicial.

10. Criminal law ⟹730(8)

In prosecution for conspiracy to commit grand theft and for attempted grand theft, where deputy district attorney complained that witness was grinning at him and court ruled that remark was improper and admonished jury to disregard it, prejudice, if any, was removed.

11. Criminal law ⟹1174(5)

In prosecution for conspiracy to commit grand theft and for attempted grand theft, remarks of police officers within hearing of jury that defendant's attorney was a "smart one" and that he should write stories for a detective magazine had no bearing upon guilt or innocence of defendant, and could not be regarded as prejudicial to substantial rights.

12. Criminal law ⟹1039

Accused or his counsel when in possession of knowledge during progress of trial statements made or conduct of witnesses or others in presence of jurors deemed prejudicial may not neglect to call court's attention thereto, speculate upon receiving favorable verdict and then assign statements or conduct as prejudicial for the first time.

13. Criminal law ⚿1039

Where defendant failed to call court's attention to alleged improper remarks of witnesses before jurors until after adverse verdict had been rendered, defendant could not complain of incident thereafter.

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Allan M. Moore, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, the above named defendants were accused in Count I of the crime of conspiracy to commit grand theft, and in Count II with the offense of attempted grand theft. Though not named as a defendant, one Dyer was named in the information as a person who had participated in the alleged offenses with the defendants.

To both counts of the information each defendant entered a plea of not guilty. Following a jury trial defendants Crawford and Atadero were found guilty as charged in each count of the information, and defendant Cabatuan was acquitted on both counts. Defendants Crawford and Atadero moved for a new trial which motion was denied. From the judgment of conviction and the order denying his motion for a new trial defendant Crawford alone prosecutes this appeal.

[1] The grounds upon which the appeal herein is predicated make it necessary to epitomize the evidence which gave rise to this prosecution. Viewing the evidence in the light most favorable to the prosecution, as we are required to do following a conviction, People v. Carothers, 77 Cal. App.2d 252, 253, 175 P.2d 30; People v. Cayer, 102 Cal.App.2d 643, 228 P.2d 70, the record reveals testimony that Sergeant Schultz of the Los Angeles Police Department received information from his superior officers that a certain person was offering to sell stolen liquor to liquor stores. Sergeant Schultz was instructed to contact a man named Dyer and was furnished with the latter's telephone number. Officer Waggoner was assigned to communicate with said Dyer. On July 6, 1950, Officer Waggoner telephoned to the number theretofore given him and talked to Dyer. He told Dyer his name was Johnnie Flocca, and that he owned a liquor store. He asked Dyer if he had some liquor for sale. Dyer said that he did have some and would like to talk to Waggoner. He asked him to meet him at the corner of Jefferson Boulevard and Normandie Avenue in the City of Los Angeles later that day. Waggoner agreed to meet him as suggested. At the meeting, Dyer said that he had a carload of stolen whiskey that he would like to sell, and Waggoner said he would like to buy it. They made an appointment to meet again on the same corner at 9:00 a. m. on July 8th.

On July 8, Waggoner went to the corner in a private automobile and met Dyer, who represented that his name was Melvin. It was then arranged that Waggoner should meet other persons. The appellant joined them in the car and was introduced to Waggoner, who was called Johnnie, as Stanley. The appellant told Waggoner that he had a truckload of stolen whiskey and asked him if he would like to buy it, and Waggoner said he would. The appellant said Waggoner would have to talk to his partner, Dyer, about it. Dyer asked what kind of whiskey Waggoner wanted. When Waggoner asked what kind he had, Dyer said he had all kinds, which he would sell for $25 or $35 a case, depending on the brand, and that he had several cases of cigarettes, which he would sell for $25 a case.

Dyer said that he had to meet a man who had just come in on a boat, and who had some "stuff" for him. Waggoner asked him what kind of "stuff" he had, and Dyer said it was diamonds, silk and Chinese herbs. When Waggoner asked what kind of herbs, Dyer said it was opium. About that time, Atadero approached the car wearing a Merchant Marine cap. Dyer invited him into the car, and after Dyer assured him that Waggoner was a friend, Atadero got in. The appellant said, "Did you bring the stuff?"

Atadero said, "Yes," and handed the appellant a small package about three inches by two, wrapped in a white paper with Chinese or Japanese figures on it. The appellant opened the paper and pulled out a red can with a green wrapping around it, also containing Japanese or Chinese figures. He said, "This is the real stuff. How much do you want for it?" Atadero said, "I want $200." The appellant took out an envelope containing some money, and counted out some currency. Atadero put the money into his pocket and the appellant said, "Have you got any more of this stuff?" Atadero said, "Yes, I have got about a hundred cans of it. I am going to get rid of it. I thought you wanted more than one can at this time." Atadero then got out of the car and left the scene.

The appellant then said, "I have got to go call the Chinaman so he can pick this stuff up right away. I want to get rid of it." He handed the can to Waggoner and said, "Will you hold onto this until I get back. I will be right back." Dyer said to Waggoner, "That is pretty good stuff that you have got there." Waggoner said, "What do you mean, 'it is pretty good stuff'?" Dyer said, "That is good opium there. Why don't you get in with Mr. Dyer (Stanley?) here and do business with him? He buys it for $200 a can and he sells it for $400. That is 100 per cent profit." The appellant came back to the car. Dyer said to Officer Waggoner, "When the Chinaman gets here, tell him that the stuff belongs to you and that you want $425 for the can. If he don't want it for $425, if he offers you $400, take it."

Cabatuan then walked up to the car and got in, after the appellant told him that Waggoner was a friend of his. Cabatuan asked to see the stuff, and inquired about the price. Waggoner told him they wanted $425. Cabatuan refused to pay $425, and offered $400. The appellant said they would take it. Waggoner handed the can to the appellant, and the appellant handed it to Cabatuan. Cabatuan pulled out a bundle of currency, counted some out and handed it to the appellant. He then left the scene.

Dyer said, "I just made $200 on this deal here. This Filipino boy has a hundred cans of it. I could really make a lot more money if I had enough to buy it all. I only have $2000. That's only enough for 12 cans. I sure wish I had the rest of the money." Dyer then said, "Why don't you go in with Crawford and both of you clean up on this deal?" Waggoner asked the appellant how much money he would need, and the appellant said, "I will need $7,800 more. Do you think it is possible you could raise it?" Waggoner said that he might be able to raise it, but that he would have to have a little time. The appellant said that was all right. He said, "We can sell every bit of this stuff to the Chinaman. We can sell it. We can buy it for $200 a can and sell it for $400 a can. You see if you can raise some money * * *. You make the meeting place and we will meet there at 2:00 o'clock." Waggoner agreed to do so, and gave the appellant his home phone number so he could call and find out where the meeting place would be. The appellant and Dyer got out of the car.

Waggoner arranged a meeting place at a room in a motel at 2901 South Flower Street. The appellant telephoned Waggoner and learned the place of meeting. Waggoner was there at 2:00 p.m., and he had arranged for other police officers, Schultz, Berone and Gerissi, to be in another room of the motel. The appellant was standing outside of the room Waggoner had obtained for the meeting when Waggoner arrived there. He and Waggoner went into the room, and the appellant said it would be about 10 minutes before Atadero got there with the "stuff". He asked Waggoner if he brought the money. Waggoner said he had it outside in the car. About 2:10 p. m., Atadero arrived in the room. He asked if Waggoner had brought the money, and Waggoner said that he had. Atadero then said he would go get the stuff. He then went out the door and returned in about five minutes with a small brown suitcase containing several small packages wrapped in papers with Chinese or Japanese figures on it. He said that the cans contained opium.

Waggoner said that he would like to see the "stuff", so Atadero opened the suitcase and showed him one of the cans. Waggoner said he would go out to his car and bring the money in. He walked out the door and notified the other officers that it was time to come in. The other officers went to the door where the appellant and Atadero were, announced that they were police officers, and demanded to be let in. Officer Schultz tried to open the door, but could not, so he kicked it open. As they entered the room, Waggoner saw the appellant throw something onto the bed. He picked it up. It was two bundles of blank paper each with a $20 bill on top and a $1.00 bill on the bottom, and a band around it stamped $1,000. There was also money of the Japanese government and Chinese government. There was a total of $58 in American money in the bundles.

After the officers had identified themselves as such, the appellant said to Officer Waggoner, "Well, I guess you have got me. There isn't opium in those cans. I was trying to pull the can game on you. You should have been a bunco artist like myself instead of a police officer. Instead of me buncoing you, you buncoed me. I just took a fellow out in Pomona for $1800 about a month ago. I was trying to take you the same way but it just backfired on me."

Later at the police station, Sergeant Schultz talked to the appellant. He asked him what kind of work he did, and the appellant answered, "You are kidding, of course." When asked again, he said, "I don't work, I am a hustler." The Sergeant asked him how many times he had operated the "can game", and the appellant said, "Well, I have made quite a few big scores lately." He said he had taken two people in Pomona for $1800 apiece, and another man for $2600. He said he had been "working bunco" all his life. At a later conversation, Sergeant Schultz asked the appellant how he "planned on getting rid" of Waggoner if the deal had gone through, as he was of the opinion that Waggoner would have stayed close to the appellant until he sold the opium. The appellant answered, "Well, I was figuring on getting rid of him like I do the rest of the suckors." "We make the arrangement to go downtown to a hotel where this Chinese person is supposed to be living, and I have the party wait in the car and I tell them that I am going up and get the Chinaman and I go in the front door and out the back." He also said that Cabatuan, Atadero, Dyer and he had arranged to meet later, after they had obtained the money, and divide it among the four of them.

The cans in the suitcase were examined by a chemist, who opened all of those which had no factory seals on them, amounting to about two-thirds of the total. None of them contained any narcotic material. In the opinion of the chemist, based upon the weight of the other cans, they did not contain opium.

Testifying in his own behalf, the appellant stated that Dyer had called him at about 10:00 o'clock on the morning of July 8, 1950; that Dyer told him he had a big deal and asked him to come to his house; that he went to Dyer's house, and Dyer told him he would introduce him to a man; that they went to the corner of Normandie and Jefferson where they met a man named Johnnie, who was Waggoner, sitting in a car; that Waggoner asked him if he could get him any whiskey or cigarettes, and he said that he did not have access to any cigarettes or whiskey; that Waggoner asked him if there was anything at all that he could get to make "a quick dollar"; that he told Waggoner he knew of nothing; that Waggoner told him about a "deal" that he wanted to pull, if he could get some help; that the "deal" was to get something that resembled dope and sell it to a man with a lot of money that he knew; and that Waggoner told him the only thing he would have to do was what Waggoner told him. He testified further that in response to Waggoner's request, he telephoned to Atadero and told him that if he was interested in a matter with quite a bit of money involved, he could come and talk it over, and then telephoned to Cabatuan and told him the same thing; that when Atadero got to the car, Waggoner told him he could sell something that was supposed to be dope, but wasn't, to a man he knew, and Atadero said he would be interested in the proposition; that Waggoner instructed Atadero to buy small cans of cloves, cinnamon, or anything else he could get that would be similar to a package of opium; and that after arranging to have the appellant telephone him and tell him of further arrangements which Waggoner would make, Atadero left. Appellant testified that after Atadero left, Cabatuan came to the car and was told what the proposition was, but that he was not interested in it and left the car; that Waggoner told appellant that he would get a place where they could meet, and that he would bring the man who was going to buy the packages; that Waggoner gave him a telephone number and told him to telephone and get the rest of the plans; that he telephoned Waggoner and got the address of the meeting place and the time of the meeting; that he, the appellant, telephoned Atadero and asked him if the things were ready, and Atadero said that they were, so he told him to bring them to the meeting place at 2:30; that he went to the motel where he met Waggoner and they entered the room; that Waggoner asked him if his money was made up to represent more than it was, as he had instructed him; that Atadero brought the cans to the room and Waggoner looked at them and said that they would do the trick; and that, saying he was going to get the fellow, Waggoner left the room, whereupon, the officers came in and arrested them.

The first point raised is that the evidence clearly establishes that appellant was entrapped and that he was induced to commit the crimes in question by Police Officer Waggoner.

[2-4] On numerous occasions it has been held by our state and federal courts to be the law that where an officer of the law induced an accused to commit a criminal act not contemplated by him, a conviction would be contrary to public policy. In other words, that where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him, no conviction may be had. The law does not frown upon the entrapment of a criminal but will not tolerate the seduction of innocent people into a criminal career by its officers. U. S. v. Wray, D.C., 8 F.2d 429, 430. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment. "It is only when the criminal design is conceived in the mind of the officer and does not originate with the accused, and a decoy is used to ensnare the innocent and law-abiding by persuasion, deceitful representation, inducement or allurement into the commission of the crime, that there is entrapment". People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114, 1115.

[5] With the foregoing rules in mind it cannot here be held that the evidence clearly established entrapment. No more appears than a conflict in the evidence and at that, the entire story as related by appellant, coupled with his admissions of participating in previous similar sinister transactions, is of such a nature that it is difficult to see how a jury could have believed that Officer Waggoner did any more than furnish appellant an opportunity to commit the offenses charged and then aided appellant in the commission thereof in order to secure the evidence necessary to prosecute him. Such a situation furnishes no defense upon the theory of unlawful entrapment. People v. Lindsey, supra, 91 Cal.App.2d at page 917, 205 P.2d 1114. The jury was entitled to believe the testimony of the police officer and if they did, it showed that pursuant to the plan conceived by appellant and his co-defendants, the officer was to be the victim of their scheme to secure his money in exchange for spurious opium.

[6, 7] The instructions given at the trial were not brought up on this appeal and are in no wise challenged. We must therefore assume that the theory of en-

trapment upon which appellant tendered his defense was fully protected by the trial judge in his instructions to the jury. People v. Jackson, 88 Cal.App.2d 747, 750, 199 P.2d 322; People v. Brown, 72 Cal.App.2d 717, 720, 165 P.2d 707. Under familiar rules, the finding of the jury based on conflicting but substantial evidence may not be disturbed on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

It is next contended by appellant that on two occasions during the cross-examination of defendants, the deputy district attorney was guilty of prejudicial misconduct. On the first occasion, the prosecutor was examining the defendant Cabatuan who had testified that at the request of either Officer Waggoner or appellant he had, in New Chinatown, bought small cans and paper to wrap them, and took them to the motel heretofore mentioned. On cross-examination the deputy district attorney was vainly endeavoring to ascertain from the witness the location of the particular store in New Chinatown at which the purchase had been made. After the examination had proceeded for sometime appellant's counsel objected on the ground that the witness "has testified to the best of his knowledge it was near Chinatown". Thereupon the following occurred:

"Mr. Myers: New Chinatown has not been defined yet, if the Court please. There is a question of time involved here. I would like to get some ways near where he bought this stuff.

"Mr. Moore (appellant's attorney): Counsel, if I may add, your witness there—

"Mr. Myers: It is not my witness. Just a moment please.

"Mr. Moore: My witness is not so fluent with the English language as you are.

"Mr. Myers: He is pretty clever; too clever for me."

Appellant's attorney then requested the court to admonish the jury to disregard the last quoted statement of the prosecutor.

The court then instructed the jury as follows: "The Court will admonish the jury at this time to disregard both of the arguments and discussion of both counsel, and to treat the remarks as though you had never heard them."

[8, 9] Since the trial judge promptly charged the jury to disregard the statement of the deputy district attorney, there is no reversible error. In any event, the remark had no bearing upon the guilt or innocence of the appellant and therefore, was not prejudicial. People v. Haughey, 48 Cal.App.2d 506, 514, 120 P.2d 121. We cannot conclude under the facts here present that jurors, sworn to find a true verdict, will disregard their oaths and also disobey the instructions of the court to base their verdict upon the testimony alone, and will allow themselves to be influenced by one or two casual remarks which may be made by counsel under the influence of passion, during the heat of cross-examination. The situation with which we are here confronted is not one wherein it can reasonably be said that the timely admonition to the jury did not remove the prejudicial effect, if any, resulting from the conduct of the prosecuting officer.

What we have just said is equally applicable to the second occasion during the trial when the deputy district attorney made a remark of which appellant complains and assigns as reversible error. The incident is reflected in the record as follows:

"Q. (by Mr. Myers, deputy district attorney): Now we are getting near the location. Now you went into this store, then. You say you left Mr.—very amusing, isn't it, Mr. Cabatuan? You left this store—

"Mr. Moore: If the Court please—

"Mr. Myers: He is sitting there grinning at me.

"Mr. Moore (appellant's attorney): Just a moment, please, counsel. I have suffered the grins of the police officers in this court, too. I think this is very prejudicial, counsel's statement. I respect him as a man much more skilled than myself, but I don't believe his comments have any place in this courtroom when there is such a grave trial going on."

Whereupon, the court instructed the jury as follows:

"If you make an objection, the Court rules the remark of counsel was uncalled for. It was not a proper remark, and I will now admonish the jury to disregard the last remark of Mr. Myers."

[10] Whatever prejudice, if any, resulted from the remark "He is sitting there grinning at me." was removed by the prompt and stern rebuke of the trial judge administered to the prosecutor.

Finally, appellant contends that the statements and conduct of certain police officers (one of whom was a witness against him), during the course of the trial, and in the presence of the jury, resulted in a miscarriage of justice. A perusal of the record indicates that this issue was raised on an affidavit of appellant's counsel presented on the motion for a new trial. The affidavit in question was not brought here on this appeal but from an examination of the reporter's transcript containing the arguments made at the hearing of the motion for a new trial, it appears that the affidavit asserted that at a time during the trial when the jury was leaving the courtroom, and within their hearing, Police Sergeant Schultz, one of the witnesses at the trial, said to the appellant's counsel, "You are a smart one, Mr. Moore, you are really sharp." That at another time, Officer Gerissi, one of the arresting officers in the case, but who did not testify as a witness, said to the attorney for appellant, "Moore, you must write Hollywood stories for a detective magazine."

In his opening brief appellant contends, and in his argument on the motion for a new trial he also contended tha' police officers concerned in the case, "smiled and smirked" in the courtroom during the examination of appellant and his codefendants.

[11–13] Assuming the statements just narrated were made, they had no bearing upon the guilt or innocence of appellant, and, as heretobefore pointed out, cannot therefore, be regarded as prejudicial to his substantial rights. Furthermore, so far as the record shows, appellant failed to call the court's attention to the incidents just related until after the verdict had been rendered. An accused or his counsel when in possession of knowledge, during the progress of a trial, of statements made or of the conduct of witnesses or others in the presence of the jurors, which he deems to be prejudicial, may not neglect to call the court's attention thereto, speculate upon receiving a favorable verdict, and then assign the statements or conduct as prejudicial for the first time after an adverse verdict has been returned against him. People v. Quiel, 68 Cal.App.2d 674, 680, 157 P.2d 446; People v. Williams, 24 Cal.App. 646, 655, 142 P. 124; People v. Lawler, 79 Cal.App. 207, 211, 212, 249 P. 18.

The trial judge was courteous and patient. Throughout the trial he was extremely careful in his rulings to safeguard the rights of appellant to a fair and impartial trial. That was all the latter was entitled to, and that he received. Appellant was fairly tried, and his conviction rests upon competent and legal evidence.

The judgment and the order by which the motion for a new trial was denied are, and each of them is affirmed.

DORAN and DRAPEAU, JJ., concur.

RUBIN v. AMERICAN SPORTSMEN TELEVISION EQUITY SOCIETY, Inc., et al.

MIKE HIRSCH ENTERPRISES, Inc. v. AMERICAN SPORTSMEN TELEVISION EQUITY SOCIETY, Inc., et al.

Civ. 18313, 18383.

District Court of Appeal, Second District,
Division 1, California.
July 25, 1951.

Rehearing Denied Aug. 15, 1951.
Hearing Granted Sept. 20, 1951.*

Actions by Harry Rubin and by Mike Hirsch Enterprises, Inc., against American Sportsmen Television Equity Society, Inc., and others, for injunction restraining local labor union from picketing plaintiffs' places of business. The Superior Court of Los Angeles County, W. Turney Fox, J., granted preliminary injunction and defendants appealed. The District Court of Appeal, Doran, J., held that complaints and affidavits justified trial court in granting preliminary injunction to restrain a local labor union from picketing plaintiffs' places of business pending determination of action on merits.

Orders affirmed.

White, P. J., dissented.

See, also, 227 P.2d 303.

Labor relations ⚷970, 971

Complaints and affidavits justified trial court in granting preliminary injunction to restrain local labor union from picketing plaintiffs' places of business pending determination of action on merits.

◆

Richard A. Perkins, Los Angeles, W. M. Freiburghouse, South Gate, for appellants.

Cyril Moss, Hollywood, George Appell, Los Angeles, for respondents.

DORAN, Justice.

The complaints allege that respondents (plaintiffs) are promoters of professional wrestling matches, licensed by the State Athletic Commission; Harry Rubin conducting such matches on certain evenings in the Long Beach Municipal Auditorium, and Mike Hirsch conducting similar matches at Ocean Park Arena. It is averred that the appellant American Sportsmen Television Equity Society, not a bona fide labor organization and not affiliated with either the American Federation of Labor, the Congress of Industrial Organizations, or other parent organization, and the officers thereof, conspired to injure plaintiffs' business in the promotion of wrestling matches. The complaints further allege that appellants attempted to coerce the respondents into signing agreements to only use wrestlers who are or will become members of or affiliate with appellant Society, and for that purpose unlawfully picketed the wrestling matches, and threatened that respondents would be boycotted and picketed.

Other allegations of the complaint are that no employer-employee relation exists between respondents and professional wrestlers but that the wrestlers are paid for performances as independent contractors under regulations of the State Athletic Commission, and that respondents exercise no control over manner or method of the wrestling performances. It is also alleged that respondents had entered into written agreements with certain corporations granting the privilege to televise the wrestling matches; that "For the television rights of wrestlers performing in said televised matches, said corporation pays a compensation directly to said wrestlers". Respondents "emphasize the proposition that insofar as the televising of wrestling matches is concerned, that no economic relationship of any kind exists between respondents and the wrestlers".

It is also alleged that none of the wrestlers, whose performances are televised, "are members of nor have they contracted with" the appellant Equity Society, and that the wrestlers "are among the foremost and so called top name wrestlers in the United States"; that respondents had refused to sign any agreement to only use wrestlers who are members or become affiliates of the corporate appellant, and that no labor controversy or dispute exists between respondents and said wrestlers. Damage in the loss of business and patronage resulting from appellants' picketing activities is alleged.

Appellants filed no answers to the complaints, demurrers thereto were overruled; preliminary injunctions as prayed for in the complaints were granted after extended arguments in reference thereto. Motions to dissolve the preliminary injunctions and for stay pending appeal, were denied. A writ of supersedeas was also denied.

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* Subsequent opinion 254 P.2d 510.

In opposition to the applications for preliminary injunction, counter affidavits were filed by appellant Lou Goodman, president of appellant Equity Society, and by Ed Don Lewis, appellant and wrestler. Respondents submitted the affidavit of 11 wrestlers to the effect that such wrestlers were independent contractors and not employees; that no social security or unemployment deductions were made from compensation, and that plaintiffs exercised no control over the wrestlers' methods of performance or results to be obtained in the wrestling matches.

Appellants' general position is stated in the following words: "The appellants acknowledge having picketed substantially as alleged except for the characterizations of conspiracy, illegality, falsity, etc. They assert their right to picket under the constitutions and laws of this State and of the United States."

The first point raised in appellants' brief asserts the right to picket even "if it be true that there is no labor dispute between respondents and the wrestlers". In support of this proposition is cited C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414, 419, where it is said that "the term 'labor dispute' is not the criterion for decision of this case under California law". However, as pointed out in respondents' brief, that case does not involve a situation comparable with the present controversy, merely holding that "Peaceful picketing is commonly used by unions to advertise labor's grievances and may not be enjoined when the purpose is reasonably connected with a controversy which affects workers in an industry generally as well as those employed by the person against whom it is directed". Appellants' second point, citing the same case, avers that "if it be true that none of the wrestlers employed by respondents is a member of Television Equity that does not render the picketing tortious".

Point III of appellants' brief, argues that "if it be true that the wrestlers who perform for respondents are independent contractors and not their employees, that does not render the picketing tortious or subject to suppression by injunction". Citing Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916; Riviello v. Journeymen Barbers Union, 88 Cal.App.2d 499, 199 P.2d 400, and Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343, 348, it is stated that "Picketing and other concerted labor activity to enroll independent contractors as union members and bring about observance of uniform working conditions are recognized as legitimate". Again it may be said that the cases cited in no manner resemble the present situation, nor do any of them purport to justify picketing under circumstances at all analogous to those here presented. In the main, such cases merely reiterate certain well recognized rules appertaining to labor controversies about which there is little if any dispute.

In Bautista v. Jones, supra, while recognizing the rule that "the intentional interference by union labor with the advantageous economic relations of others is not tortious provided the means used are peaceful and truthful and the object sought to be accomplished has reasonable relevance to labor conditions", the reviewing court affirmed a judgment enjoining a milk drivers union from coercing or preventing milk brokers from supplying plaintiff independent milk distributors with milk products, concluding that the purpose of the union was unlawful and not reasonably related to legitimate activities of labor unions.

In the instant case, respondents call attention to the fact that "The complaints and the affidavits disclose that *no labor dispute at all* exists between respondents and the televised wrestlers, or between respondents and appellants (or even between appellants and the televised wrestlers). If any labor dispute exists (which we do not concede) between appellants and any entity, that entity would be the corporation which paid the wrestlers for being televised.". In this connection it will be remembered that respondent promoters had granted to such a corporation the privilege to televise wrestling matches, which corporation paid a compensation directly to said wrestlers.

Respondents' brief likewise notes that respondents' auditoriums "were not picketed because the televised wrestlers refused to join appellant corporation (Equity Society)", but "because respondents refused to negotiate with appellant corporation as the self-constituted bargaining agent for the wrestlers, when being televised". There is no showing that appellants tried to enroll any of the televised wrestlers in the Equity Society either as independent contractors or otherwise, "or that appellants were blocked from so doing by any act of respondents. All the affidavits of Goodman and Lewis show is that appellants attempted to force an agreement from respondents that the latter would use only, in matches promoted by them, wrestlers who were members of appellant (Equity) corporation".

It is argued in appellants' brief that "There is no substantial evidence to support any findings that the wrestlers are independent contractors rather than employees". Since no testimony was taken, the injunctions in question being founded on the sworn allegations of the complaints and upon affidavits, substantial basis to support the trial court's decision must be found therein. Appellants saw fit not to file answers to the complaints but did present counter affidavits setting forth the matters relied upon. All these papers were before the trial court and the various issues appear to have been fully argued. That the issue of the wrestlers' status is fairly raised in the complaints can hardly be doubted; it is directly alleged that "the relationship of employer and employee does not now, and never has existed between said professional wrestlers and" respondents, and that respondents "exercise no control over the manner or method of the wrestling performances". This is denied by appellants who presented affidavits intended to convince the trial court that respondents were wrong.

The situation in this respect is analogous to that involved in a trial where conflicting evidence is before the court. The trial court after considering both sides of the controversy, saw fit to grant the injunction and by implication found that respondents' allegations were true. As said in Bautista v. Jones, 25 Cal.2d 746, 754, 155 P.2d 343, 348, in the concurring opinion of Edmonds, J., "the evidence compels the findings upon which the injunction was ordered, or taking the position most favorable to the appellants, the decision of the trial court rests upon conflicting evidence which places the determination beyond the reach of an appellate tribunal". The same may be said in respect to appellants other similar assertions that respondents' charges of conspiracy, and that the Equity Society is not a bona fide labor organization, etc., are not supported by proper evidence.

Under allegations contained in the sworn complaints and supporting affidavit, a case was made out which would furnish justification for preliminary injunctive relief, a non-labor controversy involving activities on the part of appellants which threaten damage to the respondents' business in promoting wrestling matches, and which activities were for the purpose of coercing respondents into agreeing to only use wrestlers affiliated with appellant Equity Society. Despite the counter affidavits and arguments of appellants, it cannot be said that the trial court was wrong in granting the preliminary injunctions, whatever result may finally be reached after a trial of the case upon its merits. Appellants have been unable to cite any case dealing with a situation analogous to that here presented, and no merit is found in any of appellants' contentions.

The orders appealed from are affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I dissent:

Since peaceful means were adopted by the unionists in their picketing, such action was lawful if reasonably relevant to working conditions and the purposes of collective bargaining. That the activities of appellants were so relevant is established by the case of C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 394, 106 P.2d 414, and cases therein cited. I would therefore reverse the orders appealed from.

Rehearing denied; WHITE, P.J., dissenting.

105 Cal.App.2d 618

SMITH et al. v. CITY OF LONG BEACH et al.

Civ. 18217.

District Court of Appeal, Second District, Division 2, California.

July 25, 1951.

Hearing Denied Sept. 20, 1951.

Action by Gary J. Smith, and others, against City of Long Beach, a municipal corporation, and others, to obtain a declaration of plaintiffs' civil service status and pension rights under the civil service regulations. The Superior Court of Los Angeles County, George Francis, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where plaintiffs, with one exception, were never employed by municipality prior to entry into armed forces, but plaintiffs had passed competitive examinations for certain positions and were placed on eligible list, plaintiffs, by having names placed on eligible list did not become persons in classified service and did not acquire any civil service status but obtained right to be certified for appointment in manner provided by law.

Judgment affirmed.

1. Municipal corporations ⚷132

Under municipal charter providing that "all persons in classified service" who shall have entered armed forces during war or national emergency and who shall have been honorably discharged shall be reinstated without loss of status or seniority to positions held by them prior to entry into service, quoted phrase does not include persons whose names were on eligible lists and does not extend to such persons same rights as were extended to persons actually in employ of city at time they left to serve in armed forces.

2. Municipal corporations ⚷125

Persons who are on eligible lists are not persons in the classified service.

3. Municipal corporations ⚷132

Where plaintiffs, with one exception, were never employed by municipality prior to entry into armed forces, but plaintiffs had previously passed competitive examinations for certain positions and were placed on eligible list, plaintiffs, by having names placed on eligible list, did not become persons in classified service and did not acquire any civil service status but obtained right to be certified for appointment in manner provided by law. Military and Veterans Code, § 395.1(b).

4. Municipal corporations ⚷132, 162(1)

Where plaintiffs, with one exception, were never employed by municipality prior to entry into armed forces, but plaintiffs had passed competitive examinations for certain positions and were placed on eligible list, plaintiffs obtained no vested rights through any contract of employment with municipality and did not acquire any pension rights under municipal charter.

5. Municipal corporations ⚷132, 162(1)

Where plaintiff held a provisional appointment in position with municipality prior to plaintiff's entry into armed forces, and plaintiff did not become a regular employee of classified civil service until plaintiff's return from armed forces, plaintiff obtained no vested rights under municipal charter and was not entitled to any pension benefits.

6. Municipal corporations ⚷184(1)

In action to obtain a declaration of employee's civil service status and pension rights under municipal charter and civil service regulations, evidence sustained finding that the employee was not appointed to the position of patrolman prior to employee's entry into armed forces.

◆

Kenneth Sperry, Long Beach, for appellants.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

McCOMB, Justice.

Plaintiffs filed this action against defendants for the purpose of obtaining a declaration of their civil service status and pension rights if any under the charter of the City of Long Beach and the civil service regulations.

Facts: With the exception of plaintiff James A. Buckle, none of the plaintiffs was ever appointed to positions of employment in the City of Long Beach prior to their entry into the armed forces of the United States. Plaintiff Buckle was given a provisional appointment in December of 1941, the terms thereof providing for the expiration of the appointment at the end of 150 days. However he resigned in March of 1942 to enter the armed forces.

Each plaintiff prior to his entry into the armed forces filed applications to take open competitive examinations for the position of either patrolman or fireman. They passed such examinations and their names were placed on appropriate eligible lists. Before any of plaintiffs were certified for or appointed to permanent positions in either the police or fire department they entered the armed forces, and when their names were reached for certification from the eligible lists they were unable to accept appointments.

On June 29, 1943, the civil service board adopted Section 17, of Rule IV, under the terms of which any person whose name was on an eligible list who was unable to accept an appointment at the time his name was reached for certification due to being in the armed forces was entitled to have his name placed on an appropriate list designated the "Military Deferred List." The rule further provided that such persons upon their return from service were entitled to certification for appointment within the time specified therein. Pursuant to this rule the name of each plaintiff was placed upon said "Military Deferred List." Upon his return from service each applicant was certified and appointed to the position of either fireman or patrolman.

At the time of the commencement of this action each plaintiff held a position in either the police or fire department by virtue of said certification and appointment.

Section 101.5 of the Long Beach City Charter provides in part as follows:

"All persons in the classified service who on or after June 1, 1940, shall have entered, or who hereafter shall enter, the armed forces of the United States during war or national emergency proclaimed by the President or the Congress of the United States or Act of Congress providing for peace time induction or conscription, and who shall have been honorably discharged or placed on the inactive or reserve list or relieved from such service with a certificate of satisfactory service, shall be reinstated without loss of status or seniority to the positions held by them prior to entry into such Federal service or to positions of like seniority and status, * * *."

Section 395.1, subdivision (b) of the Military and Veterans Code reads:

"Upon such return and reentry to the office or employment the officer or employee shall have all of the rights and privileges in, connected with, or arising out of the office or employment which he would have enjoyed if he had not been absent therefrom; provided, however, such officer or employee shall not be entitled to sick leave, vacation or salary for the period during which he was on leave from such governmental service and in the service of the armed forces of the United States.

"If the office or position has been abolished or otherwise has ceased to exist during his absence, he shall be reinstated in a position of like seniority, status and pay if such position exists, or to a comparable vacant position for which he is qualified."

The trial court found that plaintiffs did not have any pension rights under section 187 of the charter. From this judgment they appeal.

[1] *Questions:* First: *Does the term "all persons in the classified service" as used in Section 101.5 of the Charter, supra, include persons whose names were on eligible lists and extend to such persons the same rights as were extended to persons actually in the employ of the City at the time they left to serve in the armed forces?*

No. A reading of the section discloses that it deals solely with employees of the city and that such section does not include within its scope persons whose names were on eligible lists.

It is evident that had the framers of the charter intended to include eligibles for appointment within the scope of the section some mention would have been made of the procedure to be followed in extending such rights. The charter includes several paragraphs which set forth the procedure to be followed in extending rights to employees and the effect the extension of such rights would have upon them. Not a word is said about the procedure to be followed if eligibles for appointment were accorded similar rights thereunder or the effect the extension of such rights of such eligibles would have upon employees who were appointed subsequent to the time the names of eligibles were reached for certification.

[2, 3] Persons who are on eligible lists are not persons in the classified service. (Jones v. O'Toole, 190 Cal. 252, 256, 212 P. 9; cf. People ex rel. Laist v. Lower, et al., 251 Ill. 527, 96 N.E. 346, 347, 36 L.R.A.,N.S., 1203; Hurley v. Board of Education of City of New York, 270 N.Y. 275, 200 N.E. 818, 820.) Under this rule and the foregoing authorities the sole right which plaintiffs obtained as a result of their names being placed on the eligible list was to be certified for appointment in the manner provided by law. They did not in any manner become "persons in the classified service" nor did they acquire any civil service status. They could only become "persons in the classified service" when they were appointed by the appointing power. Hence section 101.5 of the municipal charter is inapplicable to plaintiffs.

Second: *Did plaintiffs acquire any rights under the provisions of section 187 of the municipal charter as it stood prior to its repeal on March 29, 1945?*

[4] *No.* Since, as we have pointed out above, none of the plaintiffs excepting James A. Buckle was ever employed by defendant municipality prior to March 29, 1945, they had no vested rights which they had obtained through any contract of employment with defendant municipality. (Kern v. City of Long Beach, 29 Cal.2d 848, 852, 179 P.2d 799.)

[5] Plaintiff James A. Buckle obtained no vested rights under the provisions of section 187 of the charter for the reason that he held merely a provisional appointment from the defendant municipality. It was stipulated that he did not receive an appointment letter from the city manager between March, 1942, and the time he returned from service in the armed forces in 1945 or 1946, and since he did not become a regular employee of the classified civil service until after section 187 was repealed he was not entitled to any of the pension benefits thereof. (Allen v. City of Long Beach, 101 Cal.App.2d 15, 224 P.2d 792.) It is conceded that he received a permanent appointment beginning March, 1946.

[6] Third: *Was there substantial evidence to sustain the trial court's finding that plaintiff Milovich was not appointed to the position of patrolman prior to his entry into the armed forces?*

Yes. It is conceded that he did not receive an appointing letter from the city manager prior to his entry into the armed forces, nor did he enter into the performance of his duties. It is likewise conceded that he was notified by the civil service board to report for a physical examination which was given to him, but there is no evidence that he had been examined by a board of physicians as provided by section 1a, rule XI, nor was there any evidence that the civil service board had approved the physical report of said plaintiff. The latter testified that the personnel officer stated that he would let him know later, or would call him later, and that he received his induction notice prior to the time that he reported for duty and that he never reported for duty prior to entering the armed forces.

Plaintiff Milovich further testified that he had called the personnel officer and stated that "I had received my induction papers and apparently I could not accept the job. I told him that I would see him after the war." These facts thoroughly support the trial court's finding that such plaintiff had not been employed by the city prior to 1946.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

105 Cal.App.2d 598

OAKS v. WEINGARTNER et al.

Civ. 7957.

District Court of Appeal, Third District, California.

July 24, 1951.

Action by G. E. Oaks, doing business under the firm name and style of Oaks Sand, Gravel and Cement Products Company, against Hartley L. Weingartner, and others, to have materialmen's lien declared superior to the lien of a deed of trust securing certain advances made after the recordation of the deed of trust. The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that materialmen's lien filed after recordation of deed of trust and after further advances had been made, was inferior to either deed of trust or advances made, even though advances had not been recorded, where it was shown that lienor examined deed of trust and noticed particularly the provision as to security for further advances but elected not to ask whether any further advances had been made.

Judgment affirmed.

1. Mortgages 🔑116

Where deed of trust to secure loan of $4,178 recited that instrument was also to secure the payment of "any further or additional loans (not to exceed in the aggregate the sum of $———, to be evidenced by a note or notes therefor)" failure of parties to deed to fill in blank in parenthetical clause did not render entire provision relating to further advancements null, but nullified only parenthetical clause, and deed of trust was then to be read as if parenthetical clause was completely eliminated.

2. Mortgages 🔑171(6)

Where deed of trust to secure loan of $4,178 recited that instrument was also to secure payment of any further or additional loans, and it appeared that lienor examined record of deed of trust and noted particularly the provision as to security for further advances, but elected not to ask whether any further advances had been made, materialmen's lien which was filed after recording of deed of trust and after further advances had been made, was inferior to either deed of trust or advances, even though advances had not been recorded.

3. Mortgages 🔑154(1)

The rule that the lien of a mortgage does not operate to secure optional advances made under the mortgage after the mortgagee has acquired actual notice of an encumbrance subsequent in point of time to his mortgage, so as to defeat or impair the rights of the subsequent encumbrancer, is applicable to trust deeds.

4. Mortgages 🔑154(1), 160, 171(1)

Recordation of mortgage is notice to subsequent encumbrancers that it constitutes a lien to the sum therein named, but subsequent encumbrancers may ascertain the actual condition of the security and by notice to the holder of the prior mortgage prevent any additional encumbrance of the property by future advancements by giving notice of their liens, in which case they are entitled to have the senior mortgagee limited to recovery of such advances as he has made under his mortgage prior to receipt of actual notice of vesting of junior liens, but if subsequent encumbrancers do not give notice, their rights must be held subject to the mortgage to the full extent of advancements made.

5. Mortgages 🔑50

In the absence of statutes providing otherwise, it is unnecessary to definitely state the amount to be secured on the face of the mortgage, and all that can be required is that a mortgage designed to secure future liabilities should describe the nature and amount with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry.

6. Mortgages ⚷50

If a mortgage discloses on its face that it is to stand as security for future advancements, the amount of the advancements to be made need not be set out if notice is sufficiently definite to put subsequent encumbrancers on inquiry.

◆

L. C. Smith, Redding, for appellant.

Carlton & Shadwell, Redding, for respondents.

VAN DYKE, Justice.

This is an appeal from a judgment which denied to plaintiff his claim that his materialmen's lien was superior to the lien of a deed of trust securing certain advances made after the recordation of the deed of trust. On October 2, 1945, Hartley L. and Nellie O. Weingartner executed to John and Catherine Pehau, respondents herein, a deed of trust. The instrument recited that it was given as security for the repayment of a loan of $4,178 borrowed by the trustors as evidenced by a promissory note in that amount concurrently executed. The instrument contained provisions that it was also to secure the repayment of "any further or additional loans (not to exceed in the aggregate the sum of $——, to be evidenced by a note or notes therefor) made by said party of the third part to said party of the first part, and all interest thereon, and as security to the parties of the second part, or the survivor of them, their successors and assigns, and to the party of the third part and his assigns, for the payment of the said other moneys, with the interest thereon, herein agreed or provided to be paid by the said party of the first part." Thereafter respondents made additional advances and loans to the Weingartners, each of which was evidenced by a promissory note until by July 25, 1947, total additional advances had been made aggregating $11,000. Each note evidencing an additional loan contained the statement that it was secured by the deed of trust, but these notes did not appear of record. The deed of trust was recorded November 10, 1945. Between January 10, 1949, and May 8th of that year appellant furnished to the Weingartners materials consisting of concrete and gravel in the reasonable value of $806.57. These materials not having been paid for, he filed his claim of lien for the amount thereof and brought this action to foreclose the lien. By appropriate allegations he alleged that his lien was superior to the lien of the deed of trust save for the original loan of $4,178.

[1] In support of his appeal appellant contends as follows: That when the respondents recorded the deed of trust they were not, either by its terms or at all, obligated to make any additional advances; that the language we have quoted from the deed of trust respecting future advances amounts to a declaration against further advances so that when appellant, before furnishing materials to the Weingartners, examined the deed of trust as recorded he could assume and did assume that it secured nothing more than the original sum loaned; that he was under no duty to inquire further but could proceed upon the security of the lien he would have if his bill was not paid and he perfected his lien in the statutory manner. In support of this contention appellant lays stress upon the parenthetical clause "not to exceed * * * $——," appearing in that portion of the deed of trust which we have quoted. He says that by not filling in the blank after the dollar sign in the parenthetical clause the entire provision relative to further advances was nullified. We do not so construe the document as executed. On the contrary, any nullification that results from leaving the blank unfilled has to do only with the parenthetical clause and leaves the quoted language with that clause eliminated, as a provision that the deed of trust should stand as security "for any further or additional loans (* * *, to be evidenced by a note or notes therefor) made by said party of the third part to said party of the first part." The parenthetical clause was for the purpose of expressing a limitation upon a general covenant that the deed

of trust should stand as security for further loans. Thereby was provided a means to express that limitation if the parties so desired, which would be done by filling in the blank with a sum agreed to be the limit of additional loans which could be secured by the deed of trust. By not so filling in the blank the parties elected to place no limitation upon the general covenant. The deed of trust was then to be read as though the parenthetical clause with the blank unfilled was eliminated. Webster's New International Dictionary defines "'Parenthesis' as a word, phrase or sentence by way of comment or explanation inserted in or attached to a sentence which would be grammatically complete without it. It is usually marked off with curved lines, commas or dashes."

[2-4] It is undisputed that appellant examined the record of the deed of trust and noted particularly the provisions as to security for further advances and after so doing elected not to ask respondents whether or not they had made any further advances. Under the circumstances the deed of trust was security prior to the lien of the materialman for materials furnished after the advances had been made. We quote the following from 17 California Jurisprudence, page 897, section 183: "In California, the courts have enunciated what, it has been said, may with propriety be denominated as the 'California rule,' which, although opposed elsewhere by authority of respectability, is also sustained by strong reason and eminent authority. The rule is that the lien of a mortgage does not operate to secure optional advances made under the mortgage after the mortgagee has acquired actual notice of an encumbrance subsequent in point of time to his mortgage, so as to defeat or impair the rights of the subsequent encumbrancer. This rule is likewise applicable to trust deeds. To the extent of advances made without actual notice, the mortgage has priority over all liens subsequent to its execution. Recordation of the mortgage is notice to subsequent encumbrancers that it constitutes a lien to the sum therein named. If they desire so to do, they may ascertain the actual condition of the security and by notice to the holder of the prior mortgage prevent any additional encumbrance of the property for future advancements by giving notice of their liens, in which case they are entitled to have the senior mortgagee limited to the recovery of such advances as he has made under his mortgage prior to receipt of actual notice of the vesting of the junior liens, but if they do not give notice, their rights must be held subject to the mortgage to the full extent of advancements made. The rule does not apply where the provisions in the first mortgage makes it obligatory upon the mortgagee to make the advances, for it would be manifestly unsound to hold that actual notice of a subsequent mortgage would deprive the mortgagee of his lien for advances he is compelled to make."

[5, 6] In Frank H. Buck Company v. Buck, 162 Cal. 300, 303, 122 P. 466, 467, the mortgagor had executed a mortgage for a definite sum which contained a statement that the further purpose of the mortgage was to secure future advances as well as the original debt. The court said:

"* * * It was a mortgage creating a lien for future as well as past advances. The very section of the Code declares that a lien 'may be created by contract to take immediate effect as security for the performance of obligations not then in existence.' Civ.Code, § 2884. * * *

"Respondent contends that the mortgage is void in that it does not state the total amount of future advances for which it is to create a lien upon the mortgagor's property. * * * That there is a diversity of opinion upon the subject may be conceded; but the correct rule as declared by the American & English Encyclopedia of Law (vol. 20, p. 927), is: 'Whether the ultimate amount intended to be secured should be definitely stated on the face of the instrument is a question upon which there is considerable diversity of opinion; but the weight of authority sustains the principle that, in the absence of statutes providing otherwise, a definite statement of amount is unnecessary, and that all that can be required is that a mortgage designed to secure such future liabilities should describe the nature and amount of them with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry, *the jurisdictions holding that the maximum amount intended to be secured should be stated being in the minority.*'" (Italics added.)

The court then referred to Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 643, and approved the rule therein stated as follows: "If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be made need not be set out. It is sufficiently definite to put subsequent incumbrancers on inquiry, and they must ascertain the extent of the lien or suffer the consequences."

We hold that the judgment of the trial court was correct and it is therefore affirmed.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 426

LORD v. HENDERSON et al. (two cases).

DIAL et al. v. HENDERSON et al.

UTILITY TRAILER SALES CO. et al. v. HENDERSON et al.

Civ. 17237–17240.

District Court of Appeal, Second District, Division 1, California.

July 16, 1951.

As Amended on Denial of Rehearing Aug. 15, 1951.

Hearing Denied Sept. 13, 1951.

Harry A. Lord, Roy Dial and others, and Utility Trailer Sales Company, a corporation, and others brought actions against A. H. Henderson, etc., and others, to have the 1937 Caravan Act imposing license fees of $15 on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, declared unconstitutional. The Superior Court of Los Angeles County, Harry R. Archbald, J., entered judgments adverse to the plaintiffs, and they appealed. The District Court of Appeal, Second Appellate District, Hanson, J., pro tem., held that the act was not unconstitutional.

Judgments reversed with instructions.

1. Automobiles 🔑24

In seeking to impose a tax on motor vehicles transported on highways of the state for gain, the legislature is possessed of the constitutional power to place all such vehicles in one class and to place all vehicles not operated for gain in another class and to impose a greater tax on the former than on the latter, even though there is no difference in the wear, tear, and upkeep of the highways, or in the hazards involved.

2. Automobiles 🔑24

If it appears to the legislature that transportation of motor vehicles on their own wheels creates large savings for the owners as compared with other modes of transportation, such as by rail, the saving may properly be considered in fixing the tax imposed on motor vehicles being transported on their own wheels.

3. Constitutional law 🔑47
Trial 🔑382

In the usual and ordinary case instituted by or against the state, its various departments or officers, it is the duty of the trial court in a non-jury case to weigh the testimony on the material issuable facts and make its findings thereon, but where question at issue is constitutionality of a statute, duty which devolves on trial court is vastly different, and in such case, province of court is not to weigh evidence before it, but to ascertain whether there are any facts in the record or outside of it, of which judicial notice can be taken to sustain the legislature in enacting the statute.

4. Commerce 🔑63

The Caravan Act of 1937 imposing license fees on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, does not violate the commerce clause of the federal Constitution.

Gen.Laws, Act 5136, § 1 et seq.; U.S.C.A. Const. art 1, § 8.

5. Constitutional law ⚷209

The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate, but merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. U.S.C.A.Const. Amend. 14.

6. Constitutional law ⚷211

Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Fourteenth Amendment to the Constitution of the United States. U.S. C.A.Const.Amend. 14.

7. Automobiles ⚷24

The state owns its highways and hence may impose reasonable fees for their use by motor vehicles moving interstate or intrastate.

8. Automobiles ⚷24

The state may class traffic of its motor vehicles on its highways according to the character of the traffic, or the purpose for which the highways are used, as for instance whether traffic be for private gain or not.

9. Automobiles ⚷24

The tax imposed by the state on the use of its highways by motor vehicles of one class need have no resemblance in character or amount to that tax imposed on motor vehicles of another class, so long as the imposition itself is reasonable with respect to the class.

10. Automobiles ⚷24

The state may condition the privilege of the use of its highways by motor vehicular traffic at a price that is not excessive or discriminatory to traffic of like character.

11. Automobiles ⚷28
Constitutional law ⚷230(1), 287

The Caravan Act of 1937 imposing license fees on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, does not infringe the due process or equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. Gen.Laws, Act 5136, § 1 et seq.; U.S.C.A.Const.Amend. 14.

12. Constitutional law ⚷48

The burden of showing that fee of $15 imposed by the Caravan Act of 1937 imposing license fees on vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, was excessive was on persons claiming the fee to be excessive and not on state officials to show that the fee was not excessive. Gen.Laws, Act 5136, § 1 et seq.

13. Evidence ⚷20(2)

The District Court of Appeal would take judicial notice of the fact that rail freight transportation charge for passenger motor vehicle from Detroit to Los Angeles is between $250 and $350, whereas if automobile is operated on its own wheels over the highways between Detroit and Los Angeles the cost of transportation is less than $100.

14. Automobiles ⚷28

The Caravan Act of 1937 imposing license fees of $15 on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, is not invalid on ground that the fee is excessive or discriminatory. Gen.Laws, Act 5136, § 1 et seq.

15. Statutes ⚷76(6), 95(1)

The Caravan Act of 1937 imposing license fees on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, does not violate the exception and classification clauses of the state Constitution. Gen.Laws, Act 5136, § 1 et seq.; Const. art. 4, § 25, subds. 20, 33; Vehicle Code, §§ 73.3, 205, 206, 207.

**16. Automobiles ⚿28
Constitutional law ⚿205(1)
Statutes ⚿74(1)**

The Caravan Act of 1937 imposing license fees on motor vehicles moved for purpose of sale into the state, or from one of two zones created within the state to the other zone, does not violate the uniformity and privileges and immunities clauses of the state Constitution. Gen. Laws, Act 5136, § 1 et seq.; Const. art. 1, §§ 11, 21.

◆

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., for appellants.

Warren E. Libby, Los Angeles, for respondents.

HANSON, Justice pro tem.

The primary question for decision, in all four of the above-entitled appeals which were consolidated for trial in the court below, is whether the Caravan Act of 1937, Gen.Laws, Act 5136, § 1 et seq., is constitutional under the state and federal constitutions. The constitutionality of the Act under the federal constitution has heretofore been challenged in the Supreme Court of the United States, but its constitutionality sustained in Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, in an opinion by Chief Jusice Stone, at that time Mr. Justice Stone. The endeavor here made to distinguish that decision which held that the Caravan Act did not violate the federal constitution is predicated upon the theory that it was based on certain facts which in the instant cases, it is alleged, were proved not to be true. It should perhaps be stated at this point that the earlier 1935 Caravan Act was held unconstitutional in Ingels v. Morf, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653, solely on the ground that a license fee of $15.00 per vehicle merely for administering the Caravan Act and policing caravan traffic was excessive and hence imposed an unconstitutional burden on interstate commerce.

The Caravan Act of 1937 which materially differs from the 1935 Act [shortly stated] imposes a flat tax of $15.00 ($7.50 for the privilege of using the public highways and $7.50 as a license fee for administration and policing the act—(a license good for a six-month period) on every motor vehicle (whether it has or has not been registered, if it be subject to registration in California) operated on its own wheels singly, in tow, or in a "caravan" or fleet, on the highway of this state, for the purpose of sale to, or purchase by, any person within or without the state, unless the operation is confined wholly within one of the two statutory zones of the state. Accordingly, any operation of the character and for the purpose mentioned, whether in a caravan or not, across a zone line within the state or the boundary line of the state makes the vehicle subject to the tax. The tax is imposed (1) for the privilege of using the highways of the state and (2) for administration and policing purposes. The funds derived from the tax are thus expressly allocated and restricted by statute.

The Act is assailed as being unconstitutional, or at least as being unconstitutional as applied to the individual respondents, on the ground (1) that it violates the commerce clause of the federal constitution, Article I, sec. 8; (2) that it infringes the due process and equal protection clauses of the Fourteenth Amendment; (3) that it violates (a) the uniformity and the privileges and immunities clauses, Art. I, secs. 11 and 21, and (b) the exemption and classification clauses of the state constitution, Art. IV, sec. 25, subds. 20 and 33.

Plaintiff Lord, as indicated by the above captions, instituted two actions, one in 1937 and another in 1943. Both actions challenged the validity of the Caravan Act of 1937. Lord caravans passenger motor vehicles, generally in pairs, i. e., a lead car and a car in tow—tandem style. The tandem is propelled by the lead car in which the driver sits. Usually the caravan or fleet of these tandem-hookups aggregates ten or so tandems (20 cars) plus a single pilot car for the manager of the fleet and a single follow-up car driven by a mechanic. The cars for the most part are gathered at Detroit, Chicago, and Kansas City and are then driven overland to the principal coast cities of California. The drivers are recruited through want ads in newspapers at the point from which the trek originates. These want ads offer free motor transportation to California with meals and lodging en route together with $25.00 to $50.00 to the drivers for the services rendered.

The plaintiff Dial is a used car dealer with his principal place of business at Long Beach. As a part of his business operations he buys passenger-type automobiles in Chicago and causes them to be driven on their own wheels, with their foreign license plates, to Long Beach by drivers who are procured through ads in Chicago newspapers. Except in rare instances the automobiles are not driven in caravans or convoys. The drivers receive no pay and, what is more, are required to pay for their own lodging and meals together with the gasoline and oil used by the particular vehicles driven by them. There was evidence that such drivers took the minimum time for sleep en route.

The three plaintiff corporations Utility Trailer Sales Company (of Los Angeles), the Utility Trailer Sales Company of San Francisco, and the Utility Trailer Sales Company of Fresno are all engaged in selling the products of a manufacturer of commercial truck trailers and vans known as Utility Trailer Manufacturing Company. The sales companies all take delivery of the truck-trailers or vans at Los Angeles and then transport them on their own wheels in tow of another vehicle to their respective warehouses or sales rooms. The trailers or vans are of various sizes weighing when empty between 4,000 and 18,000 pounds. As a rule, it is not practicable to transport these trailers or vans by railroad because of their size, the cost of transportation and lack of cranes to unload them and hence they must be driven to their destination on the highways. They are not driven in caravans, except in rare instances.

The earlier Caravan Act of 1935 was intended to apply primarily to motor vehicles driven in caravans *into* the state for sale or exchange, hence the name given to the statute. The Caravan Act of 1937 applies not only to such vehicles, but to vehicles driven *intrastate* as well, unless restricted to a single zone within the state, and regardless of whether the vehicle is or is not a part of a caravan. Accordingly, the title of the present act, i. e., "Caravan Act of 1937" is something of a misnomer.

The primary object of the 1935 Act was to tax interstate caravaning, as such, into the state of California; that is, motor vehicles driven on our highways as a part of a caravan or fleet where the objective of the owner was a sale or exchange in this state of a vehicle unregistered in California, on the theory that such a commercial use of the highways discriminated against the owners of California registered vehicles and created an undue and unnecessary congestion and hazard to traffic on the highways, and particularly to drivers of California tax registered vehicles.

[1, 2] In seeking to impose a tax upon motor vehicles transported upon our highways *for gain* the legislature is possessed of the constitutional power to place all such vehicles in one class and to place all vehicles not operated for gain in another class and to impose a greater tax upon the former than the latter, Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495; Clark v. Poor, 274 U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199; Morf v. Bingaman, 298 U.S. 407, 56 S.Ct. 756, 80 L.Ed. 1245. It is not necessary for the legislature, to achieve such a classification, to find that there is a difference in the wear, tear and upkeep of the highways or in the hazards involved. These are proper but not requisite factors for the legislature to take into consideration and to appraise, if it sees fit to subdivide the class or create proper exceptions to it. Moreover, if it appears to the legislature that transporting motor vehicles on their own wheels creates large savings for the owners as compared with other modes of transportation, such as by rail, the saving may properly be considered in fixing the tax. Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495; Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm., 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439;

Capitol Greyhound Lines v. Brice, 339 U. S. 542, 70 S.Ct. 806, 94 L.Ed. 1053.

The initial question which we are called upon to determine, in the individual cases before us, is whether any one of them is distinguishable from the holding in Clark v. Paul Gray, Inc., by reason of the findings of the trial judge below. For reasons presently to be stated, we think that upon the material and essential facts none of the cases can be distinguished from the Clark case and consequently each is controlled by it, so far as the attack against the Caravan Act of 1937 is rested on federal constitutional grounds.

In the Clark case [306 U.S. 583, 59 S.Ct. 750], the court said: "It is true that the district court found that the practice of caravaning creates no additional traffic hazard, nor any undue wear and tear on the highways. But in this we think that its determination was not only contrary to the evidence, *but went beyond the judicial province.*" (Italics supplied.) Likewise, it is true in the cases before us that the trial court found, as did the trial court in the Clark case that caravaning created no additional traffic hazard, nor any undue wear and tear on the highways. Indeed, in the instant cases the trial court went much further in its finding of facts which, in many instances, we regard as being contrary either to the evidence or to the physical facts, and, in every instance, beyond the judicial province. The facts as found by the trial court, as stated in its "Memo of Decision," reads as follows:

"I do not find anything in the evidence taken here to support the conclusion of the trial court, as related on page 411 of the opinion in the case of Morf v. Bingaman, 298 U.S. 407 [56 S.Ct. 756, 80 L.Ed. 1245], and reiterated in the case of Clark v. Paul Gray, Inc., 306 U.S. 583 [59 S.Ct. 744, 83 L.Ed. 1001] * * *, with all due respect to the justices of that court.

"I cannot find from the evidence here that the drivers of caravan cars had little interest in the vehicles they drive, nor any less regard than those of state licensed cars for the safety and convenience of others using the highway. They were certainly interested in protecting themselves from injury. Nor can I find that cars thus coupled and controlled frequently or otherwise, skid, either on curves or elsewhere, or that they cause any more wear and tear on the roads than any other single car, and no more when they are driven in doubles; nor that there were any increased difficulties in the operation of the coupled cars; nor that the length of the caravans to any appreciable degree increased the hazard and inconvenience to passing traffic; nor can I find from the evidence here that such traffic involved a special type of use of the highways which enhanced the wear and tear on the roads, nor that it augmented the hazards to other traffic; nor that they imposed on the state a heavier financial burden for highway maintenance and policing than do other types of motor traffic. There is no evidence of this at all in my opinion."

[3] In the usual and ordinary case instituted by or against the State, its various departments or officers, it is the duty of the trial court in non-jury cases, such as these cases are, to weigh the testimony upon the material issuable facts and make its findings thereon. But when the question at issue is that of the constitutionality of a statute, the duty which devolves upon the trial court is vastly different. In the latter case, the province of the court is not to weigh the evidence before it, but to ascertain whether there are any facts in the record *or outside of it,* of which it may take judicial notice, which would sustain the legislature in enacting the statute. Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001. In the instant cases there was an abundance of testimony, which the trial court was not privileged to disbelieve, which would have warranted the legislature in finding the facts directly contrary to the facts as found by the court. The fact that the trial court found that plaintiff Lord did approximately 10 to 20 per cent of the business of caravaning in this state; that he exercised considerable care in selecting the drivers who responded to ads he placed in midwest papers where the caravaning originated; that his drivers,

with one exception, had never been involved in an accident; that the tow-bar he used in case of "hookups" was the safest known; that he instructed his drivers to exercise the greatest of care, are all factors to the credit of Mr. Lord, but they are of no materiality in the solution of the questions before us. The legislature was not concerned with individual situations such as that of plaintiff Lord, but with an over-all condition, which reflected that caravaning was a dangerous or hazardous practice; that it should be taxed to meet not only the cost of policing the traffic, but to yield the state a proper *quid pro quo* for the privilege of using its highways. Cf. Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495; Aero Mayflower Co. v. Georgia Pub. Serv. Comm., 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439; Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053.

Most of the drivers engaged by many caravan operators to caravan vehicles have never been in California and are wholly unfamiliar with mountain driving encountered on their route in this state. In many instances they are under age and often below the age required for an operator's license in California. The drivers generally do not have California operator's licenses and quite often no licenses from any other state. By proceeding in a caravan or as a fleet, the manager and mechanic can keep a check that would not otherwise be possible. If one car becomes disabled the whole fleet stops on or alongside the road so that the mechanic can repair the car or attach it to some other car in the fleet. The necessity of driving the cars in a fleet tends to keep one tandem after another rather closely together. On a two-lane highway, and there are several at the boundaries of the state, cars behind the fleet necessarily encounter difficulty in getting ahead of the fleet as a whole or in between the various tandems. It seems quite probable that the recruit drivers of the tandems oftentimes are not inclined to be very courteous to other cars on the highway, as for instance to aid them in passing or enable them to get into the line when necessary to avoid oncoming cars. When the tandem cars are compelled to stop suddenly, there is often a tendency to skid, to sway out of line or to "jack-knife," because the brakes on the forward car must alone serve for both cars. The front part of the towed car, including the windshield, is usually covered up so as to avoid mud and rains thrown back and upon it by the lead-car. This procedure naturally obscures the vision of a driver behind such a tandem as he can only see cars ahead of the tandem by looking out of his own left window.

In the individual case of Lord the facts just recited must be modified by saying that Lord's caravans do not take any mountain routes in California; that his drivers are over the age of 21 and have chauffeur licenses issued by some state, but not necessarily California, that the drivers of his caravans have instructions from him to continue on and not stop if a car becomes disabled. But these differences in fact do not distinguish Lord's case from the Clark v. Paul Gray case. The latter case, however, involved only the operation of motor vehicles in a single caravan, convoy or fleet of vehicles and not that of a vehicle operated as a tandem or driven singly on its own power. As plaintiff Dial drives his cars singly and not as a part of a caravan, convoy or fleet and, as the same is true, as to the plaintiff Sales companies, except that they drive their cars tandem, we turn to a discussion of these particular distinguishing features.

Unquestionably, the operation of a single passenger-type vehicle or of two such cars driven tandem is not as hazardous, as when driven as a part of a large caravan, fleet or convoy or as is the case of two large trucks or vans driven tandem. Nevertheless, the operation by Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan. However, Dial's drivers receive no pay whatever for their services nor do they receive lodging and food, and, what is more, must furnish such costs out of their own pockets, all of which is not true in the

the plaintiff sales companies, except that case of Lord. Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord, as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do.

[4] But quite apart from these differences of fact it is obvious that the State may impose the caravan tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper.

[5, 6] Respondent Dial contends that there is nothing to distinguish his operations from that of a person who drives a passenger motor vehicle on a highway not for gain, or of a "dealer" or "transporter" who is permitted to drive such a vehicle for gain within a single zone, using dealers' or transporters' license plates which cost at most five dollars a set. We think the contention overlooks fundamental distinctions. Cf. Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495; Matter of Application of Schuler, 167 Cal. 282, 139 P. 685. As was said in Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 352, 30 L.Ed. 578: "The fourteenth amendment to *the constitution of the United States does not prohibit legislation which is limited either* in the objects to which it is directed, or by *the territory within which it is to operate.* It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly [113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923], speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, *if within the sphere of its operation* it affects alike all persons similarly situated, is not within the amendment.'" (Italics supplied.) The cognate provisions of our state constitution do not differ in substance but only in terminology with those of the federal constitution.

[7–9] First, and foremost in considering the cases before us, it needs to be recalled that the State owns its highways and consequently may impose reasonable fees for their use by vehicles moving interstate or intrastate. It may classify the traffic, among other things, according to the character of the traffic, or the purpose for which the highways are used, as for instance whether it be for private gain or not. Dixie Ohio Express Co. v. State Revenue Comm., 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495; Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm., 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439. The tax imposed as to vehicles in one class need have no resemblance in character or amount with that of vehicles in another class, so long as the imposition itself is reasonable with respect to the class. Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053.

[10] Consequently to point out, as respondents do, that motor vehicles driven by the general public, not for gain, pay only a license fee of $6.00 a year as against a fee of $15.00 for six months by respondents who operate their vehicles for gain, makes use of an entirely false analogy. Likewise, to point out that the average cost of administering and policing such general public traffic involves only a cost of $2.90 per vehicle is equally beside the point. If the State instead of requiring the payment of a license fee of $6.00 by the general public for policing and administrative purposes required no fee at all the respondents would have no standing under constitutional law—state or federal—to complain. As the State may prohibit all traffic for gain on its highways—intrastate or interstate—so it may condition the privilege of the use of its highways by such traffic at a price that is not excessive or discriminatory to traffic of like character. Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S.Ct. 806; Packard v. Banton, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596.

In Packard v. Banton, 264 U.S. 140, 44 S.Ct. 257, 259, the court said: "The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and, generally at least, may be prohibited or conditioned as the Legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them is that they are regulated by the Public Service Commission Laws, and this circumstance, if there were nothing more, would preclude us from saying that their noninclusion renders the classification so arbitrary as to cause it to be obnoxious to the equal protection clause."

We pass then to consider whether the tax levied against the class falling within the Caravan Act is excessive or discriminatory with respect to the levy made to "dealers" or "transporters" for caravaning within a single zone. We start with the observation that the State is under no obligation to provide license plates to either "dealers" or "transporters" to enable them to use its highways for private gain. If it chooses to grant the privilege to operate wholly within a single limited zone and extends that privilege equally to all who are engaged in caravaning therein there is no discrimination, as between zones, or states, or as to persons so engaged. To be sure there is a discrimination, of a sort, as between persons in one zone or state who wish to transport vehicles to another zone or state—and particularly where they are at or near a boundary line and do a large part of their business in another zone or state, but this is not a type of discrimination recognized as an illegal discrimination under the constitution—state or federal. Local "dealers" or "transporters" with their places of business in one zone and possessed of "dealers" or "transporters" license plates are accorded no greater rights or privileges than those who are not in their category, as the latter have the same rights and privileges if their operations likewise are wholly within a single zone.

The mere fact, if it be a fact, that zoning the state into two zones, may seemingly have been somewhat arbitrary and unnecessary, as respondents contend, is of no moment, so long as operators in each zone are accorded the same privileges and where, as here, it cannot be said that the legislative determination was without any substantial basis. Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001. The notion that a person engaged in caravaning within the borders of a state must be permitted to operate in all zones within a state without the payment of a tax is a fallacy long since exploded. Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578; Packard v. Banton, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596.

[11] Accordingly, as neither "dealers" nor "transporters" located or operating within a single zone can transport their vehicles for the purpose of selling, buying or exchanging them beyond the limits of their own zone without paying the caravan tax, even though they are possessed of dealers or transporters' license plates, it follows they have privileges equal only to those who are not so situated, including interstate transporters without such license plates. That being true it follows that there is no inequality as to them in the "protection of the law" or any discrimination as between them. The difficulty with the position taken by respondents is their assumption, that just because the law at one time accorded to "dealers" and "transporters" possessing special plates the right to transport their cars anywhere in the state, the right could not be cut down by subsequent legislation. Naturally there is no merit in the contention.

The reason for exempting dealers or transporters from the operation of the caravan tax so long as they restrict their operations within a single zone is obvious. Matter of Application of Schuler, 167 Cal. 282, 139 P. 685. Dealers, as is well known, tend to confine their activities, of selling and demonstrating their vehicles to very limited areas, because of competitive and other conditions. In the case of heavier equipment such as large trucks, vans, and the like, an even lesser use is made of the highways due to the fact that buyers of such equipment generally do not require demonstrations of the equipment on the highways before making a purchase. However, such purchasers often come from a distance or require delivery of the equipment to distant points within the state. But again the use of the highways of the state is quite negligible. Moreover, sales by such dealers lead to prompt registration of the vehicles and the payment of registration fees and quite substantial property taxes. In the case of metropolitan dealers the areas generally coincide with that area; in the less populous areas the area is generally limited to a county or two. Accordingly, the use of the highways in either case is slight and not at all commensurate with the area in which their dealers plates permit them to operate. In the case of transporters the same is generally, but not always, true. However, as neither transporters nor dealers operating within a single zone or beyond are accorded privileges that are not accorded to others who have neither dealers nor transporters plates there is no legal discrimination as between any of these various groups. Companies, such as railroads or so-called automobile truckaway concerns, who own their own equipment upon which they transport motor vehicles are in a distinct class and so are not to be compared with the respondents. We see no need of elaborating upon the point or of setting forth the differences existing between the two groups. Cf. Aero Mayflower T. Co. v. Georgia Pub. Serv. Comm., 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439; Packard v. Banton, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596.

The respondents next contend that the license fee of $7.50 levied for the purpose of reimbursing the State for expenses incurred in the collection of such fees and in the administration and enforcement of the act and the expense of policing the highways with respect to caravaning is excessive.

[12] The burden of showing the fee is excessive is upon respondents and not on appellants as respondents contend. Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001. The cases cited by respondents such as D. E. Foote & Co. v. Stanley, 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698, Great Northern R. Co. v. Washington, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573, Brimmer v. Rebman, 138 U.S. 78, 11 S.Ct. 213, 34 L.Ed. 862, involved in whole or in part "inspection fees" where the rule as to the burden of proof is otherwise. This is due to the fact that Article I, sec. 10, of the federal constitution expressly provides that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws." No "Imposts or Duties on Imports or Exports" are here involved as was the situation in the cases mentioned. We think the respondents here failed to meet the burden. To be sure the trial court found, upon insufficient evidence and a misconception of law, that the license fees were excessive in that the cost was much less than $5.00.

[13] The court seems to have arrived at this figure in large part, if not wholly, by using as a yardstick the average cost of policing *all* registered motor vehicles operated within the state and the cost of administering the Motor Vehicle Act and the Caravan Act which the court found amounted to $2.90 per vehicle. Not only was this not a proper criterion, but it ignored various highly important factors. For instance, the cost of ferreting out those who sought to evade the caravan tax—who driving on the highway could not be distinguished from the general motoring public; the saving involved in having a single well-established over-all police force and administrative unit, instead of a separate one set up to police or administer the Caravan Act; and, other factors which need not here be detailed. It is enough to say, as the Supreme Court of the United States has said, that "the States are not hobbled in exercis-

ing rough judgment in devising tax formulas, giving to [the] relevant factors such respect as is fairly within the restraints of decency." Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S.Ct. 806, 812, 94 L.Ed. 1053—the language is of the dissent, but not contrary to language of the majority. In the cases before us we take judicial notice of the fact that the rail freight transportation charge of a single passenger motor vehicle from Detroit to Los Angeles costs between $250.00 and $350.00, whereas operated on its own wheels over the highways between Detroit and Los Angeles it is much less than $100.00. Accordingly, a charge of $15.00 per vehicle (1) *for policing and administration of the Act* and (2) for the privilege of using the highways of this State for a period of six months is not economic discrimination, much less illegal discrimination and in no event excessive. In that connection it needs to be observed that the Caravan Act tax is in lieu of all other taxes policing or otherwise so long as the vehicle taxed is not sold or exchanged during the six-month period and entirely regardless of the mileage covered by the vehicle over the state highways or any other factor. To illustrate how this can redound in favor of a caravan taxpayer as against a registered car owner, let us review the status of each at the end of five months. If a passenger vehicle is purchased for $3,000.00 in the Middle West and brought into the state and registered in January the registered owner must pay a license tax of $6.00, Vehicle Code, sec. 370, and an additional property tax of about $60.00, Rev. & Tax. Code, sec. 10752. If he brings the car into the state and has it registered in June he pays only 7/12 of these amounts or a total of $38.50. In the case of a caravan owner he pays a caravan tax of only $15.00 if the vehicle is brought into the state in January and if it is sold and registered in June the purchaser pays only a tax of 7/12 of $66.00 or $38.50. Hence the charge against the car in the latter case for the caravan and registration fee is only $53.50 for the entire year as against a charge of $66.00 against the registered owner for the same length of time. This most certainly is not discrimination against caravaned vehicles. The fact that the caravaned vehicle may be sold by its owner within a month of its arrival in the state *in January* and as a consequence the tax totals $81.00 as against a registered owner whose tax under like circumstances is $66.00 is immaterial. This for the reason, as the Supreme Court of the United States states: "The fee is for the privilege for a use as extensive as the carrier [here the caravan owner] wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. * * * One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm., 295 U.S. 285, 55 S.Ct. 709, 711, 79 L.Ed. 1439. So, likewise, it may be said that the owner of a caravaned car who fails to make full use of the highways of the state for a period of six months, as he is permitted by the law to do, cannot complain, that others, such as drivers for pleasure, drive several thousand miles in the same period. In short, there is in neither case any restriction on mileage.

[14] The record before us does not disclose the initial cost expended by the State for the highways used by the respondents or the maintenance thereof, nor the separate cost of policing the caravaning thereon or of administering the Caravan Act, with respect to these highways separate and apart from the Motor Vehicle Act. What is plainly shown is that the economic saving of the use of highways by the respondents over the use of other modes of transportation exceeds many times over the cost of either the policing license fee or the use of the highways. So viewed, we fail to see that either fee is excessive or discriminatory and we see no basis whatever for holding either to be unconstitutional upon any of the grounds assigned.

If we correctly understand the position of respondents, they contend that, quite apart from any question of the constitutionality of the Caravan Act of 1937 they never were and are not now under a duty to pay the tax levied by that Act upon their activities even if they fall within the scope of the Act. In support of this contention they argue that as they are either "dealers" or "transporters" they are exempt from the operation of the Act by virtue of the provisions of the earlier enacted secs. 205, 206 and 207 of the Vehicle Code as these sections so they contend, were not repealed by the Act which repealed the Caravan Act of 1935 nor are they repealed by the provisions of the Caravan Act of 1937. The sections of the Vehicle Code referred to permit a "dealer" (with an established place of business in California) or a "transporter" (as defined in Vehicle Code, sec. 73.3) to move upon the highways of this state motor vehicles of a character which must be registered in California, before such registration, provided such dealers or transporters have been granted "dealers' plates" and the same are displayed on the vehicle or without such plates where the movement is "from a vessel, railroad depot or warehouse over the highways to a warehouse or salesroom upon first having obtained a written permit authorizing such operation from the department."

[15, 16] We think it plain that the language of the later Caravan Act of 1937 which expressly refers to and includes dealers and transporters as being subject to the Act, of necessity, must be construed as modifying the provisions of secs. 205, 206 and 207. Respondents cite no authority holding to the contrary and in fact do not cite any authority in support of their argument. The net effect of the two Acts (the Vehicle Code and the Caravan Act) is to divide or classify the business of dealers and transporters into two categories, i. e., the sale or transportation or both of motor vehicles (1) wholly within a single zone and (2) from or to another zone or state. The basis for this classification rests on numerous and diverse factors which while somewhat narrow we regard as being adequately distinctive. If then the classification is proper and is not discriminatory as we have already stated it is not, the Act is constitutional.

As far back as 1914 the Supreme Court of this state in Matter of Application of Schuler, 167 Cal. 282, 139 P. 685, 691, held that the Motor Vehicle Act was not unconstitutional because it placed ordinary operators of motor vehicles in one class and dealers in another with a differential in fees favoring the dealers. The court said: "Nor is the act illegally discriminatory either because it applies to motor vehicles *and not to other kinds* or because it places dealers in a class by themselves and exacts from them a fee of $50 if they operate not more than five automobiles and $10 for every motor vehicle in excess of five so operated. To the first objection the answer is that, the power of the Legislature being plenary in the matter of imposing this privilege tax, it may designate any class properly subject to such exaction. For the same reason it may exempt any class. In re Wilmerding's Estate, 117 Cal. 287, 49 P. 181. No doubt the Legislature took into consideration the fact that motor cars in the possession of dealers are usually kept for sale and are not used in the ordinary way, but merely for purposes of 'demonstration' and exhibition to intending purchasers. Dealers are therefore placed in a class by themselves.

"Nor is the exemption of nonresidents from paying the tax for a period of three months an unlawful one. Similar exemptions have been sustained upon the principle that the nonresidents are presumed to have paid all necessary licenses in their respective places of abode, and that their use of the roads in the territory subject to the provision of the act is usually but temporary."

The case of Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000, upon which respondents so heavily rely is not in point. In that case a statute required common carriers by motor truck desiring to operate between fixed termini or over regular routes to obtain from the Railroad Commission, as a condition of operating, certificates of public convenience and necessity. However, the statute exempted common carriers engaged exclusively in hauling the products or implements of husbandry. It was held that there was no reasonable distinction or substantial difference justifying the inclusion of the one and the exclusion of the others. We have no such case here.

Before concluding our opinion we wish to interpolate, by stating that the briefs in this case, as in many other recent cases presented to us, fail to set forth a Summary of the Facts as required by Rule 13 of the Rules on Appeal. Instead, the opening brief presents a summary of the testimony of the various witnesses which covers 86 pages. Under a heading entitled Statement of Evidence consisting of 90 pages respondents likewise give us merely a narrative résumé of the testimony of the various witnesses. These summaries of evidence are not what is contemplated by the rule. As a consequence of the presentation here made we have been compelled to ferret out a statement or summary of the material facts which should have been given to us in the briefs. We give the warning now so that in future cases, counsel will not be taken by surprise if they find their briefs are stricken for failure to comply with the rules.

The judgments in each of the above-entitled cases along with the special order in cause No. 17237 are hereby reversed with instructions to the trial court to enter judgments for the defendants therein and to enter an order directing that the moneys (apparently in the sum of $86,177.50) now held in a special fund by the Department of Motor Vehicles be paid into the State Treasury.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

105 Cal.App.2d 847

NIBLACK v. ATCHISON, T. & S. F. RY. CO.

Civ. 18165.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1951.

Action by John Niblack, a minor, by his guardian ad litem, Eileen McHenry, against the Atchison, Topeka and Santa Fe Railway Company, a corporation, under the provisions of the Federal Employers' Liability Act for injuries sustained in the course of employment while loading ice into a refrigerator freight car. The Superior Court, Los Angeles County, Otto J. Emme, J., after a jury verdict for plaintiff, rendered judgment thereon, and the defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain the verdict.

Judgment affirmed.

1. Appeal and error 🔑930(1)

Reviewing tribunal must view evidence in light most favorable to prevailing party.

2. Appeal and error 🔑989, 996

Power of an appellate court begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict rendered by jury, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of jury.

3. Appeal and error 🔑996, 1002

In railroad employee's action against railroad under Federal Employers' Liability Act for injuries, jury's decision in adopting certain inferences from evidence and rejecting others, would be binding upon appellate court, case being in substance same as when jury decides upon weight of contradictory evidence. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and servant 🔑278(9)

In railroad employee's action against railroad under Federal Employers' Liability Act for injuries sustained when employee, engaged in icing refrigerator car, stepped back to hook into another piece of ice with bar and stepped onto icing board, slipped and fell, verdict of recovery for employee was supported by substantial evidence, especially in view of fact that danger was reasonably to be anticipated if icing board were not moved out of working area when not in use, and that coemployees had been instructed to remove board to safe place when it was not being used. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Appeal and error 🔑1039(13)

In railroad employee's action against railroad under Federal Employers' Liability Act for injuries sustained when employee, engaged in his employment of icing a refrigerator car, stepped back onto icing board, slipped and was injured, no substantial prejudice resulted to railroad by a claimed variance between allegation of plaintiff's complaint and proof, with reference to location of icing board at time of accident. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

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Robert W. Walker, J. B. Kramer, Los Angeles, for appellant.

Raoul D. Magana, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff, an employee of defendant railway company, was injured in the course of his employment while loading ice into a refrigerator freight car. In an action brought by him under the provisions of the Federal Employers' Liability Act, U.S.C.A. Title 45, § 51, judgment in his favor was entered upon the vedict of a jury, from which judgment the present appeal is prosecuted. Appellant railway company contends that a nonsuit should have been granted and that the evidence was insufficient to sustain the verdict, in that there was no showing of negligence on the part of the railway company or its employees proximately causing the injury.

From the evidence it appears that the operation of icing a refrigerator car at Needles, Arizona, where the accident occurred, is conducted from a platform slightly higher than the top of the car. Ice, in 300-pound blocks, is brought to the surface of the platform by means of a conveyor chain. Each block is chipped into four pieces by a worker and then slid or skidded into a hatch or opening on the top of the car. Each car has four hatches, a pair at each end of the car, the two at either end being located on opposite sides of the car The car is on a track parallel to the platform. For the purpose of conveying the ice to the hatches on the side of the car away from the platform, a device described as an "icing board" is used. This device consists of four steel pipes, five or six feet long, fastened parallel to each other about four inches apart. In practice, the icing board may or may not be used also in loading the nearby hatches, depending on the preference of the worker. In cutting and manipulating the ice from the platform to the hatch, the worker uses a pole tipped with two metal points, one in the shape of a hook, this instrument being known as a "pickeroo" or "Picaroo".[1]

In the icing operation, one man operates the "pickeroo" on the platform to slide the ice down the icing board to the hatch, while another man, standing on the car, tamps or packs the ice down into the bunker or compartment beneath the hatch opening. On the day of the accident, plaintiff testified, he was engaged in the latter operation on the far hatch, and the icing board was in use. His fellow employee, Taylor, was sliding the ice down toward him. Then, according to plaintiff, "we finished filling up this bunker and after he (Taylor) got enough ice in there why I was packing it down. So he took the board (the icing board) away and I closed down the hatch, If I remember right, and came up on to the dock." Plaintiff did not notice what Taylor did with the icing board, as plaintiff was occupied with closing the hatch. Plaintiff and Taylor then exchanged positions in loading the near hatch, plaintiff working on the platform and Taylor on the car. Then, plaintiff testified, "I stepped back to hook into another piece of ice with my bar that I had to shove it off in the hole and as I stepped back with my right leg I stepped onto this icing board and my foot slipped off of it some way, got twisted up and I fell down and twisted my leg, threw my knee out."

From the testimony it appears that the icing board had been placed near the edge of the platform and near the end of the car on which plaintiff and Taylor were working. Mr. Berkshire, the shift foreman, testified that he came along and helped the plaintiff shove ice from the dock to the hatch; that at the time of the accident the icing board was lying "opposite to the bunker" and between the witness and plaintiff; that plaintiff was facing toward the car and not toward the icing board. So far as any rule or custom was concerned, the witness testified that it was a "rule" that the man using the board would throw it down away from his work; that "we all have been instructed to work in a safe manner"; that the work is to be done as quickly as possible, and the board put away, but not "in a hazardous way"; that there "is no customary, set rule as to where to put it", but it is largely a matter of the opinion of the person who is using it. Further, from the testimony of this witness, it would appear that good practice required that the icing board be moved out of the working area and down in front of the next car to be loaded.

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[1] Pickaroon—A piked pole with a hook, used by lumbermen in river driving and by tracklayers in aligning railroad ties. Webster's New Int. Dict., 2nd ed., 1937.

Appellant urges that there is no evidence that any place other than that where the icing board was at the time of the accident would have been a safer or more desirable position; that the accident resulted from plaintiff's taking a backward step onto the board, and could have resulted had plaintiff stepped onto some other object, such as a piece of ice; that the negligence was that of the plaintiff in not looking where he was placing his foot when he stepped backward.

[1–3] Viewing the evidence, as we must, in the light most favorable to the prevailing party, we cannot hold that the verdict is unsupported by substantial evidence. The power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183. Assuming that opposing inferences might be drawn by reasonable minds from the evidence presented in the cause now before us, the jury having adopted the one and rejected the other, its decision is binding upon the appellate court, the case being in substance the same as where the jury decides upon the weight of contradictory evidence. Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, and cases cited.

[4, 5] Plaintiff's cause of action was based upon the negligence of an employee of defendant railway company in placing the icing board in a dangerous position. The testimony and the photographic exhibits, together, showing the place where the work was being done, the nature of the work, and the tools used in the work, support the view that danger was reasonably to be anticipated if the icing board were not carefully moved out of the working area when not in use. Moreover, there was testimony that the employees had been instructed to remove the board to a safe place when it was not being used. The work, by its nature and the place where it was to be performed, as well as because of the fact that the cars had to be loaded as rapidly as possible, was essentially hazardous and placed a premium upon safe footing. The argument that the accident could have happened had plaintiff stepped backward onto some other object used in the work cannot prevail against the fact, as impliedly found by the jury, that he slipped upon an object which in the exercise of ordinary care should have been placed safely out of the working area. It can reasonably be said that it was as much negligence to leave the icing board where it was as it would have been to leave one of the pikes or poles used in the work lying on the dock, to be stumbled over by a worker intent upon his job of getting the ice into the cars as rapidly as possible.

The claimed variance between the allegations of plaintiff's complaint and the proof with reference to the location of the icing board at the time of the accident was not urged in the trial court; but a consideration of the claim, asserted for the first time on appeal, convinces us that no substantial prejudice resulted to defendant; and therefore such variance affords no ground for reversal.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

In re SCHLYEN'S ESTATE.

SCHLYEN et al. v. SCHLYEN.

Civ. 17897.

District Court of Appeal, Second District, Division 3, California.

July 26, 1951.

Rehearing Denied Aug. 14, 1951.

Hearing Denied Sept. 20, 1951.

Proceeding in the matter of the estate of David Schlyen, deceased, wherein Alice Harriet Schlyen, proponent, sought to have a will of the deceased probated, and the probate was opposed by Shirley D. Schlyen and Leo S. Schlyen, minors, by Fannie Carelli, guardian ad litem, contestants. Shirley D. Schlyen and Leo S. Schlyen, minors, by Fannie Carelli, guardian ad litem, brought an action against Alice Harriet Schlyen to have certain deeds executed by the deceased cancelled. The will contest and the action were consolidated for trial. The Superior Court of Los Angeles County, Charles B. MacCoy, J., entered a judgment denying probate of the will, and from that judgment and from verdict, special verdict, and order denying motion for judgment notwithstanding the verdict, the proponent appealed. The District Court of Appeal, Wood, J., held that evidence was sufficient to support finding that will was procured by undue influence on part of proponent, so as to justify denial of petition for probate of will.

Judgment affirmed, and appeals from verdict, special verdict, and order denying motion for judgment notwithstanding verdict dismissed.

See also, 228 P.2d 55.

1. Wills ⚷386

In reviewing the question as to the sufficiency of the evidence in a will contest, province of reviewing court is the same as it is in any civil case involving sufficiency of the evidence.

2. Wills ⚷384

On appeal from judgment denying probate of will, evidence must be viewed in light most favorable to the contestant, and all conflicts must be resolved in favor of the contestant.

3. Wills ⚷386

On appeal from judgment denying probate of will, power of reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

4. Wills ⚷163(2)

Where one who sustains a confidential relationship to the testator actively participates in procuring execution of will and unduly profits by will, burden is on him to show that will was not induced by his undue influence.

5. Wills ⚷163(2)

A confidential relationship exists between a husband and wife who are living together, within meaning of rule that where one who sustains a confidential relationship to testator actively participates in procuring execution of will and unduly profits by will, burden is on him to show that will was not induced by his undue influence.

6. Wills ⚷163(2)

Where testator executed a will giving to his wife, with whom he was living, all of his property except the sum of $2, which was given to testator's children by a prior marriage, and wife of testator was active in procuring execution of such will, there was a presumption of undue influence on part of testator's wife, and burden was on her to overcome such presumption on petition for probate of will.

7. Wills ⚷166(2)

Evidence was sufficient to sustain finding that will whereby testator gave all of his property to his wife except $2 which was given to children by a prior marriage was procured by undue influence on part of testator's wife, so as to justify denial of petition for probate of will.

8. Wills ⚷163(2)

Testator's widow who had burden of overcoming presumption that she exercised undue influence in procuring execution by testator of will giving her all of testator's property except $2 which was given to testator's children by a prior marriage was not required to produce a preponderance or greater weight of the evidence in rebutting such presumption.

9. Trial ⚷295(9)

On petition for probate of will, instruction that if jury found from evidence that testator's widow and testator were man and wife and that testator imposed great confidence in widow, and that she was active in procuring will whereby she unduly profited, and that there was a presumption that such undue influence was exercised by widow on testator in execution of will, and that unless such presumption was overcome by "convincing" evidence on part of widow then jury must find will was procured by undue influence of widow and was invalid, should not have used the word "convincing" but was not prejudicially erroneous when considered with other instructions.

10. Wills ⇨358

Verdict and special verdict on petition for probate of will were not appealable.

11. Wills ⇨358

Order denying motion for judgment notwithstanding verdict on petition for probate of will was not appealable.

Benjamin Elconin and Max Bergman, Los Angeles, for appellant.

Samuel W. Blum and M. Seaton Cohen, Los Angeles, for respondents.

WOOD, Justice.

Appeal from judgment denying petition for probate of will. David Schlyen died on October 5, 1948. On October 28, 1948, a petition for probate of his alleged will, dated April 20, 1945, was filed by Alice Harriet Schlyen, his surviving spouse. Under the terms of the alleged will[1] all of decedent's property, except $2, was given to Alice Harriet Schlyen. One dollar each was given to decedent's daughter and son by a former marriage. Appellant was named executrix therein to act without bond. The two children (who were then minors) by their mother as guardian ad litem, filed written "Opposition to Probate of and Contest to Will," in which they alleged in substance: (1) that said purported will was not properly executed; (2) that at the time said purported will was allegedly executed the decedent was of unsound mind; (3) that the execution of said purported will was procured by the undue influence of Alice Harriet Schlyen;

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[1] "LAST WILL AND TESTAMENT

"I, David Schlyen, of Los Angeles, California, being of sound and disposing mind and memory, and not acting under restraint or influence, do make and declare this my Last Will and Testament, as follows:

"First: I hereby revoke all former Wills made by me.

"Second: I direct that all my just debts and funeral expenses and expenses of my last illness be paid.

"Third: I hereby give, devise and bequeath to my wife, Alice Harriet Schlyen, all of my property, both real and personal, of any nature and description whatsoever, and wheresoever situated.

"Fourth: To each of my children, Shirley D. Schlyen and Leon S. Schlyen, I bequeath the sum of One and no/100 ($1.00) Dollars.

"Fifth: Should any person contest this Will, or claim any portion of my estate, then, in that event, they shall receive not more than the sum of One and no/100 ($1.00) Dollars, which sum I bequeath to them.

"Last: I hereby nominate and appoint my wife, Alice Harriet Schlyen, the Executrix of this, my Last Will and Testament, to act without bond, and with full power to sell all real and personal property at public or private sale, with or without notice and without bond.

"In Witness Whereof, I have hereunto set my hand this 20th day of April, 1945.

"David Schlyen
"David Schlyen

"The foregoing Will, all on two (2) pages, was signed in our presence by David Schlyen, who declared it to be his Last Will and Testament,

—1—

and we subscribed the same as witnesses, at his request and in his presence, and in the presence of each other on this 20th day of April, 1945.

First Witness—
Name Henry H. Rothenberg
"Address 4324 Burns Ave.
"Hollywood 27, Cal.
"Second Witness—
Name Claire Rothenberg
"Address 4324 Burns Ave.
—2—"

and (4) that the execution of said purported will was procured by fraud exercised upon the decedent by Alice Harriet Schlyen.

The present proceeding (the will contest), by stipulation of the parties, was consolidated for trial with an action between the same parties, wherein the children sought to cancel two deeds, dated May 28, 1948, which purportedly conveyed certain real property to decedent and Alice Harriet Schlyen as joint tenants. The jury was instructed that the court found, as a matter of law, that the will was executed in proper form, in accordance with the laws of the State of California, and that the decedent had testamentary capacity at the time of the execution of the will. The jury was further instructed that the only issue to be decided by it "in connection with the Will," was to determine whether the testator, at the time said will was executed, was acting under "undue influence or fraud" on the part of Alice Harriet Schlyen. Special interrogatories, submitted to the jury in the will contest, were as follows: 1. Was the will dated April 20, 1945, executed by David Schlyen, procured by undue influence on the part of Alice Harriet Schlyen? 2. Was the will dated April 20, 1945, executed by David Schlyen, induced and procured by fraud on the part of Alice Harriet Schlyen? The answer of all members of the jury to each interrogatory was "Yes." Also, special interrogatories, as to whether the joint tenancy deeds were procured by undue influence and fraud, on the part of Alice Harriet Schlyen, were answered in the affirmative by the jury.

Alice Harriet Schlyen thereupon made a motion in each case for judgment notwithstanding the verdict, which motions were denied. Judgment in the present proceeding was entered in accordance with said answers of the jury and the petition for probate of the alleged will of decedent was denied. In the action to cancel the joint tenancy deeds, the trial judge adopted the said answers of the jury (which were advisory), and the judge found that the deeds were procured by undue influence and fraud on the part of Alice Harriet Schlyen; and that property purportedly conveyed by the deeds was the separate property of decedent. Judgment in that action was entered accordingly, and it was ordered therein that the two joint tenancy deeds be cancelled and an accounting of rents, issues and profits be made. Alice Harriet Schlyen thereafter made a motion for a new trial in each case, which motions were denied. She filed a notice of appeal from the judgment in each case. Respondents made a motion to dismiss the purported appeal from the judgment in the action to cancel the joint tenancy deeds, on the ground that the judgment was interlocutory and not final. The motion was granted. Cal.App., 228 P.2d 55. As above stated, the matter now before the court is the appeal by Alice Harriet Schlyen (proponent) from the judgment in the will contest denying probate of the alleged will.

Appellant contends that (1) the evidence is insufficient to sustain the "verdict of undue influence"; (2) there is no evidence to sustain the "verdict of fraud"; and (3) there were errors in the instructions to the jury.

[1-3] In reviewing the question as to the sufficiency of the evidence in a will contest, the province of the reviewing court is the same as it is in any civil case involving sufficiency of the evidence. Estate of Trefren, 86 Cal.App.2d 139, 141, 194 P.2d 574; Estate of Pohlmann, 89 Cal.App.2d 563, 567, 201 P.2d 446. The evidence must be viewed in the light most favorable to the respondent, and all conflicts must be resolved in favor of respondent. Estate of Pohlmann, supra, 89 Cal.App.2d 568, 201 P.2d 446. The power of the reviewing court "begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690. The evidence in the present case therefore is stated in the light most favorable to the respondents.

Decedent was 52 years of age at the time of his death. While he was in the army in World War I he sustained injuries for which he received temporary partial disability benefits in 1919 and 1920 from the Bureau of War Insurance (Veterans' Administration). In 1919 he completed a course in pharmacy. In 1927 decedent and Fannie Herman were married. Respondents herein are the children of that marriage. The respondent Shirley D. Schlyen was born in 1928 and the respondent Leo S. Schlyen was born in 1930. In 1934 Fannie obtained an interlocutory decree of divorce from decedent on the ground of habitual intemperance. During the marriage Fannie had purchased a drugstore, with money given to her by her mother, and she operated the store as her separate property. Prior to the time the divorce decree was made, they entered into a property settlement agreement which provided that Fannie should pay decedent the sum of $500; that the parties released each other from any further claims; and that Fannie should be solely responsible for the support and maintenance of the children. In consideration of the execution of that agreement, decedent "assigned" all of his property to Fannie, which property was encumbered and some of it was subject to foreclosure proceedings at that time. The total amount realized by Fannie from that property was $200. In the divorce action the custody of the children was awarded to Fannie. In 1935, ten days after the divorce decree became final, Fannie married John Carelli, and the respondents since that time have resided with their mother and stepfather. Between 1937 and 1939 decedent purchased a drugstore and two parcels of improved real property. In 1938 decedent filed an application for disability benefits, and he was given a physical examination by the Veterans' Administration. The diagnosis included findings of moderate neurasthenia and arteriosclerosis, and he was granted a 44 per cent partial disability rating. In 1940 decedent was given another physical examination by the Veterans' Administration. At that time he complained of nervousness and headaches. The diagnosis included findings of neurasthenia and hypertension; and the disability rating of 44 per cent was continued.

About 1940, decedent was convicted "on a narcotic charge," and he applied for probation. At his request and in his behalf, Mrs. Carelli went to the probation department. He was granted probation. Thereafter, in June, 1940, the decedent married Lillian Viner. Prior to the marriage decedent and Lillian entered into a prenuptial agreement in which it was recited that decedent was then the owner of two parcels of real property, which property had been purchased by decedent from his separate funds; that one of those parcels, which was on Olympic Boulevard, was "subject to a trust deed in the approximate balance of $7,000.00," and the other parcel, which was on Manchester Boulevard, was "subject to a trust deed in the approximate sum of $12,500.00." It was further recited therein that decedent desired to execute a will by the terms of which the said two parcels of real property would be devised to the respondents herein; and that said Lillian Viner thereby relinquished any right to that property. Approximately six months after the marriage Lillian obtained an annulment, by default, on the ground that at the time of the marriage decedent was physically incapable of entering into the marriage relationship, and that the incapacity was incurable.

About 1941 decedent became acquainted with Alice Marks, the appellant herein, in her father's jewelry store which was "three doors" from decedent's drugstore. Appellant was then assisting her father in conducting the business of the jewelry store, but she had previously been employed about 17 years as a medical stenographer. In January, 1943, decedent was given another physical examination by the Veterans' Administration. At this time he stated that he felt nervous, had to take sedatives in order to sleep, and tired easily. The Rating Board of the Veterans' Administration reported an improvement in his "service-connected neurasthenia," but continued the 44 per cent disability. On March 18, 1943, decedent and his brother, Joseph Lyon (formerly Joseph Schlyen), entered into a written agreement which recited that decedent desired to take a vacation "for his health's sake," and that he appointed his brother "as manager in full charge" of the drugstore for one year. On September 3, 1943, the decedent and appellant were married, and they moved to the apartment which was occupied by appellant's parents. At the time of the marriage appellant had about $1,650 cash and approximately $350 in war bonds. Decedent at that time owned the drugstore and the two parcels of encumbered real property hereinbefore referred to. At the time of the marriage Carl Peterson, who was in the business of managing real property, was acting as manager of the said two parcels of real property. He collected the rents and obtained new tenants when vacancies occurred. Each month decedent went to Peterson's office for "a check," and after decedent and appellant were married the appellant went to the office with decedent "most of the time." About January, 1944, decedent went to Peterson's office and made a will, and Mr. and Mrs. Peterson were the subscribing witnesses thereto. In that will decedent gave his separate property to respondents. Peterson testified that the appellant was present, that decedent dictated the will to her, that she "typed" the will on Peterson's typewriter, and they were both very cheerful. He testified further that appellant was "very meek and docile" until April, 1944, when she told Peterson that the property was not paying enough rent and she could get more rent for it; she repeated said statement in May; after June, 1944, Peterson did not represent the decedent, and the property was managed by another agent.

Decedent's relationship with the respondents from the time of his divorce from their mother to the time of making the will in 1944 remained friendly. He went to see them frequently. He occasionally took them to places of amusement, gave them money and brought them gifts. In 1942 he gave each of them his photograph. He carried pictures of them in his wallet. The respondents had telephone conversations with decedent, and sent birthday and Father's Day cards to him.

In the spring of 1944, Mrs. Carelli told decedent that they did not have "anything in writing about the children" and she asked him if he could get appellant to enter into an agreement like the prenuptial agreement he had made with Lillian Viner. In December, 1944, Mrs. Carelli wrote a letter to decedent in which she stated that decedent had said on various occasions that he was "making provision" for the children but that he had refused to discuss the matter with Mr. Frankel (her attorney). She stated further therein that Shirley was "almost ready for college, and Sonny [Leo] ready for senior high school," and it was impossible for her to bear the expense of their education alone, and she felt that he should pay $60 a month toward the education and support of each child. In February, 1945, there was a meeting in Mr. Frankel's office, which was attended by Mr. and Mrs. Carelli, appellant, decedent and Mr. Frankel, at which there was a discussion concerning the support of respondents, and decedent stated that Mrs. Carelli knew that certain property was "going to the children, and that should be enough for now." Mr. and Mrs. Carelli testified that appellant then took a written instrument from her handbag and said, "We have made out a will," and she handed the instrument to Mrs. Carelli who read it; that Mr. Frankel then read the instrument and stated that it was a fine will "if it will stay that way," and appellant replied, "You will have to take our word" that it will stay that way. Mr. Frankel testified at the trial herein that all he remembered was the purpose and the result of the meeting; that he tried to get decedent to support the respondents and was unsuccessful, but that he did not recall being shown a will. About two months after that meeting decedent was served with an order to show cause (re support of the children) in a proceeding filed by Mrs. Carelli. Hearings were had in the superior court on April 17 and 18, 1945, and decedent was ordered to pay $100 a month for the support of respondents. Thereafter, appellant told Mrs. Lyon, in the presence of decedent, that she (appellant) thought Mrs. Carelli had "a lot of nerve making Dave support the children."

After decedent had been served with the order to show cause, and prior to the hearing thereon, appellant "suggested" to him the name of an attorney, Leo Goodman, by whom appellant had been employed approximately one week about 15 years previously. Also, after said order was served on decedent, he and appellant for the first time "had a discussion about making a will." Appellant, in a telephone conversation with Mr. Goodman, made an appointment for decedent and her to go to Mr. Goodman's office. On the date designated, about April 9, 1945, decedent and appellant went to Mr. Goodman's office. Appellant introduced decedent to Mr. Goodman and remained in the office with them. During the meeting the order to show cause and the matter of a will were discussed. Decedent showed Mr. Goodman a will which Mr. Goodman read. Mr. Goodman dictated a "disinheritance clause" to appellant, and she wrote the dictation in shorthand. Then she and decedent returned to their home. Mr. Goodman did not charge them a fee but performed said service "as a favor." On cross-examination Mr. Goodman testified that prior to the trial herein he had told counsel for respondents that it was his best recollection that he had dictated the "disinheritance" clause, at the request of appellant, during a telephone conversation with her; that he later discussed the case with appellant and with her counsel, and in thinking it over he came to the conclusion from his own recollection that the facts were different from those which he had related to respondents' counsel; that prior to the trial he informed respondents' counsel that he (the witness) was wrong and he had not dictated the disinheritance clause over the telephone. A few days after the meeting in Mr. Goodman's office, appellant typed the purported will (which is involved herein) in her home and made a carbon copy of it. Appellant testified that she was the sole beneficiary under the 1944 will; that she typed the 1945 will (involved herein) according to instructions given to her by Mr. Goodman—by copying all the 1944 will, and then adding thereto the matter dictated to her by Mr. Goodman; that said dictated matter consisted of the fourth clause (the bequest of the sum of $1 to each of the respondents) and, she believed, the fifth clause (the bequest of no more than the sum of $1 to any person who should contest the will). The day after appellant typed the will she called Mr. Goodman on the telephone and read the instrument to him and asked him "if he thought it was all right." On the evening of April 20, 1945, decedent executed the instrument at his residence, the apartment of appellant's parents. Present at said time were appellant, her parents, her sister and brother-in-law, and the subscribing witnesses Mr. and Mrs. Rothenberg who were friends of decedent and appellant. Prior to the execution of the instrument and before the subscribing witnesses arrived, decedent read the will to the family group. The witnesses arrived about 8 p. m., and the original instrument and the copy of said instrument were then signed. Decedent put the original instrument in his pocket and gave the executed copy of said instrument to his brother-in-law to put in the safe deposit box of the brother-in-law.

In February, 1947, decedent and appellant went to the office of a physician where decedent had a private consultation with the physician and was given a physical examination. At that time decedent complained principally of pain in the calves of his legs. His condition was diagnosed, as disclosed by the case record prepared by the physician, as thrombo-angiitis obliterans (Buerger's Disease). It was stated in said medical record that decedent had been a "continuous heavy drinker" from 1920 to 1944 but that he had not used alcohol since 1944. On August 11, 1947, decedent was given another physical examination by the Veterans' Administration. At that time decedent complained that he was very nervous and jittery, had cramps in his legs, could work about four hours a day, had headaches, did not sleep well, and had to take seconal capsules every night. His condition was diagnosed as neurasthenia, Buerger's Disease, and hypertension.

In 1947 the decedent employed architects who prepared plans for a new house for him and appellant. The construction of the house was begun about September, 1947, and it was completed in May, 1948. The house and lot cost $28,000 and the furnishings cost approximately $8,500. In January, 1948, decedent's brother became ill and was no longer able to work in the drugstore. The drugstore was open for business twelve hours a day, and from 1943 to 1948 the brother had been in charge of the store about eight hours a day and the decedent had been in charge of it about four hours a day. In February, 1948, decedent sold the drugstore.

About March, 1948, decedent was served with a second order to show cause, relative to an increase in the allowance for the support of the respondents, and a hearing was had on April 30, 1948. Decedent, represented by counsel, appeared and opposed an increase in the allowance for support of respondents. The hearing was also attended by appellant, the respondents and Mr. and Mrs. Carelli. This was the first time appellant had seen respondents, and Mrs. Carelli introduced them to her. Decedent and Mr. and Mrs. Carelli testified at the hearing. The court ordered decedent to pay $160 a month for the support of the respondents, and to pay all reasonable medical and dental bills of the respondents—the decedent, however, to be consulted before such bills were contracted.

About April, 1948, decedent deposited the sum of $10,000 in a checking account in appellant's name. On May 28, 1948, decedent executed two grant deeds by which he conveyed to himself and appellant as joint tenants four parcels of real property. Those deeds were recorded on June 8, 1948.

On May 3, 1948, Mrs. Carelli wrote a letter to decedent in which she enclosed a doctor's bill for $25 for medical treatment received by Shirley during the month of April, and she explained that continued treatment would be required. With the letter she sent a pamphlet "on Buerger's disease" and a photograph of each respondent. The package (which included the letter) was addressed to decedent, but appellant received it and opened it. She then told Sophie Lyon, decedent's sister-in-law, that she did not want decedent to see the photographs and she wanted to return them. She did not return them, however, after Mrs. Lyon advised her not to return them. During the first part of August, 1948, after the decedent had received a doctor's bill for $55 for medical treatment received by Shirley during July, appellant made a telephone call to the doctor's office and asked an employee in the doctor's office why the amount charged for the treatments was higher than it was the previous month; she (appellant) stated that the physician was a fine doctor but "they had not" selected him as Shirley's doctor, and she did not think they should pay more than they had paid before. The employee with whom appellant had that conversation testified that thereafter appellant called several times, and about August 18, 1948, appellant called and stated she did not feel they should pay more than $25. On August 20, 1948, decedent wrote a letter to the physician in which he stated that he was enclosing a check for $55 for the treatments received by Shirley during July, but that in the future he would be responsible for the payment of only $25 a month unless otherwise authorized by him. He mailed a copy of that letter to Mrs. Carelli, and on the bottom of said copy he wrote a letter to Mrs. Carelli, stating that respondents were receiving $180 a year from the Veterans' Administration and that he was "making the suggestion" that Mrs. Carelli "make the additional payments for Shirley" out of that amount. He stated further that he could "discontinue these payments [from the Veterans' Administration], by submitting a certified copy of the court order."

On August 21, 1948, Mrs. Carelli wrote a letter to decedent in reply to said letter. Among other things, she stated therein that the court order "does not permit you to set the amount of the bills you will pay or limit the doctor *to* his charges"; that "we raised these children for eleven years, when you contributed nothing," and she then listed specific illnesses suffered by the children which had caused "heavy expense and extreme worry" and "you never once inquired if we could afford the treatments, or even as to the progress of the children"; that if he (decedent) thought he could manage any better than she did, she would be "agreeable to letting you take the children and pay their bills"—that he had a beautiful home "and a fine wife in whose care I would not be afraid to leave" them; that, referring to the veterans' payments, the investigator had never asked her if the children were being supported by decedent; that decedent, as he had always done, would do as he chose in the matter; that decedent had tried to stop the payments before, "even going so far as to deny the paternity of the children to the veterans' investigator"; that decedent's income was "well over $2500 per month," but she was sure if his income were ten times that amount he would still plead poverty; that she was trying to avoid trouble and unnecessary attorney's fees or she would not even bother to answer him. She stated further therein that he had never done anything for the children that he was not forced by law to do; that he had made promise after promise to make a reasonable provision in his will for the children out of his estate; that when she asked him to make an irrevocable trust "guaranteeing that promise, and foregoing the support of the children you refused to do that." On September 23, 1948, Mrs. Carelli wrote another letter to decedent in which she stated that Shirley was back in school and would be able to take her medical treatments at the school at a saving of approximately $40 a month.

On October 5, 1948, decedent died suddenly from coronary occlusion while driving his automobile. Appellant did not notify respondents of their father's death.

[4–7] Appellant contends, as above stated, that the evidence was insufficient to support the finding of the jury that the will was procured by undue influence on the part of appellant. The legal principles to be used in determining whether a will is the product of undue influence are stated in Estate of Trefren, 86 Cal.App.2d 139, 146, 147, 194 P.2d 574. Where one, who sustains a confidential relationship to the testator, actively participates in procuring the execution of the will and unduly profits by the will, the burden is upon him to show that the will was not induced by his undue influence. Estate of Trefren, supra, 86 Cal.App.2d page 147, 194 P.2d 574. A confidential relationship exists between a husband and wife who are living together. Estate of Teel, 25 Cal.2d 520, 527, 528, 154 P.2d 384. A confidential relationship existed, in the present case, between decedent and appellant. Under the terms of the alleged will, all the property of decedent was given to appellant, except the sum of $2 which was given to decedent's children. Under the circumstances here, the appellant unduly profited by the will. See Estate of Bucher, 56 Cal.App.2d 135, 139, 132 P.2d 257. Also, in the present case, there was substantial evidence that appellant actively participated in procuring the execution of the will. About ten days before the will was executed she talked to an attorney, whom she had known several years, and made an appointment for decedent and her to go to the attorney's office. They went to his office and she introduced decedent to the attorney. She was present while the attorney and decedent discussed a will. The attorney dictated a "disinheritance clause" to her and she wrote the dictation in shorthand. A few days thereafter she typed the purported will (involved herein) at her home. The next day she telephoned to the attorney, read the purported will to him and asked him if it was all right. She was present when the will was executed. Under such circumstances, where the appellant occupied a confidential relationship toward the testator and she unduly profited by the purported will and was active in procuring its execution, a presumption of undue influence on the part of appellant arose. The burden of proof was upon appellant to overcome the presumption. Estate of Trefren, 86 Cal.App.2d 139, 147, 194 P.2d 574. It was a question of fact for the determination of the jury as to whether appellant had overcome the presumption. The jury could have inferred that appellant was unfriendly with the children. The evidence was sufficient to support the finding that the will was procured by undue influence on the part of appellant.

[8, 9] Appellant contends that the court erred prejudicially in instructing the jury as follows: "You are instructed that * * if you find from the evidence that Alice Schlyen and David Schlyen were man and wife and that David Schlyen imposed great confidence in Alice Harriet Schlyen, and that she was active in the procuring of the Will dated April 20, 1945, whereby she unduly profited thereby, then I charge you that there is a presumption that undue influence was exercised by Alice Harriet Schlyen upon David Schlyen in the execution of said Will and unless that presumption is overcome by convincing evidence on the part of Alice Harriet Schlyen, then you must find that the Will dated April 20, 1945, was procured by the undue influence of Alice Harriet Schlyen, and is invalid." Appellant's argument in support of that contention is that the court directed the jury to find undue influence unless the proponent overcame the presumption "by convincing evidence," that a party who has the burden of proof in a civil issue is not required to carry such burden to the extent of producing "convincing evidence", that all that such party is required "to do is produce a preponderance or greater weight of the evidence, without the necessity of 'convincing' the court or jury of the facts at issue." The proponent was only required to rebut the presumption. In rebutting the presumption she was not required to produce a preponderance or greater weight of the evidence. Estate of Eakle, 33 Cal.App.2d 379, 387, 91 P.2d 954. Immediately following the above-mentioned instruction the court instructed the jury "that as a matter of law Alice Harriet Schlyen has unduly profited by such will, in the manner as the term 'unduly profited' is used in these instructions." Immediately thereafter the court instructed the jury "that a confidential relationship existed between David Schlyen and Alice Harriet Schlyen while they resided together as husband and wife." Immediately thereafter the court gave the following instruction: "[I]f you find that Alice Harriet Schlyen, while such a confidential relationship existed between her and David Schlyen, actively participated in procuring the execution of the will dated April 20, 1945, and unduly profited by such will, as defined in these instructions, the burden then shifts to Alice Harriet Schlyen to prove that the will was not induced by her undue influence. This is but another way of saying that upon the concurrence of the elements just mentioned, a presumption of undue influence on the part of Alice Harriet Schlyen has arisen, which must be overcome by Alice Harriet Schlyen." The word "convincing" should not have been used in the instruction first above referred to, but it was not prejudicial. "Convincing" means satisfying by proof. Webster's New International Dictionary, 1942. Proof, however, that is sufficient to overcome or rebut such a presumption does not necessarily consist of evidence whereby it is demonstrated that the presumption has been overcome or rebutted, but such proof might consist of a preponderance of probabilities. In view of the last instruction above mentioned, wherein it was stated in effect that "another way of saying" what was recited in preceding instructions was that the presumption must be "overcome" by proponent, the use of the word "convincing" in the first instruction was not prejudicial.

Appellant also contends that the court erred in giving other instructions. Her argument is to the effect that several of the instructions regarding undue influence and fraud set forth correct abstract principles of law but the instructions had no application to the evidence, were conflicting, confusing, and could have misled the jury. The jury was instructed adequately.

By reason of the above conclusions, it is not necessary to discuss the other contention of appellant that the evidence was insufficient to support the finding of the jury that the will was procured by fraud on the part of appellant.

[10, 11] The notice of appeal herein also states that the appeal is from the verdict, special verdict, and the order denying the motion for judgment notwithstanding the verdict. A verdict and a special verdict are not appealable. Also, the order denying the said motion is not appealable.

Estate of Frank, 102 Cal.App.2d 126, 226 P.2d 767.

The judgment is affirmed. The purported appeals from the verdict, special verdict, and order denying the motion for judgment notwithstanding the verdict, are dismissed.

SHINN, P. J., and VALLÉE, J., concur.

STATE BOARD OF DRY CLEANERS v. THRIFT-D-LUX CLEANERS, Inc., et al.

Civ. 18122.

District Court of Appeal, Second District, Division 2, California.

July 31, 1951.

Hearing Granted Sept. 27, 1951.*

The State Board of Dry Cleaners brought action against the Thrift-D-Lux Cleaners, Inc., a corporation, and others to enjoin defendants from violating statutes authorizing the plaintiff to establish minimum price schedules for various items of cleaning, dyeing and pressing services. The Superior Court of Los Angeles county, Clarence M. Hanson, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeals, Moore, P. J., held that the statute is unconstitutional.

Judgment affirmed.

1. Constitutional law 🔑62

Any statute enacted for purpose of enabling an administrative agency to draft its regulatory measures must be supplied with standards or guiding rules.

2. Constitutional law 🔑62

If standards for guidance of administrative agency are not provided by statute creating the agency, the statute is a nullity.

3. Constitutional law 🔑81

A statute designed to regulate an industry must be for the public good and serve to accomplish a legitimate object.

4. Constitutional law 🔑62, 298(1)
Trade-marks and trade-names and unfair competition 🔑68(2.2)

A statute authorizing State Board of Dry Cleaners to establish minimum price schedules for various items of cleaning, dyeing, and pressing services, is invalid because an unlawful delegation of legislative authority, because an abuse of the police power, because a denial of due process, and because arbitrary and discriminatory. Business and Professions Code, §§ 9500 to 9597; Const. art. 1, § 1; U.S.C.A.Const. Amend. 14.

5. Trade-marks and trade-names and unfair competition 🔑68(1.2)

Minimum prices for the dry cleaning industry cannot be fixed by statute.

6. Constitutional law 🔑81

If a statute or ordinance be enacted to regulate a trade or industry, it must be affected with a public interest, and the law attempting to regulate it must aim at the conservation of the public health, public morals, or general welfare.

7. Constitutional law 🔑81

The power of the legislature to regulate private business cannot be invoked when the lawmakers are not dealing with a paramount industry.

8. Constitutional law 🔑81

Where a business is essentially private in its nature, it cannot be subjected to legislative regulation on the theory that it is public industry.

9. Constitutional law 🔑298(1)

The police power to fix prices must be limited by the rule that the statute must be reasonable under the conditions and the legislation must have a substantial relation to its object and must not be arbitrary or discriminatory.

10. Constitutional law 🔑81

Constitutional law does not sanction the granting of sovereign power to one group of citizens to be exercised against another unless the public morals, health or welfare is thereby served.

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* Subsequent opinion 254 P.2d 29.

11. Constitutional law ⚷298(1)

For a statute setting a minimum price for a commodity, there must be some semblance of a public necessity for the law.

12. Constitutional law ⚷298(1)

A statute fixing the price of a commodity must not be arbitrary and unreasonable or violate the right to own and enjoy property.

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Edmund G. Brown, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., for appellant.

Adele I. Springer, Los Angeles, for respondents.

MOORE, Presiding Justice.

In 1945 the Legislature added Chapter 18 to Division 3 of the Business and Professions Code, sections 9500 to 9597. While there was no preamble to the act, no doubt is left that the purpose of such addition was to provide statutory rules for the regulation of cleaners and dyers. It provides for the State Board of Dry Cleaners consisting of seven members: one from the public; two owners of retail plants, two owners of wholesale plants and two owners of shops. After the articles for administration, licensing and registration of those engaged in such business, Article 5 provides for "minimum price schedules". Sections 9560 through 9567. Section 9563 authorizes the board to establish "minimum price schedules for the various items of cleaning, dyeing and pressing services for any city or county or other area as may be determined by the board upon the filing of a petition with it, requesting a minimum price schedule for that * * * area signed by seventy-five per cent (75%) or more of the persons in that * * * area who are licensed under this chapter." Succeeding sections require the board to conduct in such area a survey to determine the cost of the various items for which minimum price schedules shall be established and "not [to] fix a price for any service at a sum less than that which is shown to be the cost price of such service". For violating a minimum price schedule any person may be enjoined. New minimum prices for cleaning, dyeing or pressing service may be fixed by the board for the same area after investigations when it is shown that the minimum prices fixed "are insufficient * * * to provide healthful and proper services to the public and to maintain a clean, healthful, safe and sanitary cleaning, dyeing or pressing establishment, or that any minimum price set creates an undue hardship on any licensee". Sec. 9566. Any violation of the rules prescribed by Chapter 18 is a misdemeanor punishable by a fine of not less than $25 and not more than $200.

Pursuant to such act the Dry Cleaners' Board was organized. In July, 1947, seventy five per cent of its licensees in practically all the cities of Los Angeles county petitioned the Board to establish minimum prices in both wholesale and retail fields. Basing its action upon its own cost survey, the Board established and published its minimum price schedules[1] effective July 27, 1947, and prescribed certain minimum standards with respect to the manner, type, character and method to be used in dry cleaning. What occurred immediately after the Board published its schedules is not made clear, but in September, 1949, the Board filed its complaint herein charging respondents with having violated the price schedules fixed by appellant and with having threatened to continue to violate them. They demand that respondents be enjoined from transacting business, from selling or offering for sale its dry-cleaning services at prices less than those established by the Board for the Los Angeles area. The general demurrer to the amended complaint having been sustained without leave to amend, judgment dismissing the action was duly entered. The board now demands that such decree be reversed.

Miscellaneous Vices of the Statute

All grounds urged for a reversal of the judgment stem from appellant's insistence that section 9563 (for fixing prices) is valid, whereas respondents contend that (1) it violates the due process clauses of the Fourteenth Amendment of the federal constitution, and section 13 of Article I of the California constitution; sections 11 and 21 (invalid classification); section 1 of Article IV (delegation of legislative power); also sections 24 (title of act), 25 (local and special laws); subdivisions 2 (crimes and misdemeanors), 19 (special rights, privileges and immunities) and 33 (general law); (2) it is a hindrance to public welfare; not necessary to the public health or safety and is an unlawful delegation of power; (3) it is discriminatory; (4) it is an invalid exercise of the police power; (5) it arbitrarily interferes with private business, etc. In addition, respondents contend that the provisions of the "Unfair Practices Act" furnish a sufficient deterrent to discourage foul practices among dry cleaners. The penal provisions of the Unfair Trade Laws, B. & P. C., secs. 17100–17101, should be effective if applied to those operators who ignore the rules prescribed for the safe and sanitary operation of the dry cleaning business.

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[1] The Los Angeles board fixed the least price to be paid for cleaning and pressing a man's suit at $1, while respondent Thrift-D-Lux was charging only 69 cents. The Richmond Board fixed it at $1.13 and the San Francisco Board at $1.24.

The section, B. & P. C., sec. 9563, authorizing minimum prices discriminates against those who may comprise 25 per cent of all dry cleaners who may not originate or favor the price schedules. Not only are the 25 per cent excluded from participation, but neither the board nor the public may create such a law. Thus 75 per cent of the dry cleaners by their mere petition to the board control prices and by the regulation effected are enabled to deprive all other dry cleaners of large patronage through the latter by having better locations, more experience and superior equipment are in positions to turn out greater volumes of work and thereby effect a saving to the public by charging less for each item of work done. By reason of the fact that the preponderant number of patrons of dry cleaning establishments desire their work done on the most economical basis, it is out of volume that large profits are made.[2] If the minimum schedules which it has promulgated be enforced, the opportunities would be increased for patronage of those cleaners who prefer to give the "expensive grade" of service and diminish the advantages of those who can at their own gain serve a greater number by furnishing the "economical grade."

[1–3] Not only does section 9563 ignore the two kinds of service but it is fatally weak in its failure to provide guides or standards whereby to regulate the board in the formalizing of the minimum price schedules. It is elemental that any statute enacted for the purpose of enabling an administrative agency to draft its regulatory measures must be supplied with standards or guiding rules. Such agencies may not be invested with an arbitrary power or unlimited discretion. In re McLain, 190 Cal. 376, 381, 212 P. 620; In re Peppers, 189 Cal. 682, 688, 209 P. 896. If standards for the guidance of the administrative agency are not provided by the creative statute, the law becomes a nullity. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516; See Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; Revne v. Trade Commission, Utah, 192 P.2d 563.[3] Moreover, a statute designed to regulate an industry must be for the public good and serve to accomplish a legitimate object. While ostensibly created to serve the general welfare, in fact, it regulates a segment of private industry, raises prices and is therefore detrimental to the public welfare. While the regulatory portions of Chapter 18 appear to be free of vices, it would be contrary to traditional, constitutional inhibitions to approve of the rule fixing the prices to be charged by dry cleaners at the expense of the public and of those dry cleaners who oppose the regulation. By such measure the people residing in the most populous areas of Los Angeles County have no voice in the making of the price law; no member of the legislature was consulted; appellant Board was without power to designate the day of its enactment or the geographical area to be affected.

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[2] In the dry cleaners' industry there are two grades of work: the economical and the expensive.

[3] In the Revne case the court said: "Where no standards have been set other than that a board fix just and reasonable minimum wholesale and retail prices for milk, the act has been held to be insufficient in setting out standards." 192 P.2d at page 573.

[4] A fatal defect in the Act is found in the fact that by committing to an administrative agency the authority to make rules establishing minimum prices for work the Legislature delegated its own authority. It is a principle as old as time, but as vigorous as youth that delegated power cannot itself be delegated. To this doctrine conformance has been constant and uniform throughout the years of effort to fix prices by law.[4] Indeed, as many decisions imply, if they do not expressly declare, that in the enactment of such statutes, the legislatures abdicate the constitutional obligation to make law, but pass it over to those who are ignorant of the process or to those who are directly and selfishly interested in the operation of the regulatory rule and its penal provisions. The art of legislating requires not only knowledge but it involves the exercise of a discretion as to what the law shall be. This is of especial importance in the matter of delegating legislative power to an administrative board composed of the members of the industry to be regulated. In Carter v. Carter Coal Co., 298 U.S. 238, 311, 56 S.Ct. 855, 873, 80 L.Ed. 1160, the court termed the delegation of such powers by the legislature to interested persons as "intolerable," as "legislative delegation in its most obnoxious form". In referring to the Delaware Dry Cleaning Law, the Supreme Court of Delaware in Becker v. State, 7 W.W.Harr. 454, 185 A. 92, 100, had occasion to observe its likeness to the ancient guild which operated for the advantage of its members.[5] In Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76, 77, 57 L.Ed. 156, the court denounced as "an unreasonable exercise of the police power" a municipal ordinance which required the Committee on Streets to establish a building line at a prescribed location when requested by two thirds of the abutting property owners.[6] In Dupont v. Liquor Control Commission, 136 Conn. 286,

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[4] See Revne v. Trade Commission, Utah, 192 P.2d 563; Wilson v. New, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755; Levine v. O'Connell, 275 App.Div. 217, 88 N.Y.S.2d 672, 673; Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827, 14 A.L.R.2d 98; LaForge v. Ellis, 175 Or. 545, 154 P.2d 844; Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 49 P.2d 1140; Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420; Maryland Coop. Milk Producers v. Miller, 170 Md. 81, 182 A. 432; Chester C. Fosgate Co. v. Kirkland, D.C.Fla., 19 F.Supp. 152, 153; Hollingsworth v. State Board of Barber Examiners, 217 Ind. 373, 375, 28 N.E.2d 64; Union Trust Co. v. Simmons, Utah, 211 P.2d 190 and many others.

[5] "Vast authority is centered in a governing board, a majority of which are directly interested in the industry, but who, nevertheless, are empowered to act in a judicial capacity, and to sit in judgment over fellow members of the trade. Too great a strain is imposed upon human frailty. The practical tendency of the legislation is to create and foster monopoly, to prevent, not to encourage competition, to maintain maximum, not minimum prices, all of which is against, not in aid of, the interests of a consuming public. The act savors of an attempt to establish the ancient guild which, operating not so much for the public benefits as for the advantage of its members, had come 200 years ago to be regarded as an unmitigated evil."

[6] 226 U.S. at page 145, 33 S.Ct. at page 77, 57 L.Ed. 156, the court says:

"It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power of some property holders to virtually control and dispose of the property rights of others, 71 A.2d 84, the court held an ordinance violated the constitution in that it required as a condition precedent to the issuance of a permit the consent of 50 per cent of the owners. This was tantamount to no privilege at all since 51 per cent of such owners could defeat the permit. "In effect, therefore, the consent clause confers upon the 51 per cent the power to determine, in this particular, the use the plaintiffs may make of their property." 136 Conn. at page 289, 71 A. 2d at page 85.

It follows from the foregoing that an attempt on the part of the legislature to delegate its power to an administrative board comprised of interested persons, members of the industry seeking regulation, to make a regulatory rule or ordinance is an abuse of the police power and therefore void.

California Law

[5–8] That minimum prices for the dry cleaning industry cannot be fixed by statute is the established law of this state. See In re Herrick, 1938, 25 Cal.App.2d 751, 77 P.2d 262; In re Landowitz, 22 Cal.App.2d 733, 71 P.2d 334; In re Kazas, 1937, 22 Cal.App.2d 161, 70 P.2d 962, 965. The ordinance involved in the Herrick case was expressly enacted for the purpose of increasing employment, reducing hours, increasing wages, eliminating unfair trade practices and ruinous, price-cutting evils. The ordinance fixed minimum prices for various services including the lowest price for cleaning and pressing a man's suit. The declared purpose was for general welfare. Herrick having been arrested for a violation of the ordinance was discharged on a writ of habeas corpus, on the authority of In re Kazas, supra. In the Landowitz case, supra, he was likewise discharged on the strength of the Kazas decision which established a firm foundation for the riddance of all such special, discriminatory legislation. In enacting its ordinance for fixing minimum prices for a hair cut and a shave the city of Bakersfield did attempt to be regular by declaring the existence of an emergency, "widespread unemployment and disorganization of trade and industry which affects the peace and welfare of all the people," and made a violator subject to fine and imprisonment. The ordinance was not concerned with health, safety or morals of the people. Its sole object was to attempt to regulate prices to be charged by the tonsorial artists of the town. It took no cognizance of differences in the skill of the several members of the trade, in their shop locations and equipments or in the costs of operating them. As to the declaration of emergency, Mr. Justice Marks quotes the U. S. Supreme Court in Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, to the effect that emergency does not remove restrictions upon power reserved; that emergency may not call into life a power which has never existed. However, we are not confronted in the instant action with a declaration of emergency. The issue here presented is whether the price fixing statute can be supported. If so, such support must be found despite the inhibitions of the state's constitution[7] and

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creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. * * *

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others * * *. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. * * * This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

"The case requires no further comment."

[7] Article I, section 1: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Article I, section 11: "All laws of a general nature shall have a uniform operation."

Article I, section 13: "No person

of Article XIV of the federal constitution.[8] These provisions of the organic law are vital. They protect us in our homes, in our lives and occupations. Unless an act forbidden by them be authorized by the legislature, it is invalid unless it be for the protection of the health, the morals or the general welfare. Thus, if a statute or ordinance be enacted to regulate a trade or industry it must be "affected with a public interest" and the law attempting to regulate it must aim at the conservation of the public health, public morals or general (public) welfare. If a statute purporting to have been enacted for the protection of the public health, safety, morals or general welfare has no substantial relation to any of those objects, a court cannot do otherwise than declare it void. McKay Jewelers, Inc., v. Bowron, 19 Cal. 2d 595, 600, 122 P.2d 543, 139 A.L.R. 1188. The power of the legislature to regulate private business cannot be invoked when the lawmakers are not dealing with a paramount industry. Nebbia v. People of State of N. Y., 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940. Where a business is essentially private in its nature, "as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor," it cannot be subjected to legislative regulation on the theory that it is public industry. New State Ice Co. v. Liebmann, 285 U.S. 262, 277, 52 S.Ct. 371, 374, 76 L.Ed. 747.

In the case at bar the evident purpose of fixing minimum prices of dry cleaning services was to enhance the economic status of the industry and to enlarge the profits of each operator. There is no necessary relation between the statute and the anticipated improvement of the public weal. That the statute was not enacted for the general good is shown by the paucity of those benefitted and by the many who suffer detriment thereby. While the state has a population of over 10,000,000 souls, and Los Angeles County has a population in excess of 4,000,000, the dry cleaners of the county, including shops and plants, number less than 4,000, and there are less than 8,000 in the state. How could the public morals be affected by the increase of dry cleaners' prices? How could they affect the public health? how improve the public welfare? On the contrary, an advance in prices depreciates the wealth of 1117 people for every single dry cleaner benefitted. The result of the price fixing for the industry is that less than 1% of the people of the county have initiated a penal law for the control of their industry to the financial detriment of the remainder, or practically the entire body politic without the latter's concurrence. Is it conceivable that any statute could be more oppressive with less support from the people who have built their state upon the principles that all men have the inalienable right to acquire, possess and

shall * * * be deprived of life, liberty, or property without due process of law".

Article I, section 21: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Article IV, section 1: "The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California' * * *."

Article IV, section 24: "Every Act shall embrace but one subject, which subject shall be expressed in its title. * * *"

Article IV, section 25: "The Legislature shall not pass local or special laws in any of the following enumerated cases":

Subd. 2—"For the punishment of crimes and misdemeanors. * * *"

Subd. 19—"Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity. * * *"

Subd. 33—"In all other cases where a general law can be made applicable."

[8] Article XIV, sec. 1: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

protect property, who shall not be deprived of same without due process of law; who shall never grant special privileges or immunities to a favored class; who have vested all legislative power in a Senate and Assembly which shall not pass local or special laws for the punishment of crime?

[9] The dry cleaners involved in or concerned with this action are in no better position than were the barbers in the Kazas case. The court there emphasized that because the ordinance did not pretend to concern itself with the health, safety or morals of the people, because no emergency existed as a basis for the ordinance, because the general welfare was not to be served by an enforcement of the ordinance, because it was not affected with a public interest, the ordinance was void. The Kazas opinion highlights the progressive attempts at price fixing by statute directly and expresses the law of this state. It is not overruled by Nebbia v. People of State of N. Y., 291 U.S. 502, 54 S.Ct. 505, 511, 78 L.Ed. 940, as contended by appellant. The latter decision involved the sale and distribution of milk, an article indispensable to practically every home in America. The state of New York enacted the statute to meet an emergency when the nation was at the nadir of its greatest depression. It was conceived in the vital relation of milk to the public health. The preservation of such a commodity and its fair and proper distribution are essential to public health and general welfare. The dry cleaning industry, however convenient to a large portion of the public, is not a basic or paramount industry. In fact it bears only a remote relationship to public health. The Supreme Court did not in the Nebbia case hold that any industry is subject to regulation at any time but on the contrary maintained that "a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances". The sum and substance of the Nebbia decision is that the exercise of the police power must be for an end which is in fact public and that price fixing may be a valid legislative means in the exercise of that power. See Treigle v. Acme Homestead Association, 297 U.S. 189, 197, 56 S.Ct. 408, 80 L.Ed. 575; Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. Because the Nebbia decision blazed the way for legislative action in preventing public abuses by depriving the public of a necessity it is not for that reason authority for an administrative agency to expand its activities to such an extent as to operate its power to the economic detriment of one segment of the membership it regulates and to the advantage of another segment. To say that such decision is authority for the legislature to fix prices of any commodity because some persons in the industry desire an advantage over others is not justified by anything there said. Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61, 67; Doubleday, D. & Co. v. R. H. Macy & Co., 269 N.Y. 272, 199 N.E. 409, 103 A.L.R. 1325. That the Nebbia case is not regarded as authority for fixing prices on all commodities is established by numerous decisions wherein it has been distinguished. See Natural Pipeline Co. v. Federal Power Commission, 7 Cir., 120 F.2d 625, 630; Duff v. Trenton Beverage Co., 4 N.J. 595, 608, 73 A.2d 578; Old Dearborn Distribution Co. v. Seagram-Distillers Corporation, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109; State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116. The exercise of police power to fix prices must be limited by the rule that it "must be reasonable under the conditions and the legislation must have a substantial relation to its object and must not be arbitrary or discriminatory." Lakewood Express Service v. Board of Public U. Commissioners, 1 N.J. 45, 50, 61 A.2d 730, 732, 7 A.L.R.2d 1259.

In the Kazas action the court wisely concluded that "The private advantage of a small group, not a class, composing a small percentage of the population of Bakersfield, does not make a price fixing ordinance for that group alone legislation for the general welfare of the inhabitants of Bakersfield", [22 Cal.App.2d 161, 70 P.2d 970] and held that the trade of barbering is not "affected with a public interest or clothed with a public use." No decision of the courts of this state has ruled to the contrary of the Kazas case. Moreover, it has been followed by many courts. In De Haviland v. Warner Brothers Pictures, 67 Cal.App.2d 225, 235, 153 P.2d 983, 988, the court said that "The validity of legislation infringing upon the right of contract is to be judged from its tendency to promote the welfare of the general public rather than that of a small percentage of citizens." In re Jentzsch, 112 Cal. 468, 44 P. 803, 804, 32 L.R.A. 664, the court held that constitutional liberty means the "right freely to labor * * *. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations?" Many ordinances regulating barber shops, bakeries, grocery stores, laundries etc. have been nullified. In re Boehme, 12 Cal.App.2d 424, 428, 55 P.2d 559; People v. Osborne, 17 Cal.App.Supp.2d 771, 777, 59 P.2d 1083; In re Scaranio, 7 Cal.2d 309, 311, 60 P.2d 288; Ex parte Westerfield, 55 Cal. 550, 551; regulating hours of bakers; Ganley & Claeys, 2 Cal.2d 266, 267, 40 P.2d 817; In re Mark, 6 Cal.2d 516, 521, 58 P.2d 913, regulating working hours of laundries; Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.,N.S., 183, statute prohibiting the sale of theater tickets for prices higher than those of the management; Deese v. City of Lodi, 21 Cal.App.2d 631, 69 P.2d 1005, ordinance closing grocery stores; In re Porterfield, 28 Cal.2d 91, 103, 168 P.2d 706, 167 A.L.R. 675; Bernstein v. Bush, 29 Cal.2d 773, 777, 177 P.2d 913; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 415, 65 P.2d 884, 109 A.L.R. 895; Franchise Motor Freight Association v. Seavey, 196 Cal. 77, 81, 235 P. 1000, regulation must be for the benefit not to the detriment of the consuming public; Endicott v. Rosenthal, 216 Cal. 721, 723, 16 P.2d 673; Accounting Corporation v. State Board of Accountancy, 34 Cal.2d 186, 245, 208 P.2d 984.

Kazas Followed in Sister States.

The same doctrine has been announced and the same holding as that of the Kazas case has been followed in other jurisdictions. In Revne v. Trade Commission, 192 P.2d 563, the Supreme Court of Utah annulled a statute fixing minimum prices for barbers. The federal district court in New Jersey held a price-fixing statute violative of the due process clause, and that the cleaning and dyeing industry is not affected with a public interest and therefore void, Kent Stores v. Wilentz, 14 F.Supp. 1. In Becker v. State, 7 W.W.Harr. 454, 185 A. 92, the Supreme Court of Delaware held the object of the act fixing minimum prices for cleaning and pressing to be not for the public welfare but an attempt to regulate and control an ordinary occupation. In New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747, it was held that a similar statute regulating the prices of an industry was beyond the power of a state, an arbitrary interference with private business, not related to public health, morals or welfare and with a tendency to create and foster monopoly and to maintain maximum prices. The Supreme Court of Alabama in reference to the Barber and Dry Cleaning Acts fixing minimum prices held that personal services not done in an industry devoted to public purpose cannot become affected with public interest. City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266, 111 A.L.R. 349; see Hertz Drivurself Stations, Inc., v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438; Noble v. Davis, 204 Ark. 156, 161 S.W.2d 189; State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N.E.2d 972; State v. Greeson, 174 Tenn. 178, 124 S.W.2d 253; LaForge v. Ellis, 175 Or. 545, 154 P.2d 844; Serrer v. Cigarette Service Co., 148 Ohio St. 519, 76 N.E.2d 91; State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394.

[10–12] From all the decisions it is inescapable that (1) constitutional law does not sanction the granting of sovereign power to one group of citizens to be exercised against another unless the public morals, health or welfare is thereby served; (2) it is basic that for a statute such as that here involved to be upheld there must be some semblance of a public necessity for the law; (3) such a statute must not be arbitrary and unreasonable or violate the right to own and enjoy property; (4) it must relate to the protection of public health, morals or welfare.

Appellant has placed reliance upon the hypothesis that the Legislature has power to regulate prices in the dry cleaning industry and cites in support thereof the following: Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; The Fair Trade Act, Statutes of 1931, page 583; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P. 2d 177; In re Lasswell, 1 Cal.App.2d 183, 36 P.2d 678; In re Weisberg, 215 Cal. 624, 12 P.2d 446; Carter v. Stevens, 211 Cal. 281, 295 P. 28; Nebbia v. State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; Tyson & Bros. United Theatre Ticket Offices v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L. Ed. 718; Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Reeves v. Simons, 289 Ky. 793, 160 S.W.2d 149; Townsend v. Yeomans, 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210; 20th Century Associates v. Waldman, 294 N.Y. 571, 63 N.E.2d 177; Kuperschmid v. Globe Brief Case Corp., 185 Misc. 748, 58 N.Y.S.2d 71; Kelly-Sullivan, Inc., v. Moss, 174 Misc. 1098, 22 N.Y.S.2d 491; Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388, 126 A.L.R. 729; Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074; U. S. v. Darby Lumber Co., 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703.

Those decisions fall into the following classes: (1) Legislation to meet an emergency; (2) statutes for the regulation of an industry clothed with a public use; (3) statutes for the protection of women and children. The Nebbia decision would never have been written had there been an abundance of milk for the inhabitants of New York. Since milk is necessary for the children and since the supply for New York City was shipped in by interests that could control its distribution to the detriment of the many, the legislature had to adopt a law for the protection of the health of all the people. West Coast Hotel Co. v. Parrish, supra, was a recognition of the truism that the women and children of America constitute the most valuable asset of the nation and therefore the sustenance they draw from industry is a matter of public concern. The statutes that have been approved regulating rent on commercial buildings, employment agencies, resale of motor vehicles, etc., were all for the protection of the public and not for the enrichment of the persons engaged in those lines or merely to interfere with a private industry.

While the Kazas ordinance declared its purpose was for the public welfare, the statute here involved did not do so and if it had, its declaration would not create the need for controlling prices of work for there was no emergency in the industry. The chief concern of the court in the Kazas case was whether a price fixing ordinance promoted the "general welfare." While deciding that it did not, the court held that for legislation to be justified by the last quoted phrase it must promote the welfare of the general public and not a small segment thereof. Because the minimum price-fixing section of the Dry Cleaner's Act was not inserted for the general welfare and does not contemplate that the board should consider the quality of service, the location of the shop, the rental it pays, the economic status of its patrons or its overhead expenses, but because it places all potential customers in the same category and makes no provision for the man of meagre income to obtain dry cleaning service for a reasonable charge, it is of no benefit to the public and its enactment was a detriment.

Judgment for defendants affirmed.

McCOMB and WILSON, JJ., concur.

HOSTETTER v. ALDERSON et al.

Civ. 18061.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1951.

As Modified on Denial of Rehearing Sept. 5, 1951.

Hearing Granted Nov. 1, 1951.*

Action by Homer J. Hostetter against John H. Alderson, Chief Engineer and General Manager of the Department of Fire of the City of Los Angeles, and another for restoration to plaintiff's former position in the Los Angeles fire department. The Superior Court of Los Angeles County, Charles A. Paulson, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem, held that under Los Angeles city charter a regular fireman was not subject to removal by reason of physical inability due to a hyperthyroid disease to properly perform the duties required of uniformed personnel in the fire department.

Judgment reversed and cause remanded with directions.

1. Municipal corporations ⇐198(2)

Under city charter of Los Angeles prohibiting removal of specified employees except for good cause shown upon a finding of guilt of specific charges based upon some act committed or omitted by employee, a regular fireman was not subject to removal by reason of physical inability, due to a hyperthyroid disease, to properly perform duties required of uniformed personnel in the fire department.

2. Municipal corporations ⇐198(5)

A regular fireman who had been removed without justification from his position in Department of Fire of the City of Los Angeles was entitled to restoration to position without loss of pay except for deduction of any amount received from private or public employment during period he was prevented from performing his duties in fire department.

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George E. Cryer, R. Alston Jones, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George Williams Adams, and John F. Feldmeier, Deputy City Attys., Los Angeles, for respondents.

HANSON, Justice pro tem.

The initial question which we are called upon to decide and which we regard as decisive is whether the appellant, a regular fireman employed by the City of Los Angeles, was subject to removal under section 135 of the City Charter by reason of "physical inability to properly perform the duties required of all uniformed personnel" in the Department of Fire of the respondent City. The question presented involves merely an interpretation of the section of the charter mentioned.

Section 135 provides that an employee, of the character of the plaintiff, may not be deprived of his position and the compensation that goes with it; that is to say "suspended, removed, deprived of his * * * position, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights * * *. *Such charges must be based upon some act committed or omitted by such * * * employee * * *.*"

The plaintiff employee was taken ill on or about March 1, 1948, with a sore throat and cold which upon subsequent diagnosis was found to be a hyperthyroid disease. Upon the recommendation of the police surgeon the chief engineer temporarily relieved the appellant from duty. On May 9, 1948, he resumed his duties with the department. A request by the chief engineer that he resign was refused by appellant. On November 9, 1948, appellant while engaged in fighting a mountain fire was exposed to a poison oak infection which resulted in a return of the thyroid symptoms. As hospitalization was required appellant was granted an off-duty period to expire on March 3, 1949. At that time the appellant was still undergoing treatment and accordingly was unable to return to duty. Thereupon the chief engineer temporarily relieved appellant from duty pending a hearing before and decision by the Board of Rights. At the hearing appellant admitted his physical inability to fulfill his duties as fireman, but stated he felt he would shortly be capable of doing so and hence requested that he be given lighter duties for a period or in the alternative that he be suspended for six months and that at that time it be ascertained if he was capable of fulfilling all the duties of a fireman. The Board of Rights found appellant "guilty" of the charge made against him and ordered his removal from the service.

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* Subsequent opinion 241 P.2d 230.

[1] Upon the facts as we have just stated them it seems to us entirely apparent that the removal was for a cause not within the language or spirit of section 135.

The contention of the City of Los Angeles that the voters in enacting section 135 contemplated it would cover the situation here narrated is an entirely gratuitous assumption without an iota of fact to sustain it. We read charters as they are written and do not supply them with language that is wanting. The order of removal was made without jurisdiction.

[2] The judgment is reversed and the cause remanded with directions to the court below to enter judgment in favor of plaintiff directing his restoration to his position in the Department of Fire as of March 3, 1949, and further that pursuant to Subsection 12 of Section 135, Article X, of the Charter of the City of Los Angeles that it be further directed that such restoration to duty be without loss of pay, less the amount plaintiff has received, if any, from private or public employment during the period he was prevented from performing his duties. The trial court is directed to take evidence as to the remuneration received by plaintiff from private or public employment after March 3, 1949, and to deduct any amount so received from the monthly salary due plaintiff from the city for the period covered by such employment, and to enter judgment for plaintiff for any balance.

WHITE, P. J., and DRAPEAU, J., concur.

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105 Cal.App.2d 768

In re Guardianship of THRASHER.

DEPARTMENT OF MENTAL HYGIENE v. THRASHER et al.

Civ. 7854.

District Court of Appeal,
Third District, California.

July 31, 1951.

Rehearing Denied Aug. 27, 1951.
Hearing Denied Sept. 27, 1951.

Proceeding in the matter of the guardianship of the person and estate of Ida M. E. Thrasher, an incompetent person, wherein Oscar F. Thrasher, guardian of the estate and person of Ida M. E. Thrasher, an incompetent person, petitioned for an allowance of the fourth annual account and the Department of Mental Hygiene of the State of California filed objections to the account and petitioned to reopen the first, second and third accounts of the guardian. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered an order settling the fourth annual account and overruling objections of the Department and its petition to reopen the prior accounts and the Department appealed. The District Court of Appeal held that obligation of husband to support wife even though she had estate of her own does not cease when wife was adjudged insane or when a guardian of her estate is appointed and that husband was primarily liable for her maintenance to extent of his financial ability to pay.

Orders reversed with directions.

1. Insane persons 🔑49

It is not only the right, but it is the duty, of the Department of Mental Hygiene to safeguard the welfare of an incompetent person committed to its care.

2. Statutes 🔑231

All of the statutory provisions in all of the codes must be read together and harmonized if possible.

3. Insane persons 🔑53

Duty of husband to support wife even though she has estate of her own does not cease when wife is adjudged insane or when guardian of her estate is appointed. Civ. Code, § 155; Welfare and Institutions Code, §§ 6650, 6655; Probate Code, § 1505.

4. Statutes 🔑223.2(1)

Provision of Civil Code establishing fundamental rights and duties of marriage, provisions of Probate Code establishing rights of wards and duties of their guardians to protect their interests, provision of Welfare and Institutions Code establishing various sources from which state may secure payment of hospital care for incompetents, must be considered together. Civ. Code, § 155; Welfare and Institutions Code, §§ 6650, 6655; Probate Code, § 1505.

5. Statutes 🔑184, 217.1, 223.1, 223.2(1)

In construing a remedial statute, reason must have its just proportion, and in interpreting expressions employed, court is free to study history and purpose of enactment and previous state of legislation on subject, as well as other statutes in pari materia and benefits sought to be provided.

6. Statutes ⚷212.5

It is not to be presumed that legislature in enactment of statute intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.

7. Insane persons ⚷53

Husband of a wife who had been committed to a mental institution was primarily liable for her maintenance there to extent of his financial ability to pay for it and if she, as guardian of her estate, could not draw on such estate for her maintenance so long as he had financial ability to pay for same. Civ. Code, § 155; Welfare and Institutions Code, §§ 6650, 6655; Probate Code, § 1505.

8. Insane persons ⚷53, 58

Statute providing means and method by which state may receive payment from insane person's estate does not release husband from his primary obligation to pay for maintenance of wife nor does it prevent Department of Mental Hygiene from making proper objections in guardianship proceeding to shifting of obligation to guardianship estate. Civ. Code, § 155; Welfare and Institutions Code, §§ 6650, 6655; Probate Code, § 1505.

9. Guardian and ward ⚷145

Annual or intermediate accounts of a guardian may be reviewed and corrected at any time before final settlement.

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Ariel C. Hilton, Deputy Atty. Gen., for appellant.

T. B. Scott and Elmer L. Winger, Modesto, for respondent.

PER CURIAM.

This is an appeal from orders settling the fourth annual account of Oscar F. Thrasher as guardian of the person and estate of Ida M. E. Thrasher, an incompetent person, and overruling the objections of the Department of Mental Hygiene of the State of California to the account and denying its petition to reopen the first, second and third accounts of the guardian.

Oscar F. Thrasher is the husband of the incompetent and the purpose of the objections and petition to reopen the accounts was to disallow the sums charged by him as guardian against the estate for the care, support and maintenance of the incompetent at the Stockton State Hospital on the ground that as her husband he is liable by statute for her support and should not be permitted to avoid this liability and deplete her estate by charging the full cost of the hospital care and maintenance of the incompetent to her estate.

Mrs. Thrasher was committed in 1943 and ever since has been and still is a patient at the Stockton Hospital. Her husband paid for her support at the hospital until January 2, 1945, when he obtained letters of guardianship. On May 9, 1945, an inventory and appraisement of her estate was returned and filed, the appraisement being $17,236. No mention was made as to whether it was community or separate property. A portion of the real estate was sold to Modesto City School District for $4,600 and the sale was approved. In the guardian's first annual account filed April 12, 1946, he claimed one-half of the sale money, to wit: $2,300 as belonging to the incompetent's estate and the other one-half for himself on the ground that the property sold was community property. Of the $2,300 turned into the estate, the guardian claimed and was allowed $740 to reimburse him for money he personally previously had paid for her support at the hospital. The court also gave the guardian $250 as a fee to be paid when there was sufficient money in the estate to pay it. In his second annual account he claimed and was allowed $580 to reimburse him for money he personally paid for her support and the court allowed a guardian's fee of $125 to be paid when the estate had sufficient money. The Department of Mental Hygiene filed objections to this second annual account on the ground that the $580 for her support should not come out of her estate, her support being the personal liability of the husband. His third annual account, filed April 30, 1948, showed a total received of $51.35 and $620 paid Stockton State Hospital for 15 months' support for the incompetent. Again objections were interposed to the allowance of the $620 for her support on the ground $740 had been allowed by the first account and $580 in the second account, and that the husband had an income in excess of $300 a month and was financially able to support his wife. The objections were disallowed. Again a fee of $50 was allowed the guardian, to be paid when the estate had the money. The fourth account was filed April 20, 1949, showing $480 was for her support. Objections were again interposed and a petition filed that the first, second and third accounts be reopened on the same grounds, viz., that the husband, and not the estate of the incompetent wife, was liable for her support.

Appellant Department of Mental Hygiene (hereinafter referred to as the department) states that the question to be determined is as follows: Whether the husband who is providing for the care and maintenance of an incompetent wife committed to a state hospital, may, as guardian of her estate, approve claims for this support, submitted by himself as husband to himself as guardian, thereby charging her estate for her care, and avoiding his own statutory liability as husband for the support of his wife.

Respondent insists that appellant has incorrectly stated the question on appeal, and respondent states: "This statement of the issue begs the question. By its use of the term 'statutory liability' it assumes that to be a matter of law which is the very point at issue—whether there is in this case any liability, statutory or otherwise, on the part of the husband for the support of his wife."

[1] We deem it proper to state at the outset that it is not only the right, but it is the duty, of the department to safeguard the welfare of an incompetent person committed to its care. This duty has been aptly expressed in the Estate of O'Donnell, 85 Cal.App.2d 1, 192 P.2d 94 (hearing by Supreme Court denied), in which, on an appeal by the department, the appellate court ordered that an allowance of $4000 to an heir-hunting bureau be stricken from the order of the probate court. The court said 85 Cal.App.2d at page 13, 192 P.2d at page 101; "But the department stands in another and far more important light. O'Donnell has been legally committed to its care. The department is the custodial guardian of the person of O'Donnell. The department in this case is trying to give its ward the protection which should have been given him by his guardian, the attorney for his guardian, and the trial court. No niceties of just who is appealing should deprive the incompetent of his right to the protection of the court. Even if there be left plenty of funds to care properly for O'Donnell, whatever length his life may be, there is a duty, too, on the courts to preserve his estate for those who may succeed to it on his death, whether it be heirs or the state."

Appellant first contends that a husband is primarily responsible for the support of his wife, and cites section 155 of the Civil Code which provides that the husband and wife contract towards each other obligations of support, and also cites a number of California cases which emphasize the liability of a husband for the support of his wife. Respondent, in reply, states that he does not question the general law with reference to "the liability of a husband to support his wife under ordinary circumstances, or under circumstances arising out of divorce proceedings," but he asserts that a different rule governs in the case of a wife who has been declared incompetent and committed to a mental institution, and who possesses estate of her own.

Appellant next contends that the husband of an incompetent wife has a statutory liability for her support in a state hospital for the mentally ill. Appellant asserts that section 6650 of the Welfare and Institutions Code establishes the statutory liability of a husband for the support of his incompetent wife. This section, as amended in 1947, reads: "The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the costs and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability, and such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code."

In 1937 when the sections of the Welfare and Institutions Code were first enacted, section 6650, based on former Political Code section 1276, provided in the part pertinent to our question that: "The husband, wife, father, mother, or children of an insane person or inebriate, * * * or the estate of such insane person or inebriate, * * * shall be liable for his care, support, and maintenance in a State hospital to which he has been committed or transferred."

In 1941 this section was amended by Statutes of 1941, Chapter 916, Section 1, page 2503, to provide in the pertinent portions that: "The husband, wife, father, mother, or children of an insane person or inebriate, * * * and the administrators of their estates, and the guardian and/or administrator of the estate of such insane person or inebriate, shall be liable for his care, support, and maintenance in a State institution to which he has been committed or transferred under an original commitment. The liability of such persons and estates shall be a joint and several liability except that where the insane person or inebriate has an estate such estate shall be exhausted before liability passes to the relatives."

In 1943 the section was again amended by striking out the provision that the estate of the incompetent must be exhausted before liability passes to the relatives, and returning to the former wording that "the liability of such persons and estates shall be a joint and several liability." Statutes 1943, Chapter 1052, Section 1, page 2991, effective August 4, 1943.

Appellant then contends that the liability of a husband for the support of his wife continues without regard for her possession of independent means.

In an annotation in 18 A.L.R. 1131, it is stated that the general rule is that the primary duty of support of the wife and family rests upon the husband, and he is not relieved of that duty merely because the wife may have a separate estate or means of her own available for her support. Cited in said annotation are Meyer's Estate, Myrick, Probate Court Report 178, and Shebley v. Peters, 53 Cal.App. 288, 200 P. 364.

In Meyer's Estate the husband applied for an order on the guardian of the wife, who was insane, to refund out of her estate the amount which he had expended for her support, since she had a large estate, although he was also wealthy. The court, in denying the application, said: "It is the duty of the husband to maintain the wife, whether she be sane or insane; and while he has the ability so to do, resort cannot be had to her estate."

In Shebley v. Peters, supra, which was an action for death of a husband and father, the Supreme Court, in denying a hearing, said 53 Cal.App. at page 293, 200 P. at page 366: "Such support it is the right of every wife and minor child to receive from the husband and father, even if they are not dependent upon him at all, but have ample means of their own."

And in Davis v. Davis, 65 Cal.App. 499, the court said at page 501, 224 P. 478, at page 479: "It is the law that every wife is entitled to demand of her husband a support in accordance with his station in life, even if she be not dependent upon him at all and although she has ample means of her own."

Appellant contends further that before a husband may be relieved from the support of an incompetent wife it must be shown that he is unable himself to provide suitably for that support, and appellant quotes section 1505 of the Probate Code which reads: "If a husband is unable to provide suitably for the support and maintenance of a wife over whose estate a guardian has been appointed by reason of her incompetency, the expense of providing such support or maintenance may, to the extent necessary, be charged against and defrayed out of such estate, as directed by the court or as approved by the court in settling the accounts of the guardian; for this purpose the guardian may sell or mortgage or give a deed of trust upon any of her property as hereinafter provided."

The provisions of said section 1505 seem simple and clear, so it is not surprising that there are no decisions construing it.

Respondent in reply argues that appellant's argument and authorities "do not deal with the kind of situation as exists in the case at bar" and that Probate Code section 1505 is not controlling. Respondent asserts that "our law specifically provides that the support and maintenance of a person committed to a State Mental Hospital shall be paid from the estate of the person so committed." Respondent quotes the first paragraph of section 6655 of the Welfare and Institutions Code which reads: "If any person committed to a State mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance, and necessary expenses at the mental hospital to the extent of the estate. Such payment may be enforced by the order of the judge of the superior court where the guardianship proceedings are pending. On the filing of a petition therein by the department, showing that the guardian has failed, refused, or neglected to pay for such care, support, maintenance, and expenses, the court, by order, shall direct the payment by the guardian. Such order may be enforced in the same manner as are other orders of the court."

Respondent then points out that the second paragraph of said section directs the guardian to sell any property owned by the incompetent person to pay for the latter's maintenance and expenses at the mental hospital. Respondent then goes on to argue that under said section 6655 the guardian is not only directed to use the estate of the incompetent person for the latter's support and maintenance, but that he is directed to do so to the extent of such estate "if such insane person has been declared chronically insane." He then quotes the third paragraph of section 6655, which reads as follows: "Payment for the care, support, maintenance, and expenses of a person at a State hospital shall not be exacted, however, if there is likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital. If a certificate from the medical superintendent of the State hospital in which the person is confined as a patient is filed in the office of the county clerk with the papers in the guardianship proceedings of the patient, in which certificate the medical superintendent states that the patient is suffering from a chronic form of insanity, and that in his opinion a recovery is beyond reasonable hope and that the patient will in all probability continue to be a charge in a State hospital until death, such certificate shall be prima facie evidence that the patient is not likely to recover or to be released from the hospital, and the guardian shall pay the amount due for his care, support, maintenance, and expenses at the hospital and such other charges as are allowed by law out of any moneys of the estate in his possession."

Respondent asserts that under the provisions of said section 6655 "the guardian is authorized to expend all of the estate of an incompetent providing the latter is chronically insane. So long, therefore, as the guardian is administering the estate in accordance with this section, the State Department of Mental Hygiene has neither a duty nor a right to interfere, even if all of the incompetent's property is expended for her support and maintenance." In answer to appellant's statement that the incompetent wife here has a life expectancy of twenty-five years and that at the present rate of expenditure this estate will be exhausted in less than one-third of that time, leaving the State in the probable position of having to provide the full support of the incompetent, respondent argues that this argument is fallacious because section 6650 of the Welfare and Institutions Code gives the State the power to obtain continued support for said incompetent from responsible relatives after the depletion of the estate of the incompetent. Respondent states further that "the position which appellant seeks to sustain would result in a freezing of the funds and property of the chronically insane person, while forcing her relatives to defray her expenses at an institution."

To summarize the contention of respondent, as applied to the undisputed facts of the instant case, it is that, although respondent husband has a gross monthly income in excess of $400, that he has no dependents other than his insane wife, that she has a life expectancy of 25 years and that at the present rate of expenditure for her support her estate will be exhausted in approximately eight years, the department has no right to prevent the depletion of her estate by objecting to the withdrawal from her guardianship estate of the amount required to be paid to the state for her maintenance and has no right to insist that respondent husband, who has the unquestioned ability to do so, fulfill his duty and statutory obligation to support his wife.

[2] We are unable to agree with the contention of respondent. All of the statutory provisions in all of the codes must be read together and harmonized if possible. As stated in In re Porterfield, 28 Cal.2d 91, at page 100, 168 P.2d 706, at page 712, 167 A.L.R. 675: "It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. (Citing cases.)"

[3] As we have hereinbefore pointed out, it is the undoubted duty of the husband to support his wife even though she has estate of her own. This obligation does not cease when she is adjudged insane or when a guardian of her estate is appointed. Section 1505 of the Probate Code specifically provides that if a husband is unable to provide for the maintenance of a wife over whose estate a guardian has been appointed by reason of her incompetency, the expense of her maintenance may to the extent necessary be defrayed out of the guardianship estate. Section 6650 of the Welfare and Institutions Code provides that the husband, wife, father, mother, or children of a mentally ill person, or the guardian of his or her estate, shall be jointly and severally liable for the maintenance of such person in the state institution. Section 6655 provides that if any person committed to a state mental hospital has sufficient estate to pay for his maintenance the guardian shall pay for such maintenance to the extent of the estate; and said section provides further that payment shall not be exacted if there is likelihood of patient's release from the hospital and the payment will reduce his estate to the extent that he will become a burden upon the community, and also that if the medical department certifies that the patient is not likely to recover or be released from the hospital, the guardian shall pay for his maintenance at the hospital out of his estate.

[4–6] We do not believe that the construction placed upon section 6655 by respondent is either required or justified. We do not believe that it was the intention of the legislature to overrule or ignore the provision of the Civil Code establishing the fundamental rights and duties of marriage, the provisions of the Probate Code establishing the rights of wards and the duties of their guardians to protect their interests, the provision of the Welfare and

Institutions Code establishing various sources from which the state may secure payment of the hospital care for incompetents, and look only to one section of the Welfare and Institutions Code as providing the one source from which an incompetent's care may be paid. All of these sections must be considered together, and as stated by our Supreme Court in County of Los Angeles v. Frisbie, 19 Cal.2d 634, at pages 639 and 644, 122 P.2d 526, 529:

> "* * * in construing a remedial statute, like a law concerning the rendition of charitable aid to indigents and recovery therefor, reason must have its just proportion, and in interpreting the expressions employed, the court is free to study the history and purpose of the enactment and the previous state of the legislation on the subject, as well as other statutes *in pari materia* and the benefits sought to be provided. People v. Earl, 19 Cal.App. 69, 71, 72, 124 P. 887.
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> "* * * it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. Lowe v. Yolo County Consolidated Water Co., 8 Cal.App. 167, 174, 96 P. 379; 23 Cal.Jur. 782, sec. 158."

[7, 8] We believe that the reasonable and proper construction of all of the applicable sections is that the husband of a wife who has been committed to a mental institution is primarily liable for her maintenance there to the extent of his financial ability to pay for it; that if she has estate over which a guardian is appointed, he may not draw upon such estate for her maintenance so long as he has the financial ability to pay for same; that it is not only the right but it is the duty of the Department of Mental Hygiene to protect and preserve the estate of a person legally committed to its care; that the Welfare and Institutions Code provides the means and method by which the state may receive payment from the insane person's estate, but this in no way releases the husband from his primary obligation, nor does it prevent the department from making proper objections in the guardianship proceeding to the shifting of said obligation to the guardianship estate.

While there is no decision in California on the precise point involved, a similar contention to the one made by respondent here was rejected by the Supreme Court of Indiana in Aurora Casket Co. v. Ropers, 117 Ind.App. 684, 75 N.E.2d 680, where the court said, at page 682: "This statute did not expressly provide that such provision should relieve the husband for liability of support under such circumstances, nor can we read such intention of the legislature into such statute by implication."

In Re Fox' Will, 1937, 275 N.Y. 604, 11 N.E.2d 777, a wife was committed to a state hospital. For some time the husband paid for her support, but later fell into arrears for eighteen months. The husband was appointed "committee" (guardian) of the estate of the incompetent wife and thereafter he paid for her support out of her estate, while he personally paid nothing. He died and a new committee for the incompetent asked that the estate of the deceased husband be surcharged with the amount paid out of her estate. The court charged his estate as requested and the order was affirmed.

In re Hutcherson's Guardianship Estate, 239 Mo.App. 801, 199 S.W.2d 899, 902, is identical. A wife was committed to a state hospital and her husband was appointed guardian of her estate. He filed an inventory showing her estate to be of the value of $5,086.60, and the court directed that $30 a month be paid out of her estate for her support. The husband, as guardian, filed seven annual accounts and in each he took credit for the amount paid by him to the state hospital for the support of his wife. The husband died and his daughter was appointed administratrix of his estate. Cora Mueller was appointed as a new guardian of the person and estate of the incompetent. The administratrix of the estate of the deceased husband filed a final account of the deceased husband as guardian in which she took credit for two items of $90 each, paid by the deceased guardian out of the incompetent's estate for her support. The new guardian filed exceptions to each of the seven annual settlements made by the husband as guardian and also excepted to the final account, such exceptions being directed toward the items for the support of the incompetent wife at the state hospital. The probate court denied the exceptions, but the circuit court sustained the exceptions and surcharged the deceased husband's estate with $2,703.35. The court of appeals affirmed the decision of the circuit court, and in conclusion said: "In this case the trial court [circuit court] found that the guardian was at all times able to pay for his wife's support at the state hospital. There was ample evidence to support this finding. Such being the case, the court properly surcharged his settlement with the amounts expended from the wife's separate estate." Among other cases the court cited In re Fox' Will, supra.

[9] Appellant next contends that the annual or intermediate accounts of a guardian may be reviewed and corrected at any time before final settlement, and respondent does not dispute the fact that the Probate Court has such power, so we need not prolong this opinion by discussing that question. Nor, in view of the decision in Estate of O'Donnell, supra, can there be any doubt as to the right of appellant, Department of Mental Hygiene, to file its objections to the fourth annual account and its petition to reopen the first three accounts and to disallow the sums charged therein for the hospital care of the incompetent.

No other points raised require discussion.

For the reasons hereinbefore set forth we believe that the court erred in making its orders overruling appellant's objections to the guardian's fourth annual account and in allowing such account, and in denying appellant's petition to reopen and modify the first, second, and third accounts of said guardian. Said orders are reversed, with directions to the probate court to enter appropriate orders in accordance with the views herein expressed.

Hearing denied; SCHAUER, J., dissenting.

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105 Cal.App.2d 840

MUNSON et al. v. CRESCENT COMMERCIAL CORPORATION et al.

Civ. 18088.

District Court of Appeal, Second District, Division 1, California.

Aug. 7, 1951.

Action by John C. Munson and James F. Munson against Crescent Commercial Corporation, and Louis Ziegler Brewing Company, Inc., seeking to have cancelled three written contracts for delivery of beer to plaintiffs by Crescent Commercial Corporation, for declaratory relief, and by common counts to recover monies withheld by defendants. The Louis Ziegler Brewing Company, Inc., filed a cross-complaint. Superior Court of Los Angeles County, William P. Haughton, Judge assigned, rendered judgment for plaintiffs and Louis Ziegler Brewing Company, Inc., appealed. The District Court of Appeal, White, P. J., held that pleadings and evidence sustained judgment cancelling contracts and ordering defendant brewing company to pay plaintiffs $3,300.

Judgment affirmed.

1. Corporations ⚿521

In action to cancel three written contracts for delivery of beer to plaintiffs by defendant corporation and for other relief, where exhibits attached to complaint showed that defendant brewing company stepped into shoes of corporation with which plaintiffs had contracts, and cross-complaint by brewing company alleged that plaintiffs had deposits with brewing company to total of $3,300 by virtue of the three contracts which plaintiff sought to have cancelled, finding that corporation did transfer to brewing company the $3,300 total deposits belonging to plaintiffs, and for which plaintiffs sued for, was within issues.

2. Corporations ⚿518(1)

In action to cancel three written contracts for delivery of beer to plaintiffs by distributing company, for declaratory relief, and by common counts to recover money withheld by distributing company, pleadings and evidence sustained judgment cancelling contract with distributing company, and ordering brewing company which had stepped into shoes of distributing company to pay plaintiffs $3,300 deposited by plaintiffs with defendant distributing company and transferred to defendant brewing company.

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Don Lake, Los Angeles, for appellant.

David A. Matlin, Los Angeles, for respondents.

WHITE, Presiding Justice.

Defendants appeal from a judgment entered after trial before the court, sitting without a jury, cancelling three written contracts for the delivery of beer by the plaintiffs from Crescent Commercial Corporation, and ordering that plaintiffs recover the sum of $3,300.00 and interest from the defendants.

In the first cause of action of the complaint it is alleged that on May 8, 1946, plaintiffs, who were engaged in the retail sale of beer in Los Angeles, entered into an agreement with defendant Crescent Commercial Corporation whereby plaintiffs agreed to purchase 1,800 cases of "eastern" beer at OPA prices, a copy of the agreement being annexed to the complaint; that prior to entering into the agreement said defendant represented that it had five different brands of "eastern" beer and that all five brands would be delivered to plaintiffs in accordance with their request; and further stated that the beer was "good eastern beer"; that plaintiffs entered into the agreement in reliance on said statements. In accordance with the terms of the agreement plaintiffs deposited the sum of $1,800.00 with said defendant.

It was further alleged that in 1946 and 1947 "eastern" beer was designated in the trade as beer manufactured in the eastern part of the United States and was of better quality than "western" beer, and "had a certain defined standard of quality and taste"; that about March, 1947, plaintiffs received complaints from their customers and on investigation ascertained that the beer they were receiving from said defendant was "sour", "cloudy" and "wild", and did not have the taste or quality of "eastern" beer; that said defendant also failed to supply plaintiffs with five different brands of beer, but only one or two brands. That upon complaint being made, said defendant advised plaintiffs that it would replace the beer with a good grade of "eastern" beer, but failed to do so, whereupon plaintiffs notified said defendant that they did not desire any more of its beer. That the written agreement of May 8, 1946, provided that the price of the beer should be at OPA ceiling price; that said defendant had been charging plaintiffs $3.19 per case, but was selling the same beer to others in the city of Los Angeles for $2.19 per case. That defendants have failed to pick up "empties" on plaintiff's hands for which plaintiffs were entitled to a credit of $150.00.

Further, it was alleged, a controversy existed between the parties, in that plaintiffs contended the agreement was unenforceable as there is no definite agreement as to the price to be charged, in that there was no further OPA ceiling price on beer and the defendant contends it can charge any price it desires; and further, that the defendant is not delivering the type of beer commonly known as "eastern" beer, nor delivering five different brands of "eastern" beer, and is not picking up the cases of empty bottles held by plaintiffs.

As a second cause of action it was alleged that the defendants and each of them received the sum of $1,100.00 for and on behalf of plaintiffs; that said sum has not been paid plaintiffs although demand therefor was made, and that the whole thereof is now due, owing and unpaid.

Similar allegations in two causes of action were set forth on behalf of plaintiff James P. Munson alone, and John C. Munson alone.

By a further cause of action on behalf of John C. Munson alone, it was alleged that defendants represented that unless said plaintiff signed a modification of his said agreement that "Crescent Commercial Corporation would forfeit the deposits that they had with them." That the defendants stated that they represented only Crescent Commercial Corporation and demanded that plaintiff sign two agreements represented to be modifications of his agreements with defendant Crescent Commercial Corporation; that in reliance upon such statements plaintiff signed two agreements, copies being annexed to the complaint. That in lieu and in place of the words "Crescent Commercial Corporation" in said agreements appear the words "Louis Ziegler Brewing Company, Inc."; that said plaintiff had no intention of entering into any agreement with the last-named corporation, and would not have executed the last-mentioned agreements but for his reliance upon defendants' representations.

[1] Although the notice of appeal herein was filed on behalf of both Crescent Commercial Corporation and Louis Ziegler Brewing Co., the briefs filed by their counsel purport to be on behalf of Louis Ziegler Brewing Co. alone. It appears to be the argument of appellant Louis Ziegler Brewing Co. that the finding of the court that "on or about May 22, 1947, the Crescent Commercial Corporation did transfer to the Louis Ziegler Brewing Company, Inc., the $3,300.00 total deposits belonging to the plaintiffs as set forth in their several causes of action" is a finding without the issues; that the common counts against Crescent and Ziegler must be considered in connection with the allegations setting out in detail the contracts and facts on which plaintiffs relied; that since such latter allegations do not support any finding against Ziegler, the judgment against it is without support. These contentions cannot be sustained. The exhibits attached to the complaint as part of the seventh cause of action involving the contracts with Ziegler show that, in effect, Ziegler stepped into the shoes of Crescent Commercial Corporation. In a cross-complaint filed by Ziegler it was alleged that the plaintiffs had deposited with Ziegler a total of $3,300.00 by virtue of the three contracts which plaintiff sought to have cancelled. Thus the finding complained of was well within the issues framed by the voluminous pleadings and disclosed by the evidence. No complaint is made that any of the findings, uniformly favorable to plaintiffs, were not supported by substantial evidence. That the balance of $3,300.00 remaining of the funds deposited with Crescent had been "transferred" to Ziegler was testified to by the witness Hamilton, president of Crescent Commercial Corporation, and principal stockholder of Louis Ziegler Brewing Co.

The language relied upon by appellant in Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 489, 110 P.2d 396, 399, that a common count for money had and received, "following allegations setting out in detail the facts upon which appellant relies, must be considered in connection with those facts", is not applicable to the instant situation. In the cited case, the question arose upon a demurrer to the complaint. So, also, in Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248, 1251, where the rule was stated as follows: "It is the established law of California that, if plaintiff is not entitled to recover under one count in a complaint wherein *all* the facts upon which his demand is based are specifically pleaded, *it is proper to sustain a demurrer* to a common count set forth in the complaint, the recovery under which *is obviously based on the set of facts specifically pleaded* in the other count." (Emphasis added.)

[2] Here the situation is one in which plaintiff sought cancellation of certain contracts and declaratory relief in certain causes of action and by common counts sought the recovery of moneys held by the defendants. By the evidence at the trial, as well as by the admission in the cross-complaint of appellant Ziegler, it was shown that the moneys sought to be recovered were in the hands of appellant Ziegler. While the causes of action by the respective plaintiffs against defendant Crescent in declaratory relief may not have set forth facts justifying a recovery against Ziegler, the common counts were utilized for the purpose of recovery of the moneys which had been transferred by Crescent to Ziegler; and the evidence, properly admitted under these counts, fully warranted the court's findings in favor of respondent.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur

106 Cal.App.2d 34

Adoption of WILLIAMS.

Civ. 8065.

District Court of Appeal, Third District.

Aug. 13, 1951.

Proceedings in the matter of adoption of Baby Williams, a minor. The Superior Court, Humboldt County, entered an order denying appellants' motion for new trial following denial of their petition to withdraw consent in the adoption proceedings, and the appellants' appealed. The District Court of Appeal, Per Curiam, held that appellants' failure to appear and oppose respondents' motion to dismiss after due service of notice would be deemed an abandonment of the appeal and authorized its dismissal.

Appeal dismissed.

Appeal and error 🔑801(1)

Appellants' failure to appear and oppose respondents' motion to dimiss appeal after due service of notice of motion could be deemed an abandonment of appeal authorizing its dismissal. Rules on Appeal, rule 41(c).

White & White, Mills, San Francisco, for appellants.

Hill & Hill, Eureka, for respondents.

Clarence A. Linn, Deputy, for Dept. of Social Welfare.

PER CURIAM.

This proceeding arises out of a purported appeal from an order denying appellants' motion for a new trial following the denial of their petition to withdraw consent in an adoption proceeding.

Subsequent to the matter being calendared this court received a communication from counsel for appellants stating that their clients would not prosecute the appeal further nor would they oppose respondents' motion to dismiss the same.

It is therefore readily apparent that appellants' failure to appear and oppose respondents' motion to dismiss after due service of notice of said motion may, as stated in Rule 41(c), Rules on Appeal, "be deemed an abandonment of the appeal [and] authorizing its dismissal", and, as further provided in said rule, "may be deemed a consent to the granting of such motion", and we conclude such to be the situation presented in this proceeding.

For the foregoing reasons respondents' motion is granted and the appeal is dismissed.

REED v. NORMAN et al.

Civ. 18142.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1951.

Hearing Granted Oct. 11, 1951.*

Action by Hoyt Reed against Carl O. Norman and John E. Haskins, directors and officers of the Norman Decorating Co., Inc., a California corporation, to declare the issuance of 255 shares of the corporation's capital stock to the first named defendant and the subsequent election of directors and officers of the corporation void. The Superior Court of Los Angeles County, Robert H. Scott, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that permit issued by Corporations Commissioner authorizing issuance of certificates of ownership for cash did not authorize issuance of stock to named defendants in payment for indebtedness of corporation to him.

Judgment reversed.

1. Licenses 🔑36

Permit issued by Corporation Commissioner authorizing corporation to issue 500 shares of stock for cash did not permit issuance of stock to a defendant in exchange for cancellation of corporation's indebtedness to him. Corporations Code, § 26100.

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* Subsequent opinion 256 P.2d 930, 933.

2. Licenses ⚷36

Permits issued by Corporation Commissioner for sale of stock must be strictly complied with.

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Hy Schwartz, Beverly Hills, for appellant.

Howard W. Hunter, Los Angeles, for respondent.

DRAPEAU, Justice.

Norman Decorating Company, Inc., a California corporation, issued to defendant, Carl O. Norman, 255 shares of its capital stock. Mr. Norman paid $1,500 cash for 150 shares. The other 105 shares were paid for by cancelling indebtedness of the corporation to him.

The corporation issued to Mr. Hoyt Reed, plaintiff, 245 shares, for which he paid $2,500 cash.

The stock was issued in accordance with a permit of the Corporation Commissioner for the issuance of 500 shares of stock of the corporation to Mr. Norman or Mr. Reed, or either of them, at par, for cash, without any commission or compensation.

Later at a meeting of stockholders Mr. Norman and his nominee, the other defendant, John E. Haskins, were elected directors. There were three directors on the board. Then the directors organized and elected Mr. Norman president and Mr. Haskins secretary of the company.

Mr. Reed thus found himself in the minority as a stockholder and director. He brought this action to declare the issuance of the stock to defendant, and the subsequent elections of directors and officers void. From the judgment of the trial court contrary to his contentions he appeals.

While the briefs contain quotations from the testimony, and arguments as to inferences to be drawn from the evidence, the following questions and answers are sufficient to support the findings of the trial court, so far as the acquirement of the Norman stock, 150 shares for cash, and 105 shares for cancellation of indebtedness, are concerned:

"The Court: I see. The books then show that Mr. Norman then had put in $1,500 in cash in February and then had furnished materials up to the 31st of August totaling an additional amount of $5,508.81.

"The Witness: They owed—that is, the corporation owed him for materials to that date.

"The Court: Yes.

"The Witness: He had furnished more materials than that.

"The Court: I see. Therefore, the $1,050 was charged against that account and then the $1,500 was charged against that account?

"The Witness: That is correct.

"The Court: Making a total of $2,550, which would be 255 times 10 or the amount which was the purchase price of the 255 shares of the stock?" (From testimony of the accountant for the corporation.)

The problem presented is whether the words "for cash" in the Corporation Commissioner's permit prohibited the issuance of the 105 shares of stock in exchange for indebtedness of the corporation to Mr. Norman.

At first glance it would seem reasonable to approve the exchange of stock for indebtedness of the company. Section 1109 of the Corporations Code provides that debts cancelled are sufficient consideration for issuance of corporate shares. And in Christy v. Oakland Title Ins. & Guaranty Co., 132 Cal.App. 315, 22 P.2d 737, in construing the application of a commissioner's permit to issue certificates of ownership in a common-law trust for cash for property conveyed to the trust, it was said that the law would not require the idle act of paying cash which would have to be immediately paid back. The thought is stated in a somewhat different way in 18 C.J.S., Corporations, § 240, page 672.

Moreover, it may fairly be argued that when the Corporation Commissioner permitted issuance of the stock in the instant case for cash, he was of the opinion that the corporation was solvent; that being solvent its indebtedness would be paid 100 cents on the dollar; hence no harm was done to anyone.

[1] After careful consideration, however, this Court is of the opinion that it is not the purpose or intent of the corporate securities act of this state to permit any deviation from the literal meaning of the words "for cash" in permits of the Corporation Commissioner. Such deviation would open the door to exchanges of stock for questionable indebtedness; would favor certain creditors against others; would make the administration of the law more difficult; and would afford a means to circumvent the salutary purposes of the legislation. It would require the Corporation Commissioner to add prohibitory clauses in permits in endless detail—all of which will be included in a strict construction of the meaning of the words "for cash."

[2] Permits issued by the Corporation Commissioner for the sale of stock must be strictly complied with. Mannion v. Baldwin, 217 Cal. 600, 20 P.2d 678.

Section 26100 of the Corporations Code provides that every security sold or issued by a company with the authorization of the commissioner, but which has been sold or issued in nonconformity with any provision in the permit authorizing the issuance or sale of the security is void. And see Live Oak Cemetery Ass'n v. Adamson, 106 Cal.App.Supp. 783, 288 P. 29.

No device for the extension of credit is to be permitted in sales of securities. Commercial Building Co. v. Summers, 117 Cal.App. 428, 3 P.2d 1033. Transfers of real property for stock are not for cash, within the meaning of the corporate securities act. Holmquist v. Kent, 219 Cal. 231, 25 P.2d 977. Sales on credit are excluded by this language in permits to sell stock, the word "cash" in its ordinary sense being the antonym of the word "credit". Parrish v. American Ry. Employees' Pub. Corp., 83 Cal.App. 298, 256 P. 590. Sales for which promissory notes are given are void. Gridley v. Tilson, 202 Cal. 748, 262 P. 322. A commissioner's permit specifying that sales of stock shall be for cash expressed exactly his determination upon the facts presented to him; stock issued in exchange for merchandise was not issued in conformity with the permit and was void. Herkner v. Rubin, 126 Cal.App. 677, 14 P.2d 1043.

The judgment is reversed.

DORAN, Acting P. J., and HANSON, J. pro tempore, concur.

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106 Cal.App.2d 21

LINDSTROM v. McREYNOLDS.

Civ. 7926.

District Court of Appeal, Third District, California.

Aug. 13, 1951.

Elmer Lindstrom brought action against V. H. McReynolds to recover for injuries sustained in intersectional collision of automobiles, and defendant filed a cross-complaint to recover for damages to defendant's automobile. The Superior Court of Stanislaus County, Sherrill Halbert, J., entered a judgment denying recovery to either of the parties, and the plaintiff appealed. The District Court of Appeal, Adams, P. J., held that evidence authorized giving of instruction relating to obstructed intersection.

Judgment affirmed.

1. Appeal and error 🔑930(1)

On appeal, evidence was required to be viewed in light most favorable to verdict and judgment.

2. Automobiles 🔑246(56)

In action to recover for injuries sustained in intersectional collision of automobiles, evidence authorized giving of instruction that if jury found that as plaintiff traversed the intersection he did not during the last 100 feet of his approach to such intersection have a clear and unobstructed view of such intersection and of any traffic on all of the highways entering such intersection for 100 feet along all such highways, and that plaintiff approached and entered intersection while driving at speed in excess of 15 miles an hour, such facts were sufficient to constitute prima facie evidence of negligence. Vehicle Code, § 511(a)(4).

Remington Low, San Francisco, C. Ray Robinson, R. A. McCormick and H. F. Hawkins, all of Merced, for appellant.

Vernon F. Gant, Modesto, for respondent.

ADAMS, Presiding Justice.

Plaintiff Lindstrom brought this action against defendant McReynolds, alleging that due to negligence on the part of the latter in the operation of an automobile which he was driving, McReynolds' car collided with the vehicle driven by plaintiff, with resulting injuries to plaintiff for which he sought damages. McReynolds, in answer to plaintiff's complaint, denied negligence on his own part, alleged contributory negligence on plaintiff's part, and in a cross-complaint sought recovery from plaintiff for damages to defendant's automobile.

The jury which heard the evidence returned a verdict in favor of defendant on plaintiff's complaint and in favor of plaintiff on defendant's cross-complaint and denied recovery to either of the parties. From the judgment which followed plaintiff Lindstrom has prosecuted this appeal, the only error relied upon being the giving of an instruction which he claims misled the jury and resulted in a miscarriage of justice.

That instruction is as follows: "If you find that as the plaintiff traversed the intersection of Sylvan Avenue and Coffee Road he did not during the last one hundred feet of his approach to such intersection have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of one hundred feet along all of such highways, and if you further find that plaintiff approached and entered said intersection while driving his vehicle at a speed in excess of fifteen miles per hour, then I instruct you that such facts are sufficient to constitute prima facie evidence of negligence."

It is based upon Section 511(a)(4) of the Vehicle Code, which provides that 15 miles per hour is the limit of speed of a motor vehicle "(4) When traversing any intersection of highways if during the last 100 feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of 100 feet along all such highways, except on a through highway or at a traffic-controlled intersection."

[1] The evidence pertinent to the issue presented on this appeal, viewed, as it must be, in the light most favorable to the verdict and judgment shows the following facts. Near Modesto Coffee Road running north and south is intersected at right angles by Sylvan Way which runs east and west. There are no stop signs at the intersection. On the day of the collision Lindstrom was driving south on Coffee Road toward the intersection and McReynolds was driving west on Sylvan Way, also toward the intersection. McReynolds testified that when he was about 200 yards east of the intersection and traveling at about 35 miles per hour he saw Lindstrom's car, which was then about a quarter of a mile north of Sylvan Way; that he saw it again when Lindstrom was about 500 feet away and he (McReynolds) was about 200 feet away and traveling at about 25 miles per hour; and that he saw it the third time when Lindstrom was but 50 feet away from the intersection and was traveling from 60 to 70 miles per hour; that he (McReynolds) had reduced his speed to about 15 miles per hour and on seeing Lindstrom's near approach put on his brakes, but that the cars collided; and that he was then traveling no more than 1 or 2 miles per hour and Lindstrom's speed was still 60 to 70 miles an hour. The Lindstrom car turned over several times and came to rest 155 feet from the point of impact. McReynolds also testified that while there were trees growing on the

northeast corner of the intersection that one traveling south on Coffee Road northward of Sylvan Way could see traffic on Sylvan Way through the trees.

K. W. Olinger, a highway patrolman, testified that one traveling south on Coffee Road, as Lindstrom was, does not have a clear view of the intersection for the last 100 feet; and Eugene Meyer, another highway partolman, said that Lindstrom could not have seen McReynolds' car on account of the trees on the corner and that the intersection was "blind" for both roads. He did say, however, that one traveling south on Coffee Road, as Lindstrom was, could see between the tree trunks, but that he would not have an unobstructed view.

A Mr. Cruze, who was traveling south on Coffee Road, and intended to turn into Sylvan Way, testified that Lindstrom, traveling from 40 to 45 miles an hour, passed him and that he (Cruze) was 300 to 400 feet away when the collision occurred, at which time he estimated Lindstrom to be traveling at about 50 miles per hour. He said that he saw McReynolds' car on Sylvan Way and watched it because he was going to turn into that road; that he thought Lindstrom would get through the intersection ahead of McReynolds; that one traveling south on Coffee Road, as Lindstrom was, could see Sylvan Way under the tree limbs, but would have to watch very carefully if going fast. A Mr. High, a farmer who resided in the neighborhood and was 250 yards away when he heard the crash, stated that by watching Lindstrom could have seen traffic for 300 yards back of the intersection, but that "your view through the trees there is sort of a dot and dash proposition"; that there were trees growing along the north side of Sylvan Way and that to see the road under the trees you would have to lean down, otherwise you would have broken glimpses of the highway and of traffic approaching on Sylvan Way through and between the trees. Lindstrom himself testified that on the day of the accident he left Riverbank for his home, but his last recollection thereafter was when he was crossing a canal bridge a mile from the intersection with Sylvan Way; and he could tell nothing at all about the facts preceding the accident; that his mind was blank as to what occurred after he crossed the canal bridge a mile away from the intersection.

[2] In view of the foregoing facts we think that the giving of the instruction to which appellant objects was proper. This Court in Hamm v. San Joaquin & Kings River Canal Co., 44 Cal.App.2d 47, 111 P. 2d 940, 947 (hearing in Supreme Court denied), considered comparable facts and the giving of the identical instruction complained of herein, saying: "It is true that he testified his view of Mr. Yoest's automobile was never obstructed. But other witnesses testified that his view of an automobile approaching on Cornelia avenue would be effectively obstructed. That issue presented a question of fact for the determination of the jury. We are bound by the implied finding of the jury in that regard."

Again, in Mize v. Duffy, 106 Cal.App. 15, at page 16, 288 P. 798, at page 799, the court said: "There was a clear conflict in the evidence as to the rate of speed at which appellant was traveling and as to whether the intersection was an 'obstructed' or 'blind' corner. It was the province of the jury to resolve these conflicts."

In Formosa v. Yellow Cab Co., 31 Cal. App.2d 77, at page 87, 87 P.2d 716, at page 721, the court said: "It became a question of fact for the jury to determine whether or not this particular intersection was an obstructed intersection, and the finding of the jury upon this question would determine the speed at which vehicles approaching both from the north and from the south should travel. It was therefore proper for the trial court to instruct the jury as to the relative speed limits in approaching an intersection that was obstructed and also approaching the same intersection where the view was not obstructed."

While it may be true that there was evidence tending to show that the intersection was not a blind one, such evidence created only a conflict which was for the jury to resolve and we, therefore, conclude that there was no error in giving the instruction of which complaint is made.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

106 Cal.App.2d 16

PEOPLE v. DUNCAN.

Cr. 4620.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1951.

Paul Jerry Duncan was convicted in Superior Court of Los Angeles County, Otto J. Emme, J., of robbery and he appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Criminal law 🔑747

Where evidence is in sharp conflict, the issue thus raised is for the jury or the court to decide.

2. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction for robbery.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant and one Andrade were charged with robbery. Andrade pleaded guilty. Appellant was adjudged guilty, by the court, a jury having been waived. The appeal is from the judgment.

It is contended on appeal that the evidence is insufficient to support the judgment.

Briefly the record reveals that two men armed with revolvers entered the store of Simon Dershowitz. As recited in respondent's brief, Dershowitz testified, "that at about 3:15 in the afternoon of July 25, 1950 two men came to his store with guns and that his wife, who was in the store with him ran out of the store and that one of the men ran after her and then came back with the gun and hit the witness on the head with the gun. Before the witness was hit, one of the men said to him, 'Money, money, money, money, * * * quick.'; that then the witness was hit in the head with a gun and that he opened the cash register. The witness then lost consciousness and when he recovered his consciousness he found that the bills were gone from his cash register. He testified that the money in the register was in the sum of approximately $70. The witness testified that because of the injury to his head he was required to go to the hospital and that he was treated.

"Mr. Dershowitz testified that one of the men was the defendant Andrade and that it was the other man who hit him on the head. The witness testified that he did not see the defendant Duncan.

"The wife of the preceding witness, Pauline Dershowitz, testified that she was in the liquor store on the afternoon of July 25th and that she saw the men enter the store; that one of the men had a gun in his hand. She testified that one of the men was the defendant Andrade; that Andrade did not have a gun; that Andrade said, 'It is a stickup'. She testified that she ran out of the store and into the drug store next to the liquor store and asked them to call the police. She testified that as she was coming out of the drug store the men were coming out of the liquor store and entering the car; that the car was parked in front of the drug store and that it was a red car."

The clerk in the drug store obtained the number of the car. The police were notified and the car traced to the owner Beverly Garcia. "She testified that she knew the defendant Paul Jerry Duncan and that he borrowed her car on the afternoon of July 25 because something had happened to his car. She testified that she agreed to lend the car; that she gave him the key to the car around 1 o'clock in the afternoon; that she next saw the car around 3 or 3:30 and that the car was parked in front of her house".

Officer Killeby testified that in a conversation with appellant, "defendant Duncan stated that he borrowed the car from Beverly Garcia and that he had gone with the other boys, Kinsinger and Andrade and another one known only as Bob, to the liquor store on Eastern Avenue; that the defendant Duncan said that he didn't know they were going to hold up the store; that he said, 'All that I overheard was that they were going over to look it over, but I did not know that they were going to hold the store up.' The police officer then asked the defendant Duncan where he was during the holdup and Duncan said, 'I was across the street when they first started in'; that then Duncan said that he walked across the street and went into the drug store and when all the commotion started he ran out; that he got scared and jumped in the car; that Duncan said, 'I wasn't going to go back to the car with the fellows', but, 'When the commotion started I got excited and run and jumped in the car.'; that Duncan said they drove away from the place. * * *

"On cross-examination the officer stated that Duncan surrendered himself at the police station; Officer Killeby then was asked if Duncan told him he had received any money from the holdup and the officer testified that the defendant said, 'Well, yes. I did get $10, but that was money that Kinsinger owed to me.' On cross-examination the officer was asked if Duncan had told him that he didn't know they were going to hold up the store and the officer testified, 'He told me that they were going over to case the store, look it over.'"

Two girls testified that they were across the street from the liquor store at the time of the robbery and that defendant was across the street and "kept watching these other two that went into the liquor store and as they started to come out of the liquor store the boy that was across the street ran into the car and then the two of them that were in the liquor store got into the car and drove away down the street".

[1, 2] It is evident from the foregoing that the evidence for the defense was in sharp conflict with that relied on by the prosecution. It is well settled that in such circumstances the issue thus raised is for the jury or the court to decide. That the evidence is sufficient to support the judgment there can be no question for which reason the judgment must be and is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

105 Cal.App.2d 752

McKENNA v. PING et al.

Civ. 17945.

District Court of Appeal, Second District, Division 3, California.

July 31, 1951.

Rehearing Denied Aug. 24, 1951.

Hearing Denied Sept. 27, 1951.

Action by Catherine A. McKenna against Marie Ping, and others, to quiet title to realty in which Peter D. Miller and Spero Kraieff filed cross-complaint based on title by tax deed. The Superior Court of Los Angeles County, William S. Baird, J., entered judgment for cross-complainant Miller, and plaintiff appealed. The District Court of Appeal, Wood, J., held that plaintiff's proceeding was barred by statute requiring proceeding based on alleged invalidity of deed to state for taxes to be commenced within one year after date of recording of deed in county recorder's office, even though plaintiff was in possession under quit claim deed from grantee of original tax delinquent owner, since plaintiff was not owner in possession within meaning of general rule precluding running of limitation statute

as to quiet title actions against one in possession of land.

Judgment affirmed.

1. Taxation ⚷810(3)

In action to quiet title to realty in which plaintiff contended that deed from county to state in defendant's chain of title was void because notice erroneously stated period of redemption which was less than five years and that property was not sold at public auction as required by statute, there was no evidence that such erroneous notice had been given or that property had not been sold at public auction. Political Code 1937, § 3771a.

2. Taxation ⚷788(5)

A tax deed from county to state is primary evidence that at proper time and place property was sold as prescribed by law and by proper officer. Revenue and Taxation Code, § 3517.

3. Taxation ⚷688

Tax validation acts apply to all tax proceedings consummated prior to respective effective dates of such acts.

4. Limitation of actions ⚷44(1)

It is general rule that limitation statute with respect to action to quiet title does not run against one in possession of land and person in possession cannot be required, under penalty of forfeiture, to bring action against one claiming adverse interest or title to such property

5. Limitation of actions ⚷44(1)

General rule that limitation statute with respect to action to quiet title does not run against one in possession of land was inapplicable to one in possession who took quitclaim deed from grantee of original tax delinquent owner four years after property had been deeded to state, and consequently action to quiet title, based on alleged invalidity or irregularity of deed to state for taxes, which was not commenced within one year period required by limitation statute, was barred. Revenue and Taxation Code, § 3521.

6. Dismissal and nonsuit ⚷60(1)

Under statute providing that proceeding contesting validity of tax deed or tax sale shall be dismissed by court on motion of defendant after due notice to plaintiff or by court upon its own motion, unless action is brought to trial within one year after filed except when parties have stipulated in writing that time may be extended, it is mandatory that action be dismissed when not brought to trial within period specified unless parties make written stipulation. Revenue and Taxation Code, § 3638.

7. Taxation ⚷799

Where plaintiff in quiet title action attacked validity of tax sale and tax deed and relied upon two actions filed by plaintiff against state prior to tax sale as depriving state of authority to issue deed while actions were pending but neither of such actions had been brought to trial although pending for several years and no explanation was offered for failure to bring such actions to trial, nor was there stipulation in writing between parties extending time, court was entitled, in view of statute requiring dismissal in such actions unless brought to trial within one year, to disregard such actions. Revenue and Taxation Code, §§ 3618, 3619, 3621 et seq., 3638.

◆

Catherine A. McKenna, in pro. per.

Ralph Burns, Huntington Park, for respondent.

PARKER WOOD, Justice.

In this action to quiet title to real property, plaintiff based her claim of title upon a quitclaim deed, dated May 17, 1942, from Herman A. Paulk and Mary Agnes Paulk, husband and wife. Defendants Peter D. Miller and Spero Kraleff filed a cross-complaint to quiet title, basing their claim of title on a tax deed dated May 13, 1944, from the Tax Collector of Los Angeles County to Peter D. Miller and Spero Kraleff. After the filing of the cross-complaint and before the trial, Kraleff quitclaimed to Miller all his interest in said property, which quitclaim deed was dated September 27, 1945. It was adjudged that defendant and cross-complainant Miller is the owner of the real property, and that plaintiff and cross-defendant has no right, title or interest therein. Plaintiff appeals.

The property was assessed for taxation in 1932. The taxes levied under that assessment ($148.33) were not paid, and on September 2, 1933, the property was sold to the state by operation of law for $160.68, which amount included the taxes, penalties, and costs. On July 1, 1938, the property not having been redeemed, the Tax Collector of Los Angeles County conveyed the property by grant deed to the State of California.

In 1932, the property was owned by George W. Bahe. In 1937, he conveyed the property to Herman A. Paulk. As above stated, on May 17, 1942, Mr. and Mrs. Paulk quitclaimed the property to plaintiff. Mr. Paulk testified that he quitclaimed the property to plaintiff in satisfaction of a debt of approximately $100 or $150 that he owed her on some legal matters.

[1–3] Appellant contends that the deed to the state, dated July 1, 1938, was void because: (1) it was executed less than five years after the sale to the state on September 2, 1933; (2) the notice stated that the property would be deeded to the state if not redeemed on or before July 1, 1938—thereby the 5-year period of redemption was shortened 64 days; (3) and the property was not sold at public auction as required by section 3771a of the Political Code. The fact that the sale to the state was made on July 1, 1938, (before the expiration of five calendar years from September 2, 1933), did not make the deed void. A statute enacted in 1933, Stats.1933, p. 1520, authorized such a sale on July 1, 1938. Markowitz v. Carpenter, 94 Cal.App.2d 667, 672, 211 P.2d 617; Elbert, Ltd. v. Nolan, 87 Cal. App.2d 24, 26, 27, 196 P.2d 88. Appellant does not cite transcript references in support of her assertion that the notice of sale recited that the property would be deeded to the state on July 1, 1938, or in support of her assertion that the property was not sold at public auction. We do not find any evidence to the effect that such a notice was given or that the property was not sold at public auction. A tax deed to the state is primary evidence that "At a proper time and place the property was sold as prescribed by law, and by the proper officer". Pol. Code, sec. 3786, subd. 5, now in substance Revenue & Taxation Code, sec. 3517. In Bell v. Towns, 95 Cal.App.2d 398, 213 P.2d 73, it was contended that tax deeds were void for failure to recite therein that the property was sold to the highest bidder. It was said therein, 95 Cal.App.2d at page 400, 213 P.2d at page 75:

> "None of these alleged procedural errors or defects, if any in fact exists, is jurisdictional. If any occurred it is such as has been cured by the Curative Acts. * *
>
> "A tax deed to the State is prima facie evidence of the regularity of certain of the tax proceedings and conclusive as to all others from the levy of the assessment to the execution of the deed."

The Curative or Tax Validation Act of 1943, St.1943, p. 1993, is applicable to the present case. The tax validation acts apply to all tax proceedings consummated prior to the respective effective dates of the acts. City of San Diego v. Alpha Securities Corp., 99 Cal.App.2d 246, 250, 221 P. 2d 770.

[4, 5] The present action was commenced on May 7, 1945. Defendant alleged in his answer that the plaintiff's cause of action against the tax title of defendant is barred by the provisions of section 3521 of the Revenue and Taxation Code. That section provides: "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later." As above shown, the present proceeding is based on the alleged invalidity of the deed to the state dated July 1, 1938. It therefore appears that this action was not commenced within one year after June 1, 1941, but was commenced about four years after that date. Appellant argues, however, to the effect that her action was not barred by the provisions of section 3521, since defendant claims title under a tax deed dated May 13, 1944, and since her action

herein was filed within one year thereafter, namely, on May 7, 1945. It is to be noted that the deed referred to in said section is the deed "to the State." Appellant argues further to the effect that since she was in possession of the property her action was not barred by the provisions of said section. She asserts that at the time she commenced her action she was in possession of the property through her tenants. It appears to be a general rule that a limitation statute, with respect to an action to quiet title, does not run against one in possession of land, and a person in possession of land cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property. See Tannhauser v. Adams, 31 Cal.2d 169, 175, 187 P.2d 716, 5 A.L.R.2d 1015. "[T]he rule of inapplicability of statutory limitation has been said to apply as to owners who because of their possession could not be assumed to have actual knowledge of claims of adverse interest by persons not in possession." McCaslin v. Hamblen, 37 Cal.2d 196, 231 P.2d 1, 3. In the case last cited it was said: "Assuming that the rule might have application in a case where the plaintiff is the original tax-delinquent owner in undisturbed possession, it would seem right to conclude that a generalization applicable merely to 'owners in possession' is too broad. The plaintiffs are not the original tax-delinquent owners. They took conveyances of the parcels from the tax-delinquent owner after sale to the city and subject to the city's rights."

In the present case, appellant was not the original tax-delinquent owner. The owner in 1932, when the taxes became delinquent, was Mr. Bahe. He conveyed the property to Mr. Paulk in 1937. The property was deeded to the state in 1938, and Mr. Paulk quitclaimed the property to appellant on May 17, 1942. It thus appears that appellant took the quitclaim deed from a grantee of the original tax-delinquent owner about four years after it had been deeded to the state and subject to the state's rights. Mr. Paulk, the grantee of the original tax-delinquent owner, was in possession of the property for approximately a year after June 1, 1941 (14 days less than a year). It also appears that the one-year limitation period referred to in said section 3521, except for 14 days thereof, had expired when appellant took the quitclaim deed from Mr. Paulk. Appellant was not an owner in possession under such circumstances that the limitation statute was not applicable to her. The action of appellant was barred by the provisions of said section 3521 of the Revenue and Taxation Code.

Appellant also asserts, as a basis for the present action, that she "redeemed the land and tendered the tax" by filing an action against the State of California, No. 487150, on July 28, 1943, and by filing another action against the State of California, No. 493202 on May 11, 1944. She asserts that by those actions she redeemed the property under the provisions of "Sections 3618, 3619, 3621, et seq." of the Revenue and Taxation Code. These sections so referred to are in chapter 5.7 of the Revenue and Taxation Code, which chapter is entitled (In Deering's California Codes) "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed". Section 3620 of that code provides: "The owner of any real property deeded to the State for taxes * * * or any other person who may redeem such property, may bring an action in the superior court * * * to contest the validity of the tax sale or the tax deed to the State." Section 3631 of that code provides: "[T]he court shall render its interlocutory decree requiring the payment, within six months after the interlocutory decree becomes a final judgment, of the amount of taxes, computed as of the date of payment, without interest, penalties or costs thereon. The interlocutory decree shall declare that if payment is not made within such six months period, a final decree shall be rendered, quieting the State's title under the tax deed as to tax-deeded property." It may be stated generally that in said actions appellant sought an interlocutory judgment as follows: That the tax deed was void; determining the amount of delinquent taxes; that she should have six months after entry of the decree in which to pay said amount; and that upon making such payment she should have a decree quieting title in her favor against the state. In the second action last above referred to appellant alleged that the state had collected $1,272 "from the said property" and that she is entitled to have said sum applied as a credit on account of the taxes to be paid by her for redemption of the property. (On July 22, 1943, the tax collector furnished to appellant a writing stating the estimated amount to redeem the property was $1,358.22.)

[6, 7] Appellant recorded a notice of lis pendens on May 11, 1944, the date the second action was filed. She contends that when defendant Miller purchased the property at the tax sale on May 13, 1944, he took the tax deed with notice of the pending action which was filed on May 11, 1944; that the tax collector also had notice of that pending action and had no authority to issue the deed to defendant Miller while such action was pending; and that defendant Miller did not acquire any interest in the property by reason of that deed. The original files in the superior court in said two actions, last above referred to, were introduced in evidence by appellant. The only document in the file of the said first action is the complaint. The only documents in said second action are the following: Complaint; a summons showing return of service on some defendants; five amendments to the complaint alleging the true names of defendants sued under fictitious names; and another summons showing return of service on some defendants. Neither of said two actions has been brought to trial. Section 3638 of the Revenue and Taxation Code provides: "Any proceedings heretofore or hereafter commenced under this chapter shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant after due notice to plaintiff, or by the court upon its own motion, unless such action is brought to trial within one year after the plaintiff has filed his action, except where the parties have stipulated, in writing, that the time may be extended. Section 583, Code of Civil Procedure shall not apply to actions commenced under this chapter." There is nothing in the files of said two actions to indicate that the parties stipulated in writing that the time for the trial of either of said actions be extended. If the parties did so stipulate, appellant should have proved that such stipulations had been made. At the time of the trial herein on July 26, 1949, one of said actions had been pending about six years, and the other one had been pending about five years. Appellant, who introduced the said files and relied upon them as proof of actions pending, made no attempt to prove any excuse for the failure to bring the actions to trial. Since neither action has been brought to trial, and since there was no proof that the one-year period within which the actions should be brought to trial had been extended, it was mandatory that the actions be dismissed. A similar code provision with reference to dismissing an action that has not been brought to trial within a specified time is the third sentence of section 583 of the Code of Civil Procedure, which reads: "Any action * * * shall be dismissed by the court * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended". It has been held that such a provision is mandatory and does not admit of the exercise of discretion on the part of the trial court. See Cruse v. Superior Court, 102 Cal.App. 290, 294, 283 P. 73. In view of the fact that the said two actions had been pending for several years and no explanation was offered relative to appellant's failure to bring the actions to trial, the trial court was not required to regard them as pending actions which might result in a determination that appellant had an interest in the said property. The court was justified in disregarding them.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

105 Cal.App.2d 548

PEOPLE v. KOBEY et al.

Cr. 4564.

District Court of Appeal, Second District,
Division 2, California.

July 18, 1951.

Hearing Denied Aug. 16, 1951.

Marvin Kobey, Phillip Cobert, Harry Kogus, Donovan Himebaugh, Harry Conn, Nathan Kletnick, John Buford, Albert Kogus and others were convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., for conspiracy to violate the bookmaking statutes and the named defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained the convictions.

Judgments affirmed.

1. Conspiracy ⚷47

Evidence sustained conviction of defendants for conspiracy to violate bookmaking statutes. Pen.Code, §§ 321, 337a.

2. Criminal law ⚷511(3)

Circumstantial evidence suffices to furnish corroboration of accomplices needed to implicate defendants. Pen.Code, § 1111.

3. Criminal law ⚷510½, 511(1)

Proof of relationship of parties, their conduct and statements during and after crime are competent, and if jury finds that such facts indicate the parties' knowledge of criminal acts while in process, such finding will suffice to corroborate accomplices, and such evidence is sufficient if it tends only slightly to implicate accused, and where it is inculpatory it is not essential that it extend to every detail related by accomplices. Pen.Code, § 1111.

4. Criminal law ⚷512

In prosecution for conspiracy to violate bookmaking statutes, corroborative testimony of accomplices of defendants was sufficient to sustain convictions. Pen.Code, §§ 321, 337a, 1111.

5. Criminal law ⚷404(3)

In prosecution for conspiracy to violate bookmaking statutes, records and equipment identified as bookmaking paraphernalia found at defendants' place of business were admissible against all defendants, and fact that defendant, in whose immediate possession they were found, was acquitted of conspiracy charges did not alter force of such company records as proof against his principals. Pen.Code, §§ 321, 337a, 1111.

6. Criminal law ⚷510½

In prosecution for conspiracy to violate bookmaking statutes, books and records of defendants were properly received in evidence as another link in chain tending to prove defendants' participation in the conspiracy. Pen.Code, §§ 321, 337a, 1111.

7. Conspiracy ⚷47

In prosecution for conspiracy to violate bookmaking statutes, evidence wherein it was shown that neither of four of the defendants had ever denied that he was engaged in bookmaking when accused and none of them denied their connection with the bookmaking organization, and proof of arrangement of several offices of companies and partnerships, of telephones, scratch sheets and other paraphernalia commonly used only by bookmakers, sustained conviction. Pen.Code, §§ 321, 337a.

8. Conspiracy ⚷28

In prosecution for conspiracy to violate bookmaking statutes, fact that defendants maintained and occupied an enclosure with paraphernalia used for recording bets on horse races was sufficient without necessity of showing a race was actually run. Pen. Code, §§ 321, 337a.

9. Criminal law ⚷472, 1169(9)

In prosecution for conspiracy to violate bookmaking statutes, refusal to strike testimony of a witness who was a lawyer and trained accountant that a certain item which appeared on weekly disbursement records of defendants under designation "JC" represented a cash outlay for protection from law enforcement officers, when witness testified as to basis of his opinion, was not error, and in view of the other evidence, if there was error, it was not prejudicial. Pen.Code, §§ 321, 337a.

10. Criminal law ⚷1144(15)

In prosecution for conspiracy to violate bookmaking statutes, where, after admission of testimony of witness, who was a lawyer and an accountant, that certain amount which appeared on weekly disbursement records of defendant represented a cash outlay for protection from law enforcement officers, court advised jury in charge that they were not bound to accept opinion of any expert but only to give to it such weight as that to which they deemed it to be entitled and to disregard it if they found it unreasonable, jury was presumed to have followed court's advice and to have exercised its discretion soundly. Pen.Code, §§ 321, 337a.

11. Criminal law ⚷1137(8)

Where, after regular jurors were sworn to try cause, and prior to time an alternate juror had taken oath to serve, one of the regular jurors was excused pursuant to stipulation of defendants' attorneys, and pursuant to stipulation defendants' attorneys examined and accepted excused juror's successor, if there was error, in refusing to discharge jury on removal of one of the regular jurors, defendants could not complain of what they had caused trial court to do. Pen.Code, § 1123.

12. Criminal law ⚷1030(1)

Before a party may successfully take advantage of behavior of trial court, he must have objected, protested and assigned conduct as prejudicial in order that court may correct asserted error.

13. Criminal law ⚷822(13)

In prosecution for conspiracy to violate bookmaking statutes, giving of instruction relating to proof of conspiracy by means of circumstantial evidence which told jury that it could consider what occurred at or before or subsequent to formation of conspiratorial agreement to determine whether in fact it did exist, in view of entire charge given, was not error. Pen. Code, §§ 321, 337a.

14. Conspiracy ⚷47

It is not necessary to establish a conspiracy to show directly that parties actually closeted themselves, attained proverbial meeting of the minds and agreed to undertake unlawful acts.

15. Conspiracy ⚷45

In determining whether an agreement was unlawful triers of fact may consider events that occurred at or before or subsequent to formation of agreement, and from proof of occurrences beforehand and at time of agreement, linked with evidence of overt acts, a jury may determine that a criminal conspiracy was formed.

16. Criminal law ⚷810

In prosecution for conspiracy to violate bookmaking statutes, there was no conflict between instruction that jury could consider what occurred at or before or subsequent to formation of conspiratorial agreement to determine whether in fact it did exist, and instruction which advised jury that no act or declaration of any conspirator should bind another until a conspiracy had been proved to have existed at time of declaration and no defendant should be responsible for act of an alleged conspirator when only substantial evidence of an agreement between them was evidence of acts and declarations of the latter, and because at defendants' request same instruction was given, no error resulted from giving of that instruction for the people. Pen.Code, §§ 321, 337a.

17. Conspiracy ⚷48

In prosecution for conspiracy to violate bookmaking statutes, giving of instructions that term "bookmaking" as used in indictment meant the making of a betting book and included the taking and receiving of bets and wagers, and recording and registering of bets and wagers, keeping and occupying of any room and building with books and papers, devices and paraphernalia for purpose of registering and recording bets and wagers upon results or purported results of any trial or purported trial or contest or purported contest of skill, speed and power of endurance of beasts, to wit, horses, was not error. Pen.Code, §§ 321, 337a.

18. Criminal law ⚷772(2)

In prosecution for conspiracy to violate bookmaking statutes, instruction that defendants were accused of effecting a conspiracy to engage in pool selling and bookmaking with and without writing was not erroneous as charging more than one offense or for failure to advise jury as to specific charge against defendants. Pen.Code, §§ 321, 337a.

William B. Beirne and David H. Cannon, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Joseph T. Powers, Deputy Dist. Attys., Los Angeles, for respondent.

MOORE, Presiding Judge.

Defendants appeal from judgments entered pursuant to verdicts of guilty as charged under an indictment for conspiracy to violate sections 337a and 321 of the Penal Code. They demand reversal on the grounds of the insufficiency of the evidence, errors in receiving certain evidence and errors in giving specified instructions.

The evidence introduced at the trial demonstrates conclusively that appellants were all participants in a vast bookmaking conspiracy which operated in the Los Angeles area for a period of several years prior to the date of the indictment, filed November 17, 1949. The bookmaking organization was carried on behind the trappings of three ostensibly legitimate business entities, to wit, Guarantee Finance Co., a corporation, Guarantee Discount Co., a partnership, and the Colby Collection agency, an apparent partnership. All of such agencies, partnerships, organizations and companies are herein referred to collectively as the "group," "company," "organization," or "enterprise."

Headquarters for the conspirators and for the above concerns was located in a two-story business building on Florence Avenue in the suburbs of the city of Los Angeles. Offices for the finance and discount companies were on the ground floor at number 1747, while next door at 1749 was the office of one Handley, resident accountant for the organization. Handley was named defendant in this action, but won an acquittal. Colby Collection Company records were found at both addresses. The upstairs of the building is a large loft room or hall unoccupied except for one end where a large-scale "phone spot" bookmaking enterprise was conducted with telephones, tables, betting marker racks and the usual paraphernalia for recording wagers on horse races. Access to the loft was gained from a separate entrance at 1747½.

The telephones there were listed on telephone company applications in the fictitious names of a number of firms ranging from a cabinet maker to one "Stone's Service Station"; but these numbers were listed in the records of the bookmaking organization.

Appellants Kobey, Cobert, Harry Kogus and Albert Kogus were the four principals in the organization, being partners in both the Discount Company and Collection Agency. Kobey and Cobert were president and secretary respectively of the Guarantee Finance Company.

The enterprise had in its employ a number of men and women whose duties consisted of recording wagers telephoned to any of a number of so-called "phone spots" located throughout the county. Also affiliated with the organization were some 118 "agents" who operated throughout Los Angeles County. Included among them were appellants Conn, Kletnick and Buford. The latter were on a quasi-partnership basis with the organization, soliciting wagers from the public and sharing profits and losses on a 50–50 basis with the central group. The agents were furnished telephone numbers by the company which they in turn passed on to their customers. By the use of a number so supplied the customer called in to the agent his wagers on horses running on the various race tracks throughout the United States. The usual procedure was for the bettor to place his wager on a particular steed, identifying himself by a first name or nickname and identifying his agent by his first name or a given symbol.

Detailed records of the betting were kept at the headquarters of the group where a daily and weekly accounting was made with the agents who then paid off winning customers or, as was more often the case, collected the wagers from the losers. Customers who became in arrears on their accounts were taken to Guarantee Finance Company where a loan was conveniently arranged. However, the funds loaned were immediately transferred to the Discount Company and the agent's account credited conditionally.

The Testimony

There was no want of evidence to warrant the conviction of appellants. The industry and intelligence of the District Attorney and the other law-enforcing agencies examined every avenue leading to the heart of the "organization."

1. The first group of witnesses consisted of representatives of the Division of Corporations who made the initial investigation of the Finance Company's operations at its office on Florence Avenue on January 27, 1949. Voluminous records revealing the bookmaking activities of the several entities of the group were discovered, segregated and later seized under subpoena from the Governor's Crime Commission.

The witnesses identified the numerous documents discovered at both ground floor addresses, testified as to admissions made by the accountant Handley that his employer was a large bookmaking organization, related the admissions of Kobey and Cobert as to their own bookmaking activities, and told of their offer to surrender their personal property broker's license on condition that the investigation be discontinued.

One investigator testified as to the unusually small number of loans handled by the finance firm, and that of these loans a large number were unsecured or wage assignment transactions. The excess of the number of loans without security and of those secured by assignments of wages was so suspicious as to create the atmosphere of a criminal enterprise.

2. Members of the vice squad of the Los Angeles Police Department, qualified as experts, identified much of the seized material as being paraphernalia commonly used by bookmakers in Los Angeles. Also, they established that betting markers and detailed records of wagers on horses then racing throughout the country were in common use by men or groups of men engaged in bookmaking. Some of these same police officers testified to their having previously visited the upstairs telephone spot, of having gained access thereto through a rear window which was subsequently barred by the occupants. Police Lieutenant Fisk gave his opinion that the bookmaking industry was in full swing at the time of his investigation which opinion he based upon the presence of telephones, betting markers and numerous worksheets in the loft at 1747½. He testified also that he later had a meeting with appellant Kobey at which time the latter admitted being engaged in bookmaking. Police Lieutenant Wellpott also testified to a meeting with Kobey and to similar admissions.

3. Two other police officers testified to their having apprehended defendant Himebaugh one night in Los Angeles and that he was then in possession of a quantity of bookmaking materials. Appellant Kobey later communicated with Lieutenant Wellpott and sought to recover possession of this paraphernalia.

4. Another group of important witnesses consisted of former employees of the organization. All of them had worked at the various "phone spots" and testified as to the *modus operandi* of the enterprise in receiving and recording wagers, how they had been hired by one of the principals of the organization and how often they had seen one or more of the appellants in and about the phone locations, how they had been paid their weekly salaries in cash and that the Colby Collection Agency was their listed employer who would furnish them withholding-tax statements.

5. A number of former "agents" of the enterprise testified in detail as to their functions in procuring customers to place wagers, as to the procedure used in placing the bets with the central group and of the periodic accounting for profits and losses, and as if to weave about appellants their own winding sheet, one Sackman, their tax consultant, testified as to the income of many of the principals of the enterprise and of certain damning admissions by them.

6. A number of former customers testified concerning their betting transactions with agents of the organization, identified appellants Kletnick, Conn and Buford as their particular agents and related incidents and circumstances of such nature as to identify these men as instrumentalities of Guarantee Finance Company. They detailed also the procedure followed in obtaining

loans from Guarantee to pay off gambling debts incurred.

7. A telephone company official testified as to the applications of appellants for listings of telephones at the Florence avenue address. The witness Charles H. Manaugh, accountant for the Crime Commission had made an examination and analysis of the books and records seized at the Florence avenue headquarters. He traced a transaction involving a loan to a customer who had been unable to pay his gambling losses. He testified also that the business of the bookmaking organization and that of Guarantee Discount Company were substantially the same. His disclosures with regard to protection pay-offs will constitute an illuminating page in this discussion.

[1] Without unduly extending this report of a shocking chapter of a vice-protected rendezvous, suffice it to say that an abundance of evidence establishes that all of the appellants were parties to a grand-scale bookmaking conspiracy. It can hardly be seriously contended otherwise when there is virtually no conflict in the record inasmuch as appellants offered no witnesses in their behalf and not one of them ventured to testify on behalf of himself or his associates or to challenge the testimony of a state witness. However, they do contend that any evidence establishing a conspiracy was supplied only by testimony of those who had served as agents of the organization and that they were accomplices whose testimony was not corroborated.

Ample Corroboration

[2, 3] Such contention is archaic. Under Penal Code, Section 1111, the corroborating evidence need only tend in some slight degree to implicate the defendants. Circumstantial evidence suffices for this purpose. Proof of the relationship of the parties, their conduct and statements during and after the crime are competent and if the jury finds that such facts indicate the parties' knowledge of the criminal acts while in process—such finding will suffice to corroborate accomplices. People v. Griffin, 98 Cal.App.2d 1, 24, 26, 219 P.2d 519, and authorities there cited. Such evidence is sufficient if it tends only slightly to implicate the accused and where it is inculpatory it is not essential that it extend to every detail related by the accomplices. Ibid.

[4–6] The corroborative proof in support of the "agents" was ample. The witness Pearce, assistant commissioner of corporations, related that Kobey and Cobert told him: "We are bookmaking. You have got the dope. You caught us with our books all mixed up and what is the use of going on with the hearing?" He also testified that in the presence of the four principal appellants, Sackman told them they were foolish because he warned them not to mix their other business with that of the finance company; that they were caught and now they were crying over spilt milk. At the hearing conducted by Mr. Pearce, despite the accusations that the group were bookmaking, not one denial came from any appellant. Moreover, the presence of the records and equipment identified as bookmaking paraphernalia supplied additional corroborative evidence. These records were found at appellants' place of business and were admissible against all defendants. People v. Steccone, 36 Cal.2d 234, 223 P.2d 17. The fact that Mr. Handley, in whose immediate possession they were found, was acquitted of conspiracy charges does not alter the force of such company records as proof against his principals. People v. Ross, 100 Cal.App.2d 116, 121, 223 P.2d 85. Concerning his preparation of the partners' tax reports Sackman testified that he told his clients that he needed facts and figures as to their income in order to complete proper tax returns. They replied that such figures could not then be procured because "their books and records" were in the custody of law enforcement officers. The records were properly received in evidence as another link in the chain tending to prove appellants' participation in the conspiracy. People v. Steccone, supra, 36 Cal. 2d 234, 223 P.2d 17.

Sufficiency of the Evidence

[7, 8] Appellants contend that there is "no evidence on which the convictions of Himebaugh, Conn, Kletnick and Buford can stand." In view of the evidence given above where it is shown that (1) no ap-

pellant ever denied that he was engaged in bookmaking when accused and (2) none of them denied his connection with the organization, it cannot reasonably be held that the evidence was insufficient. People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1; People v. Allen, 22 Cal.2d 191, 192, 137 P.2d 439. The facts impliedly found and recited in the statement of the case place the judgment of conviction beyond suspicion. The proof of the arrangement of the several offices of the companies and partnerships, of the telephones, scratch sheets and other paraphernalia commonly used only by bookmakers render it inappropriate to doubt the veracity of those appellants who admitted they were bookmakers. The circumstances established, the admissions made and a total lack of evidence on behalf of appellants were sufficient to justify the judgments. See People v. Jerman, 29 Cal.2d 189, 196, 173 P.2d 805; People v. Warnick, 86 Cal. App.2d 900, 902, 195 P.2d 552, and authorities there cited. The fact that they maintained and occupied an enclosure with paraphernalia used for recording bets on horse races is sufficient without the necessity of showing a race was actually run. People v. Hinkle, 64 Cal.App. 375, 380, 221 P. 693; People v. Vertlieb, 22 Cal.2d 193, 197, 137 P.2d 437.

Testimony of Manaugh

It is contended that the court prejudiced appellants in denying their motion to strike the testimony of the witness Manaugh relative to an item of $108,985 labeled "special" appearing in appellants' records of cash disbursements for the year 1948. The witness was a lawyer and a trained accountant. For him to testify to the significance of bookkeeping terms in current use was in accord with customary practice and with the rules of admissibility. The same amount appeared on a weekly disbursement record under the designation "JC."

Basing his testimony on the assumption that the defendants had been operating a bookmaking concern the witness was permitted to testify that in his opinion this item represented a cash outlay disbursed in 1948 for protection from law enforcement officers. He based his opinion upon his own examination of the accounting records of the organization which indicated that these were cash disbursements charged to a special account labeled "JC"—a label which could well stand for "juice," a term used to signify money paid for protection or pay-off. He testified further as to the basis of his opinion that these sums were distributed weekly in varied uneven amounts and that a portion of the expense appeared to be allocated back to the agents. He related also that he found entries entitled "juice account," "shake down," "hold-up," "take," and "pay." The sum of $108,895 was the only amount charged as an expense of this bookmaking enterprise in 1949 and the sum had been carried forward from 1948. While the witness could not tell from the records exactly which persons had received the money, yet the fact of its disbursement under the mysterious accounts is a circumstance indicative of the criminal nature of the group and its activities and its consciousness of a necessity to harbor in secrecy the actual destination of the "juice" moneys. The very presence of the phrase "shake down" reveals the horror of the penman who was required to record the payments of the sums constituting the fortune which was disbursed for protection. The bookkeeper could have had no motive for inscribing such winged words into the glum records of a bookie house other than to have a record of moneys disbursed to nameless recipients who had served his outlaw employers.

[9] There is no surmise or conjecture in the opinion of the witness. Every circumstance that contributed to his opinion was detailed to the jury and the latter were in possession of all the facts which enabled them to determine the correctness of his opinion. Of such matters they could judge for themselves just as in the case of a nonexpert's opinion that an accused person on trial is insane. The opinion serves as a guide while the verdict must be founded upon the facts recited by the witness. The jury was helped by the opinion by reason of the magnitude of the unusual scheme and plan of the company and of its far-reaching operations. His experience in inspecting the books of sundry concerns had

acquainted him with the widespread use of bookkeeping terms commonly used to conceal the identity of payees.

[10] If his testimony had not been true, it would have been a simple matter for the man who made the entries to explain them or for appellants to have denied the correctness of his observations. They knew the facts better than one who had merely read their accounts. People v. Steccone, supra; People v. Adamson, 27 Cal.2d 478, 490, 491, 165 P.2d 3. Moreover, in its charge the court advised the jury that they were not bound to accept the opinion of any expert, but only to give to it such weight as that to which they deemed it to be entitled, and to disregard it if they found it unreasonable. The jury is presumed to have followed the court's advice and to have exercised its discretion soundly. People v. Letourneau, 34 Cal.2d 478, 494, 211 P.2d 865; People v. Horiuchi, 114 Cal.App. 415, 436, 300 P. 457; People v. Ferlin, 203 Cal. 587, 600, 265 P. 230.

But conceding, *arguendo,* that there was error in the court's denial of the motion to strike Manaugh's testimony, it was not prejudicial. In view of the enormous volume of evidence received on behalf of the prosecution, of the practical confessions of the chief actors, and the failure of every appellant to mount the witness stand, how could the interpretation by an experienced accountant have misled a juror? Since no other verdict than that of guilty could have been returned, the court's refusal to strike the Manaugh testimony could not reasonably justify a reversal of the judgment. People v. Simmons, 28 Cal.2d 699, 720, 172 P.2d 18; Constitution, Art. VI, sec. 4½.

Discharge of One Juror

Appellants assign as prejudicial error the refusal of the trial court to discharge the jury after they had been sworn "and upon the removal of one of the regular jurors." They have no justifiable basis for such assignment. The facts are that on March 6, 1950, twelve regular jurors were sworn to try the cause. The proceedings to select alternate jurors continued through March 8. On that day the court discovered that juror number 9 had not disclosed "the existence of a state of mind * * * which would preclude her from trying the case with absolute impartiality." No alternate juror had yet taken oath to serve. Thereupon, all counsel stipulated that another venireman be called and examined as to his qualifications. Juror nine was then excused without protest and Mrs. Goodwin was subjected to the customary inquiry. She satisfied all parties and was on the same day sworn in as a member of the regular panel. With all parties cooperating, the selection of alternates was thereafter duly consummated.

[11, 12] Appellants now contend that it was the court's duty to discharge the entire jury and empanel an entirely new one, citing section 1123 of the Penal Code.[1] There is no evidence of a violation of the cited statute. But if there were, the parties had the right to agree upon the persons who would constitute their jury. This is exactly what appellants did through their attorneys who stipulated to the discharge of juror nine and actually examined and accepted her successor. The attorney had authority to stipulate to steps in the procedure of a criminal case. People v. Hanna, 36 Cal.App.2d 333, 336, 97 P.2d 847, and on appeal the "defendant may not assert * * * procedural rights which he waived at the trial." People v. Wilson, 78 Cal. App.2d 108, 120, 177 P.2d 567, 573. So if it were error, appellants as authors of the stipulation cannot be heard to complain of

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[1] Penal Code, sec. 1123. "If before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors or if there be no alternate juror, a juror becomes sick or otherwise unable to perform his duty and has been discharged by the court as provided herein, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may be again tried."

what they caused the court to do. Jackson v. Superior Court, 10 Cal.2d 350, 358, 74 P. 2d 243, 113 A.L.R. 1422. Their claim that their stipulation extended only to the removal of juror nine is an unreasonable argument in the light of the record. How could they contend so after participating in the examination of Mrs. Goodwin and accepting her. It is a general rule whose repetition seems often to be required: Before a party may successfully take advantage of the behavior of the trial court, he must have objected, protested and assigned the conduct as prejudicial in order that the court may correct the asserted error. Appellants' contention does not come within any exception to that rule.

Instruction 933 Is Not Error

In a lengthy charge covering every phase of the issues created by the indictment and appellants' plea, the court included the following approved instruction taken from Caljic ("California Jury Instructions, Criminal"): "The formation and existence of a criminal conspiracy belong to a class of facts which seldom can be established by direct evidence. In the very nature of the case, such common design rarely can be shown by direct evidence, and often can be shown only by circumstantial evidence. A finding of the formation and existence of a conspiracy may stand upon circumstantial evidence alone, if from all the evidence the jury is convinced beyond a reasonable doubt of the existence of such facts. In determining the question whether or not an alleged conspiracy was formed and existed, it is proper to take into consideration the relation of the accused parties to one another, if the evidence shows any connection between them, their personal and business associations with each other, if any, and any and all facts in evidence which may tend to show what, if anything, occurred between them at or before the time of the alleged combination or agreement, or which tend to show what, if anything, occurred between them, or any of them, thereafter in relation thereto, as well *as evidence of any acts performed and declarations made by any of said parties subsequent to the formation of such alleged combination or agreement and in respect to, and in pursuance and furtherance of, the alleged conspiracy.* From such facts and circumstances as shown by the evidence, you will determine whether or not a criminal combination or agreement did in fact exist, as charged in the case, and if it did exist, which, if any, of the defendants were parties to such conspiracy."

[13] Appellants complain of the italicized portion and contend that the jury were thus told that in determining whether or not a conspiracy existed as alleged in the indictment they could take into consideration some sixty-eight overt acts set forth in the indictment as having been done in pursuance of the conspiracy and to effect its objects and purposes. It is argued that (1) under this instruction the jury could find the existence of a conspiracy from the overt acts, and (2) this is erroneous inasmuch as there can be no overt act (something done in pursuance of the conspiracy or to effect its object) until after the conspiracy itself it established, citing U. S. v. Goldberg, 25 Fed.Cas. page 1342, No. 15, 223. However, there is no error in the instruction, prejudicial or otherwise, when read in its entirety and in the light of the entire charge. People v. Frazier, 88 Cal. App.2d 99, 105, 198 P.2d 325. The theme of the instruction related to proof of conspiracy by means of circumstantial evidence, that the jury could consider what occurred "at or before" or "subsequent" to the formation of the conspiratorial agreement to determine whether in fact it did exist. It is true that no agreement amounts to an actionable conspiracy unless an overt act is alleged and proved but this does not preclude the jury from considering acts subsequent to the agreement in arriving at the defendants' intent. People v. Torres, 84 Cal.App.2d 787, 794, 192 P.2d 45; People v. Daener, 96 Cal.App.2d 827, 831, 216 P.2d 511.

[14, 15] Virtually the only method by which a conspiracy can be proved is by circumstantial evidence—the actions of the parties as they bear upon the common design. It is not necessary to show directly that the parties actually closeted themselves, attained the proverbial meeting of

the minds and agreed to undertake the unlawful acts. People v. Steccone, supra, 36 Cal.2d 234, 223 P.2d 17. It is a familiar principle of the law that in deriving whether an agreement was unlawful the triers of the fact may consider the events that occurred "at or before" or "subsequent" to the formation of the agreement. From the proof of the occurrences beforehand and at the time of the agreement linked with evidence of the overt acts a jury may determine that a criminal conspiracy was formed. People v. Daener, supra; People v. Torres, supra. The major portion of the evidence might consist of the conversations and writings of the conspirators or it may consist of the overt acts done pursuant to the conspiracy. Such acts may establish the purpose and intent of the conspiracy and relate back to the agreement whose purpose may be otherwise enshrouded in the hush-hush admonitions of the conspirators. Whatever be the order of proof the jury has finally to determine whether the alleged conspiracy has been established. People v. Steccone, supra.

There was nothing in instruction 933 to mislead the jury. They were told that no agreement becomes a conspiracy unless "at least" one of the criminal acts agreed on be alleged and proved. From that instruction aided by the general charge the jury necessarily understood that they could not convict appellants unless an overt act was done to effect the object of the conspiracy. Viewed as a minute part of the instructions to the jury, there was no prejudice caused by Caljic's 933.

[16] No error resulted from an alleged conflict of 933 with Caljic's 935 which advised the jury that no act or declaration of any conspirator shall bind another until a conspiracy has been proved to have existed at the time of the declaration and no defendant shall be responsible for the act of an "alleged conspirator when the only substantial evidence of an agreement between them is evidence of the acts and declarations of the latter."

Because at appellants' request the court gave the same instruction, no possible error could obtain in that given for the people. Since any single instruction can be considered only in connection with all others, People v. Tolmachoff, 58 Cal.App.2d 815, 825, 138 P.2d 61, it is clear that no error flowed from 935 or from its asserted conflict with 933. The jury could not have been misled by the contents of either because they were directed to consider and construe each instruction with all the others. People v. Jordan, 24 Cal.App.2d 39, 54, 74 P.2d 519. Viewing the two cited instructions in connection with the evidence and the entire charge "the verdict cannot reasonably be deemed to have been the result of a misconception of the law." People v. Honeycutt, 29 Cal.2d 52, 62, 172 P.2d 698, 704.

Instruction on Bookmaking

[17] The court gave the following instruction: "You are instructed that the term 'bookmaking' as used in the indictment means the making of a betting book and includes the taking and receiving of bets and wagers; the recording and registering of bets and wagers; and the keeping and occupying of any room and building with books and papers, devices and paraphernalia for the purpose of registering and recording bets and wagers upon the results or purported results of any trial or purported trial or contest or purported contest of skill, speed and power of endurance of beasts, to wit, horses." Appellants assign it as error.

Such instruction is fully in accord with the law as enacted by the legislature. No authority would approve of any interpretation of the cited section contrary to that contained in the instruction. People v. Wilson, 78 Cal.App.2d 108, 113, 177 P.2d 567. Appellants' comment that the jury were told that "appellants were charged with conspiring to commit not one but five separate offenses," does not accord with the impression gained by a disinterested party. As seen from this distance the court's charge sounds verily like the parties at the bar were on trial for having performed a criminal conspiracy to violate the bookmaking statute. The jury thought so as indicated by their verdicts, convicting them as charged. The trial judge thought so as indicated by his rulings, his denial of the motion for a new trial and by the punishment meted out to appellants. To do all of the things specified in all five subdivisions of section 182 of the Penal Code (defining criminal conspiracy) "amounts to a single offense." People v. Gilbert, 26 Cal.App.2d 1, 7, 78 P.2d 770, 774. The conspiracy inhibited by the cited section is a single offense, howsoever diverse its objects. The gist of the crime is the conspiracy and it is single although its object be several crimes. People v. Yant, 26 Cal.App.2d 725, 729, 80 P.2d 506. Thus, the contention of appellants goes wide of the mark: the question of distinct and separate offenses is not involved.

[18] Appellants complain that notwithstanding its duty to do so the court did not charge the jury fully and fairly upon the law relating to the facts of the case. They do not read the record as it is found by this court. Appellants were accused of effecting a conspiracy "to engage in pool selling and bookmaking with and without writing." They say that the jury should have been advised "as to the specific charge against appellants so that they could properly apply the law with reference to those charges to the facts shown by the evidence." The jury were so advised. The foregoing discussion of the instructions shows that the crime charged was conspiracy, the overt acts alleged and proved demonstrated to the idle spectator that appellants were on trial for a conspiracy to engage in bookmaking and the contentions of appellants throughout indicate their awareness of the crime charged. Nothing in the instruction quoted above justifies the statement that such instruction charged a conspiracy to violate subdivisions 2, 3, 4 and 6 in addition to subdivision 1 of section 337a. The indictment attempted to do no more than to charge a conspiracy to violate subdivision 1 which makes it a crime to engage "in pool-selling or book-making, with or without writing." After alleging a conspiracy to violate section 337a, the pleading proceeds to enumerate 69 overt acts. Each act alleges the occupancy by defendants of specified rooms with books and paraphernalia for registering bets on horse races, their recording and registering bets, their installation of telephones for receiving bets, their furnishing betting markers, pencils and scratch sheets to their employees, the employment of sundry persons to assist in such receiving and recording, or their loans to different persons for the purpose of discharging debts incurred in wagers on horse races and divers other acts, all having to do with the business of bookmaking.

But aside from the indictment, the instruction was a correct statement of the law as applied to the facts proved. A conspiracy was alleged and the instruction aptly and clearly defined the meaning of bookmaking. To define bookmaking as only "the making of a book of bets" as appellants contend it should be is not sufficiently definitive to be of any aid to a jury. The fact that the term "bookmaking" used in subdivision 1 of 337a necessarily overlaps in some degree the offenses proscribed by the other subdivisions does not nullify or disparage the offense specified in subdivision 1. Bookmaking on horse races necessarily includes the receiving and recording of bets on the results of races and implies the use of some method for recording wagers. People v. Jerman, 29 Cal.2d 189, 199, 173 P.2d 805; City of Portland v. Duntley, 185 Or. 365, 203 P.2d 640, 644.

Appellants assign as error that the jury were not advised as to the specific charge against them. Not only does the voluminous charge defeat the assignment by its definitions of bookmaking, conspiracy and overt acts as well as the kind, quality and degree of proof required, but the indictment with its full and complete statement of the accusation of a criminal conspiracy to violate section 337a was generous advice as to the crime charged. Furthermore, throughout the trial on innumerable occasions, it was stated in the presence of the jury: "They are charged with a conspiracy to violate bookmaking laws." Consequently, it cannot be held that appellants suffered any prejudice by reason of the jury's lack of knowledge of the offense charged.

The judgments and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

On Petition for Hearing

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

PETERS and GOODELL, Justices pro tem., sitting in place of SHENK and SPENCE, JJ., absent.

105 Cal.App.2d 811

PEOPLE v. JACKSON.

Cr. 2271.

District Court of Appeal, Third District, California.

Aug. 2, 1951.

Hearing Denied Aug. 30, 1951.

Levi Jackson was convicted in the Superior Court of Merced County, R. R. Sischo, J., of arson, and from the judgment of conviction and from an order denying motion for new trial, the defendant appealed. The District Court of Appeal, Peek, J., held that there was doubt as to the sanity of the defendant within meaning of statute, so that trial on issue of defendant's present sanity became mandatory.

Judgment reversed and case remanded with instructions, and order denying motion for new trial affirmed.

1. Criminal law 🔑48

The commitment of an individual to a state hospital for the mentally ill is not conclusive or in any way determinative of the question of that individual's responsibility for criminal acts. Welfare and Institutions Code, § 5040.

2. Criminal law 🔑48

To constitute a defense to criminal proceedings, on ground of insanity, the insanity of the defendant must be such that he had not the capacity to distinguish between right and wrong concerning the particular act with which he is charged.

3. Criminal law 🔑49

Partial insanity or insane delusions are not sufficient to establish defense of insanity, if defendant understands the character and consequences of the crime and knows its wrongful nature.

4. Criminal law 🔑48

An adjudication under statute which defines a mentally ill person as one whose mental condition is such that he is in need of treatment, supervision, care, or restraint, or is dangerous to himself, or to the person or property of others, may be entirely unrelated to the question of the criminal responsibility of one adjudged to be a mentally ill person under such statute. Welfare and Institutions Code, § 5040.

5. Criminal law 🔑311

Where defendant charged with arson failed to plead not guilty by reason of insanity, he would be conclusively presumed to have been sane at the time of the alleged commission of the offense. Pen.Code, §§ 447a, 1016.

6. Criminal law 🔑913(5), 968(1)

Technically, the insanity of a defendant at time of trial or prior to sentencing is neither a ground for a new trial nor for a motion in arrest of judgment.

7. Criminal law 🔑913(5)

Where superior court on February 14, committed defendant to state hospital for mentally ill on ground that he was a mentally ill person, and on April 21, defendant was paroled from the hospital but remained under jurisdiction of hospital officials and was required to report monthly, and thereafter defendant was charged with arson allegedly committed on June 9, and defendant did not plead guilty by reason of insanity at the trial, there was no error in denying defendant's motion for a new trial after his conviction. Welfare and Institutions Code, § 5040; Pen.Code, §§ 447(a), 1016.

8. Criminal law 🔑981(1)
Insane persons 🔑84, 85

A person cannot be tried, sentenced, or punished for a public offense while he is insane. Pen.Code, § 1367.

9. Criminal law 🔑625

The "doubt" as to the sanity of a defendant within meaning of statute providing that if at any time during pendency of an action and prior to judgment a "doubt" arises as to sanity of defendant, court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if trial by jury is demanded, is a doubt that must arise in the mind of the court, and the question rests in the sound discretion of the court, and the rule is not otherwise, though the judge who passes on the question did not preside at the trial of the cause at which the defendant was convicted. Pen.Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Doubt".

10. Criminal law ⚿981(2)

Where superior court on February 14, committed defendant to state hospital for mentally ill on ground that he was a mentally ill person, and on April 21, defendant was paroled from the hospital but remained under jurisdiction of hospital officials and was required to report monthly, and thereafter defendant was charged with arson allegedly committed on June 9, and defendant did not plead guilty by reason of insanity at the trial, and after defendant was convicted and made motion for new trial, court ordered a psychiatric examination of defendant, there was "doubt" as to the sanity of defendant within meaning of statute, and a trial on the issue of the present sanity of defendant became mandatory, and trial on that issue was required to be entirely separate and independent of the criminal proceeding. Welfare and Institutions Code, § 5040; Pen.Code, §§ 447a, 1016, 1367, 1368.

Joseph J. Lebeda, Public Defender, Atwater, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction for the alleged violation of Section 447a of the Penal Code (arson) and from the order denying his motion for a new trial.

The information charged that on June 9, 1950, defendant burned three cabins owned by his wife. The jury returned a verdict of guilty, following which counsel for defendant moved for a new trial. His motion was accompanied by a copy of an order of the Superior Court of Merced County, entered February 14, 1950, committing defendant to the State Hospital at Stockton, it being adjudged therein that defendant was a mentally ill person. In support of the motion, and as a part thereof, was an affidavit by defendant's counsel wherein he averred that on February 14, 1950, after a hearing in the Superior Court of Merced County, defendant was committed to the Stockton State Hospital as a mentally ill person; that he was paroled therefrom on April 21, 1950, remaining, however, under the jurisdiction of the officials of the hospital and being required to report monthly to a visiting Psychiatric Social Welfare Worker employed by the Department of Mental Hygiene; and that the affiant attorney had not learned of said order of commitment until after the trial and entry of the verdict in the present proceeding.

The transcript shows that the order of February 14, 1950, committing defendant to the State Hospital was the result of proceedings under Article 3 of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code, instituted by defendant's wife. The certificate of the medical examiners, on which the order was based, recommended that the defendant be confined to a State Hospital for the reason that he was dangerous to himself and others.

The Honorable R. R. Sischo was absent on the date set for the hearing of defendant's motion for a new trial and the matter was heard before the Honorable Gregory P. Maushart, who presided at the commitment proceedings on February 14, 1950. The transcript shows that Judge Maushart, because of his stated lack of knowledge of the facts presented at the trial, observed that he believed it would be unfair for him to rule upon the motion. In lieu thereof and on his own motion he ordered a psychiatric examination of the defendant, in order, he said, so that when Judge Sischo returned he would "have complete information concerning the present mental ability of the defendant."

Upon the return of Judge Sischo a hearing was had upon defendant's motion and upon the conclusion thereof the court denied defendant's motion as well as his further motion to be re-committed to the Stockton State Hospital, stating that he was convinced that defendant was presently sane.

The gist of defendant's argument on appeal is that the conviction and sentence must be reversed since there has been no subsequent determination that he is a sane person, hence his prior commitment to the Stockton State Hospital is a conclusive adjudication that he was insane at all times involved herein. Insofar as said contention relates to the sanity of appellant at the time of the commission of the offense it is not well taken.

[1–3] As respondent contends, the established law of this state is that the commitment of an individual to a State Hospital is not conclusive or in any way determinative of the question of that individual's responsibility for criminal acts. People v. Willard, 150 Cal. 543, 89 P. 124; People v. Puter, 85 Cal.App.2d 348, 193 P.2d 23. The reason for this rule is clear. To constitute a defense to criminal proceedings, the insanity of the defendant must be such that he has not the capacity to distinguish between right and wrong concerning the particular act with which he is charged. People v. Coleman, 20 Cal.2d 399, 126 P.2d 349. Partial insanity or insane delusions are not sufficient to establish the defense, if the defendant understands the character and consequences of the crime and knows its wrongful nature. People v. Lizarraga, 108 Cal.App. 152, 291 P. 434.

[4] Section 5040 of the Welfare and Institutions Code, under which defendant was committed on February 14, 1950, defines a "Mentally ill persons" as one whose mental condition is such that he is in need of treatment, supervision, care, or restraint, or is dangerous to himself, or to the person or property of others. It is readily apparent from a reading of that section an adjudication such as the order of February 14, 1950, may be entirely unrelated to the question of the criminal responsibility of appellant.

[5] Furthermore, appellant, by failing to plead not guilty by reason of insanity, is conclusively presumed to have been sane at the time of the commission of the offense. Section 1016 of the Penal Code; People v. Walsh, 50 Cal.App.2d 164, 122 P.2d 671.

[6, 7] Technically, the insanity of a defendant at the time of trial or prior to sentencing is neither a ground for a new trial nor for a motion in arrest of judgment. People v. Kirby, 15 Cal.App. 264, 270, 114 P. 794; People v. Chambers, 122 Cal.App. 723, 724, 10 P.2d 467. Hence, there was no error in denying appellant's motion for a new trial.

[8, 9] However, under Section 1367 of the Penal Code, a person cannot be tried, sentenced or punished for a public offense while he is insane. The proper procedure for raising the question of the present insanity of the defendant is set forth in Section 1368 of the Penal Code which provides that, "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; * * *." The "doubt" as to the sanity of a defendant is one that must arise in the mind of the court, and the question rests in the sound discretion of the court. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 129 A.L.R. 1123. "The rule is not otherwise * * * though the judge who passes upon the * * [question] * * * did not preside at the trial of the cause at which the accused was convicted." People v. Carskaddon, 123 Cal. App. 177, 184, 11 P.2d 38, 41.

Respondent's argument that there was no abuse of discretion in the trial court's failing to entertain a doubt as to defendant's sanity is not applicable to the facts of this case. The circumstances under which Judge Maushart ordered a psychiatric examination of appellant leave no question but that he did, in fact, entertain a doubt as to appellant's present sanity. A similar factual situation was presented in People

v. Vester, 135 Cal.App. 223, 26 P.2d 685. There the trial court, at the time of arraignment, ordered a medical examination stating that it appeared to the court that the defendant "should be examined as to his mental condition". Following the report of three physicians the case proceeded to trial on the criminal charges and the defendant was convicted. On appeal it was held that the order of the trial court stating that the defendant should be examined as to his mental condition was a sufficient indication that a "doubt" had arisen within the meaning of Section 1368 of the Penal Code, and hence prejudicial error was committed by the trial court in failing to determine judicially whether the defendant was sane at the time of trial.

[10] Thus, in the present case, it would seem to follow that since a psychiatric examination was ordered by the judge who, only a relatively short time before, had committed defendant to a state institution as a mentally ill person, the "doubt" contemplated by said section was as sufficiently established as it was in the Vester case. See People v. West, 25 Cal.App. 369, 143 P. 793.

The sole question remaining is whether the court, having such a doubt, proceeded properly in compliance with Section 1368. By the terms of Section 1368, once a doubt has arisen, a trial on the issue of present sanity becomes mandatory, and that trial must be entirely separate and independent of the criminal proceeding. People v. Hensley, 101 Cal.App.2d 744, 226 P.2d 385. And, as stated in the Vester case, failure to conduct such trial in the face of the existing "doubt" is a denial of substantial rights of the defendant. People v. Vester, supra.

The facts in the present case show without question that Judge Maushart, because of his reluctance to rule on the motion for a new trial, continued the hearing on the medical report until Judge Sischo's return, at which time the report was considered together and in connection with the motion for a new trial. There was not in any sense a separate trial or a judicial determination pursuant thereto on the question of appellant's present sanity. The failure to order a trial on that question was error.

The judgment is reversed and the case is remanded with instructions to the trial court to institute a separate and further proceeding on the question of the present sanity of defendant in conformity with Section 1368 of the Penal Code. The order denying the motion for a new trial is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

105 Cal.App.2d 744

FEIGIN v. KUTCHOR.

Civ. 7886.

District Court of Appeal,
Third District, California.
July 30, 1951.

Joseph Feigin brought an action in claim and delivery against Stephen Kutchor to recover possession of a compressor and its attachments, or the value of thereof, and to recover for the alleged conversion of certain lumber, plumbing fixtures and materials, gasoline, oil and dynamite fuses and caps and defendant counterclaimed for work, labor and services performed by defendant and for a storage charge for materials stored on defendant's property. The Superior Court, Tuolumne County, T. B. Warne, J., held, inter alia, that evidence justified finding that plaintiff's only interest in the compressor was the right to use the compressor at a certain mine and that defendant owned compressor as result of sale to defendant by former owner subject to plaintiff's right to use compressor at such mine.

Judgment affirmed.

1. Replevin 🔑8(2)

An action in claim and delivery as a possessory action and one entitled to possession is entitled to maintain the action even though he is not vested with legal title.

2. Pleading 🔑236(4)

A court may, in its discretion, permit amendment of pleadings after evidence is all in, pending argument of counsel, and even after submission of cause. Code Civ.Proc. § 473.

3. Replevin 🔑68

In action in claim and delivery for possession of a compressor and its attachments, trial court properly permitted defendant to file a second amendment to answer denying plaintiff's right to possession after defendant's opening brief was filed with trial court after submission of cause, where questions of title and right of possession were fully gone into by parties at trial and counsel for plaintiff did not during trial contend that it was not an issue. Code Civ.Proc. § 473.

4. Pleading 🔑1

Counsel and court should cooperate in having pleadings so shaped that controversy between parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice.

5. Appeal and error 🔑930(1)

On appeal all conflicts in evidence must be resolved in favor of respondent and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

6. Appeal and error 🔑989, 996

When a verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can reasonably be deduced from the facts, the reviewing court cannot substitute its deductions for those of jury or trial court.

7. Replevin 🔑72

In action in claim and delivery for possession of a compressor and its attachments, evidence justified finding that plaintiff's only interest in compressor which plaintiff had repaired before placing it on mine property was the right to use compressor at such mine, and that defendant owned compressor as result of sale to defendant by former owner subject to plaintiff's right to use compressor at such mine.

8. Mines and minerals 🔑97

In action in claim and delivery for possession of a compressor and its attachments, evidence justified finding that mining enterprise in which plaintiff and defendant engaged as partners was stopped and partnership relation was ended prior to time defendant bought compressor from owner subject to plaintiff's rights to use compressor at such mine, which compressor plaintiff had repaired and placed at such mine, as against contention that defendant was a partner of plaintiff in mining property and therefore stood in such fiduciary relationship to plaintiff that defendant could not purchase compressor and set up a claim thereto against plaintiff.

9. Work and labor 🔑14(1)

Where one party to contract refuses to go ahead with his part of contract, the other party is entitled to treat contract as rescinded and to bring suit in quantum meruit for reasonable value of services actually rendered.

10. Mines and minerals 🔑97, 99(2)

Evidence justified findings that plaintiff and defendant were engaged in a partnership mining venture up to time venture was abandoned by plaintiff and defendant, and that abandonment was for benefit of both plaintiff and defendant, and under circumstances defendant was not entitled to recover from plaintiff for labor defendant had performed up to time of abandonment of venture.

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Joseph A. Brown, San Francisco, for appellant.

Mazzera, Snyder & DeMartini, Stockton, for respondent.

SCHOTTKY, Justice, pro tem.

Plaintiff filed a complaint containing two causes of action, the first being in claim and delivery to recover possession of a compressor and its attachments, or the value thereof; and the second being to recover for the alleged conversion of certain lumber, plumbing fixtures and materials, gasoline, oil and dynamite fuses and caps. The reasonable value of the compressor and attachments was alleged to be $2500, and the value of the materials was alleged to be $2117.

The answer denied the plaintiff was the owner of the compressor and alleged that defendant owned it "by reason of the purchase made by the defendant from one Ralph Maxwell on April 24, 1948, the same being covered by a bill of sale on said date." The original answer, signed and filed by defendant in propria persona, did not deny that plaintiff was entitled to the possession of the compressor, although the complaint had alleged that plaintiff was both the owner and entitled to the possession thereof. All allegations in plaintiff's second cause of action were denied. An amendment to the answer, subsequently prepared and filed by defendant's present counsel, set up counterclaims for work, labor and services performed by defendant for plaintiff in the amount of $360 and a storage charge of $32 for materials stored on defendant's property.

The case proceeded to trial on January 20, 1949, and all phases of the controversy between plaintiff and defendant relating to the ownership and right to possession of all of said property were fully covered by the testimony introduced. At no time during the trial, or prior thereto, did counsel for plaintiff indicate by motion, objection, statement, or otherwise, that plaintiff's right to possession was not an issue because of the failure of the answer to deny it.

As to the first cause of action the court found that defendant owned the compressor and was entitled to the possession of it, "subject, however, to Plaintiff's right to use said compressor and attachments in the exploration, development and exploitation of the said Williams Mine during the life of his said mining venture * * *." The court also found that "Plaintiff has not used said compressor or attachments in the exploration, development or exploitation of the said Williams Mine or otherwise in connection with said mining venture at any time since January 1, 1948; that Plaintiff has not done any work of any sort at Williams Mine since January 1, 1948, and has abandoned his said mining venture at said Williams Mine; that in April of 1948, and at the time said compressor was removed from said Williams Mine by Defendant, the said Defendant desired to use said compressor for his own bona fide temporary uses elsewhere and so removed said compressor for such purpose."

As to the second cause of action the court found that the materials were stored upon defendant's property, and that defendant had not converted them to his own use, but they were in the possession of defendant for the use of plaintiff in his mining venture. The court found that defendant used for his own purposes 220 gallons of gasoline and 5 gallons of oil, of the value of $45.93.

The court allowed defendant $32 as the reasonable amount for storage of plaintiff's materials. The remaining allegations of the counterclaim were found to be false.

Plaintiff has appealed from the judgment entered in accordance with said findings, and defendant has appealed from that portion of the judgment denying relief on his counterclaims for work, labor and services. We shall first consider the appeal of plaintiff.

Plaintiff's Appeal.

[1] As his first ground for reversal of the judgment, plaintiff contends that he was entitled to judgment on the pleadings on the first count in claim and delivery of the compressor because defendant in his first answer did not deny the allegation that plaintiff was entitled to its immediate possession. Plaintiff points out, correctly, that an action in claim and delivery is a possessory action, and that one entitled to possession is entitled to maintain the action even though he is not vested with the legal title.

Defendant admits the defect in the answer, but points out that plaintiff did not take advantage of the defect by demurrer, motion for judgment on the pleadings, objection to evidence, or otherwise. A reading of the transcript shows that the parties considered the right to possession as one of the issues, and that the issue was fully covered by the evidence. Defendant states that plaintiff did not complain of the defect until his opening brief was filed with the trial court on March 14, 1949, after submission of the case, and this is admitted by plaintiff. These briefs are not in the record on appeal, but defendant states that in the reply brief to the trial court he asked leave to amend the answer, and this seems to be supported by the fact that the second amendment to the answer denying plaintiff's right to possession was filed with the clerk on March 29, 1949. A "Memo Decision" filed May 13, 1949, contained the following order: "It is further ordered that Defendant's Second Amendment to Answer be filed." Judgment was entered December 30, 1949.

[2, 3] Plaintiff argues also that the trial court erred in permitting the filing of defendant's Second Amendment to Answer denying plaintiff's right to possession, but there is no merit in this contention, for as stated in 21 Cal.Jur. 193, "A court may, in its discretion, permit amendment of pleadings * * * after evidence is all in, pending argument of counsel, and even after submission of the cause. It is unusual to find it necessary to amend the complaint after a case has been submitted, but there is, under the power given by section 473 of the Code of Civil Procedure, no limitation as to the time before judgment entered when the power of the court ceases." And as stated in Andrus v. Smith, 133 Cal. 78, at page 81, 65 P. 320, at page 321: "The court did not err in allowing plaintiff to amend her complaint after the cause was tried and submitted, but before findings had been filed or judgment given. The submission was set aside, and defendant allowed to answer the amended complaint and to introduce further evidence. This was the correct practice, and was in furtherance of justice, and for the purpose of having the case disposed of upon its merits." And in Burrows v. Burrows, 18 Cal.App.2d 275, at page 279, 63 P.2d 1135, at page 1136, the court said: "Under the provisions of section 470 of the Code of Civil Procedure, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so as to make such pleadings conform to the proofs; and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse." (Citing cases.) See, also, Valencia v. Shell Oil Co., 23 Cal.2d 840, 848, 147 P.2d 558.

[4] As hereinbefore stated the questions of title and right of possession were fully gone into by both parties at the trial, and counsel for plaintiff did not at any time during the trial contend that it was not an issue. Had he done so the trial court would undoubtedly have permitted the amendment. If counsel for plaintiff was aware of such omission in the answer, it was his duty as an officer of the court to make an objection or motion on that ground; if he was unaware of it until after the trial was concluded and proceeded to try the case as though the right of possession were an issue, he should not now question the court's undoubted right to permit the amendment. A trial is more than a contest between opposing counsel, and a trial judge is more than an umpire in a battle of wits between opposing counsel. The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice.

As we view the matter, upon the record here, it was not only within the power of the court to permit the amendment, but it was its duty to do so.

[5, 6] Plaintiff next contends that the uncontradicted evidence shows that the defendant unlawfully took and detained the compressor, and he makes an extended argument in an effort to show that the record does not sustain the findings of the trial court. If the judgment had been in favor of plaintiff his argument upon this point would be very helpful in point-

ing evidence in support thereof, but in view of the finding in favor of defendant upon this issue, the argument of appellant is but an argument as to the weight of the evidence. And as was said in Juchert v. California Water Service Co., 16 Cal.2d 500, at page 503, 106 P.2d 886, at page 888: "As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

The record shows that plaintiff was engaged in mining activities in Tuolumne County. Defendant worked for the plaintiff at various mines before their venture at the Williams Mine. According to defendant, the parties were to have a fifty-fifty interest in the Williams Mine. Defendant was to operate the mine, and plaintiff agreed to furnish materials, and an extra man after the tunnel was cleaned out by the defendant. Plaintiff testified that he was informed by Mr. Williams, the owner of the mine, and by the defendant that the tunnel was 250 feet long, but when defendant cleaned the tunnel it was discovered that it was only fifty feet in length. Plaintiff had the mine surveyed on October 12, 1947. The survey disclosed that the end of the tunnel was 500 feet from the ore. Plaintiff testified that he abandoned the venture after receiving the results of the survey; and that the contract prepared by him was not signed for the reason that the tunnel was not as long at it had been represented to be.

Defendant testified that after the survey was made, the parties agreed to continue mining operations on a fifty-fifty basis and plaintiff agreed to furnish a man to assist in the work; that defendant worked six weeks after the survey and plaintiff did not furnish the extra man; and that he stopped work at the end of the six weeks period because plaintiff did not furnish a written contract or partnership agreement as he had agreed.

The evidence appears to support the finding that defendant owns the compressor. Mr. Maxwell, original owner of the compressor, testified that he talked with plaintiff in the early part of September, 1947, and agreed to permit plaintiff to use the compressor at the Williams Mine if he would repair it, but that nothing was said about plaintiff's using it at other mines. Plaintiff spent $1200 repairing the compressor before placing it on the Williams Mine property. Mr. Maxwell testified that he sold the compressor to the defendant in April, 1948, subject to plaintiff's right to use it at the Williams Mine. Plaintiff testified that Maxwell agreed to give him the compressor if he would repair it and allow Maxwell to use it on temporary jobs. The compressor was installed at the mine but was never operated.

[7] The trial judge was fully justified in concluding that the evidence indicated that plaintiff's only interest in the compressor was the right to use it at the Williams Mine. The evidence shows that he was not deprived of that use. As noted above, plaintiff testified that he abandoned the operation after the survey in October, 1947. Mr. Williams, the owner of the mine, testified that he had consulted plaintiff after November, 1947, to determine whether plaintiff intended to continue operating the mine; and that in April, 1948, plaintiff gave him permission to use the tunnel as a storage dam for irrigating purposes.

[8] Plaintiff contends further that defendant was a partner of plaintiff in the mining property and therefore stood in

such a fiduciary relationship to plaintiff that he could not purchase the equipment and set up a claim thereto against plaintiff. This argument is, of course, based on the assumption that we must accept plaintiff's version of the evidence, but, as pointed out by defendant, and as sustained by the record, the Williams mining enterprise was stopped and the partnership relation ended in October or November, 1947, and the compressor was not purchased or removed by defendant until April, 1948. There is no merit in this contention.

Equally without merit is plaintiff's attack upon the court's finding that the materials described in plaintiff's second cause of action were stored upon defendant's property and had not been converted by defendant, but that defendant had used some gasoline and oil for which he was indebted to plaintiff in the sum of $45.93, and that the remainder thereof had been sold by plaintiff to defendant and paid for by defendant. The record fully supports this finding, as it also supports the finding that plaintiff was indebted to defendant in the sum of $32 for storage.

Defendant's Appeal

[9] Defendant's appeal is from that part of the judgment denying relief on his counterclaim for work and services. It is contended that he is entitled to be compensated for the six weeks of work performed after the mine survey. Defendant relies upon the rule that where one party to a contract refuses to go ahead with his part of the contract, the other is entitled to treat the contract as rescinded and to bring suit in quantum meruit for the reasonable value of services actually rendered.

Defendant alleged, in substance, in his counterclaim that he performed labor for plaintiff at plaintiff's instance and request, of the value of $360, and also that plaintiff became indebted to him in the sum of $392 upon an account stated. The trial court found that these allegations were not true.

[10] The evidence in this case was highly conflicting but it was the duty of the trial court to weigh the evidence and resolve the conflicts. The learned trial judge, who had the benefit of many years of experience upon the trial bench, and who had doubtless heard testimony in many similar cases, no doubt concluded that plaintiff and defendant were engaged in a partnership mining venture up to the time it was abandoned, and that such abandonment was for the benefit of both parties, and that under such circumstances defendant was not entitled to recover from plaintiff for labor that defendant had performed up to the time of the abandonment of the venture. We believe that the record fully sustains the findings of the trial court and that the rule of law relied upon for a reversal of the judgment as to the counterclaim is inapplicable to the facts as found by the court.

In view of the foregoing the judgment is affirmed, respondent Kutchor to recover his costs on appeal.

ADAMS, P. J., and VAN DYKE, J., concur.

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106 Cal.App.2d 6

PEOPLE v. ROSENTHAL.

Cr. 4649.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1951.

Rehearing Denied Aug. 22, 1951.

Joseph Rosenthal was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of grand theft and defendant appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Larceny 🔑65

Evidence sustained conviction for grand theft.

2. Criminal law 🔑1023(13)

An order denying a motion for new trial is not a judgment and a purported appeal therefrom would be dismissed.

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Royal M. Galvin, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was adjudged guilty of grand theft by the court, a jury having been duly waived. Proceedings were suspended and probation granted with a year in the county jail as one of the conditions. Defendant appeals from the judgment and from the order denying a motion for a new trial.

[1] It is contended on appeal that the evidence does not support the conviction. It is argued in this connection that, "It is obvious that the only theory upon which the people can possibly urge that the evidence is sufficient to sustain a charge of grand theft is upon the theory that the money was obtained from Parisi by false pretenses. Nowhere in the record is there any evidence that the defendant Rosenthal represented himself as the owner of the automobile or that he had legal title to the same." It may be conceded for the sake of argument that there were no such representations in words but defendant's conduct could well have been regarded as the equivalent. The record reveals that defendant sold the same car twice. The first sale was completed and a conditional sales contract executed between the buyer and Berg the seller. On the following day Marino the purchaser "talked to the appellant on the used car lot next to that owned by Gene Berg, and told him he was dissatisfied with the car, and was going to return it to the appellant. Appellant said he would take the car and would take care of everything and would give him his money in 30 days. At this time he told the appellant he wanted his $500 down-payment back. He delivered the car to the appellant. Appellant did not say he would sell it for him, but said he would refund his money. He saw the appellant again a few days later in Bell Gardens, and appellant told him he was trying to sell the car. He saw him again about a week or ten days after the deal, this time in Compton, and this time appellant said he had a deal going through with the car. Marino never received back his $520, nor did he ever receive back the Buick." A week or so later defendant sold the same car to one Parisi for $1,285 cash. The whole transaction, as the evidence clearly reveals, was fraudulent. It would serve no purpose to recite the details.

[2] The evidence is sufficient to support the conclusion reached by the trial court. The order denying the motion for a new trial is affirmed. Inasmuch as this is no judgment, the purported appeal from the judgment is dismissed

WHITE, P. J., and DRAPEAU, J., concur.

DUNN et al. v. RUSSELL et al.

Civ. 18085.

District Court of Appeal, Second District, Division 2, California.

July 31, 1951.

Rehearing Denied Aug. 15, 1951.

Hearing Granted Sept. 27, 1951.*

Action by Fidelia Dunn, also known as Fidelia Dunn Caldwell, and another against Clifford Russell and others for injuries sustained when automobile collided with parked truck, wherein Antoinette Lloyd Sciaroni, administratrix of estate of Martha Sciaroni, deceased, was substituted in lieu of Martha Sciaroni. The Superior Court, Los Angeles County, Frederick F. Houser, J., rendered a judgment in favor of the defendants and the plaintiffs appealed. The Court of Appeals, Moore, P. J., held that in view of the sharp conflict in evidence as to whether truck driver parked close to the curb or whether his truck stood in such a position as to jut far out into the roadway, an instruction that each party was entitled to presumption of ordinary care was prejudicial error inasmuch as it gave truck driver benefit of presumption.

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* Dismissed June 10, 1952.

Judgment reversed.

Prior opinion, 232 P.2d 258.

1. Trial ⇨260(8)

In action for injuries sustained by passengers in automobile which struck parked truck, refusal of specific instruction that driver of automobile was entitled to presumption that he exercised due care was not error where court instructed that each party was entitled to presumption that every person takes ordinary care of his own concerns, notwithstanding that driver died during suit and administratrix was substituted as a party.

2. Parties ⇨59(3)

An administratrix substituted as party plaintiff has no personal interest in action and appears merely in a representative capacity. Code Civ.Proc. § 385.

3. Negligence ⇨121(1), 134(1)

Party testifying as to his conduct in, and events leading up to, accident is not entitled to presumption of due care, but jury must rely upon such testimony as proof of freedom from negligence.

4. Appeal and error ⇨1064(1)
Automobiles ⇨246(60)

In action for injuries sustained by passengers in automobile which struck a parked truck, where primary issue was whether truck driver parked close to curb or whether his truck stood out in such a position as to jut far out into roadway and there was only slight evidence of negligence on part of motorist, instruction that each party was entitled to presumption of ordinary care was prejudicial error necessitating a reversal since it gave truck driver benefit of presumption.

5. Appeal and error ⇨1067
Trial ⇨260(8)

In action for injuries sustained by passengers in automobile which struck parked truck, refusal of instruction that defendant rather than plaintiff must prove that it was not practical for defendant to park elsewhere was not prejudicial, in view of instruction on substance of statute relating to parking on highway and in view of fact that plaintiff proved that it was practicable for truck driver to park elsewhere. Vehicle Code, § 582.

6. Trial ⇨241

In action arising out of collision between automobile and parked truck, instruction pursuant to statute requiring that vehicles be driven within a single lane where road is divided into three or more lanes was proper in view of evidence that highway consisted of six clearly marked traffic lanes, three each way. Vehicle Code, § 526.

7. Automobiles ⇨246(13)

In action arising out of collision of automobile with parked truck, trial court properly instructed that terms "paved" or "improved portion of highway" as used in provision of Vehicle Code with respect to parking on highway means that portion of highway ordinarily used for vehicular travel. Vehicle Code, § 582.

8. Automobiles ⇨245(17)

In action arising out of a collision of automobile with parked truck at point where hard surface at outer edge of highway rose eight inches in distance of four feet, whether such surface constituted a "curb" was a question for jury. Vehicle Code, § 582.

9. Automobiles ⇨246(13)

In action arising out of collision of automobile with parked truck, instruction that "curb", as applied to state highway, was a stone or row of stones or similar construction of concrete, wood or other material along margin of highway, was proper. Vehicle Code, § 582.

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Stutsman, Hackett & Nagel, Fresno, Abe Levin, Hollywood, Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr., and Otto M. Kaus, all of Los Angeles, for appellants.

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles and Leon Savitch, Los Angeles, of counsel, for respondent Russell.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Gerald Luhman, Deputy City Atty. and Wendell Mackay, Deputy City Atty., all of Los Angeles, for respondent Department of Water and Power of City of Los Angeles.

MOORE, Presiding Justice.

Fidelia Dunn Caldwell and Martha Sciaroni sued to recover on account of injuries received when Mrs. Caldwell's automobile, operated by Mrs. Sciaroni, collided with the rear end of a truck parked near the west side of Lankershim boulevard in the city of Los Angeles. The truck was the property of respondent, Department of Water and Power of Los Angeles, and at the time of the accident was in the custody of its employee, respondent Russell. During the pendency of the suit, Mrs. Sciaroni deceased from causes unrelated to the accident, and at the time of trial the administratrix of her estate, Antoinette Lloyd Sciaroni, was substituted as a party plaintiff.

Respondents denied all material allegations of their negligence and alleged contributory negligence on the part of appellants. The latter appeal from the judgment entered upon a verdict denying them relief.

Appellants concede that if there was any negligence on the part of Mrs. Sciaroni, it should be imputed to Mrs. Caldwell. Reversal is demanded on the ground that the court erred in the giving and refusing of a number of instructions.

Lankershim boulevard, a north-south highway, at the point of the collision is approximately seventy feet wide. A double white line is painted down its center. Twelve feet to the west thereof is a single white line. The highway is paved with a heavy duty asphalt from its center westerly 23 feet. The next 12 feet westerly is composed of a rock and oil pavement, two inches thick. Eight feet thereof continues the gentle downward slope, but then rises about eight inches in the next four feet. Thus a gutter effect is created along the edge of the pavement. The center 46 feet of the boulevard is the mainly traveled portion.

At the time of the accident, Russell was parked on the west margin of Lankershim boulevard. He testified that his right wheels were within one foot of the extreme edge of the highway, and his left wheels approximately a foot or two east of the flow line of the gutter. There was a sharp conflict on this point, appellant Caldwell having testified that the truck's left wheels were from four to six feet east of the gutter line. Russell had just re-entered the cab of his truck after checking supplies in its rear compartment when it was struck by the Caldwell vehicle. She testified that her car was proceeding southerly in the center lane on the west side of the roadway with Mrs. Sciaroni at the wheel. Before reaching respondents' truck, a black sedan passed them on the left, crowded them over, cut into their lane and sped on without touching the Caldwell car. Mrs. Sciaroni applied the brakes, swerved to her right, collided with the rear of the truck.

[1] Appellants' first ground for reversal is that the court erred in refusing to instruct the jury specifically that Mrs. Sciaroni was entitled to the presumption that she had exercised due care. The fallacy of such contention is manifest to him who reads the instruction given, to wit: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

[2] Appellants argue that Mrs. Sciaroni was not a "party" to the suit and therefore was not benefited by this instruction.

Such contention would lead to error. Although Mrs. Sciaroni was not technically a party to the action after her decease, nevertheless her administratrix has no personal interest in the action and appears merely in a representative capacity. Code Civ.Proc. sec. 385; Campbell v. West, 93 Cal. 653, 657, 29 P. 219, 645. Although it would have been more correct to designate Mrs. Sciaroni by name, it would be an overly strict and unreasonable interpretation of the instruction to hold that it did not extend the benefit of the presumption of due care to her. The jury could not reasonably have considered otherwise than that decedent was a "party" within the meaning of the court's instruction. The pleadings and the evidence show that she was a party involved in the accident. The jury was instructed that she was driving the Caldwell car, that she had subsequently deceased and that her personal representative was entitled only to such special damages as were incurred for hospitalization and treatment of her injuries.

[3] However, the giving of the instruction was erroneous inasmuch as it also gave respondent Russell the benefit of this presumption of due care. Where a party has testified as to his conduct in, and of the events leading up to, an accident in which he was an actor, he is not entitled to the presumption in his favor but the jury must rely strictly upon such testimony as proof of his freedom from negligence. Speck v. Sarver, 20 Cal.2d 585, 587–588, 128 P.2d 16. The determinative question is whether appellants were prejudiced by the reading of the instruction. Numerous decisions have stigmatized the instruction as erroneous but their authors declined to denounce it as prejudicial or to reverse the judgment. See Speck v. Sarver, supra, 20 Cal.2d at page 588, 128 P.2d at page 16; Tuttle v. Crawford, 8 Cal.2d 126, 133, 63 P.2d 1128; Rogers v. Interstate Transit Company, 212 Cal. 36, 39, 297 P. 884. On the other hand Ford v. Chesley Transportation Company, 101 Cal.App.2d 548, 225 P.2d 997; Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597; Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914; Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 82 P.2d 720, and Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920, held it to be reversible error.

Necessarily, the question of prejudice turns upon the facts of each case. On this rehearing, because of the warning sounded in Ford v. Chesley Transportation Company, supra, we have re-examined the decisions and with care have subjected the facts of the instant case to more refined scrutiny. The Ford case involved a truck and trailer astride the highway in the nighttime with the plaintiff a passenger in the automobile which struck the truck. Just as in the case at bar, the trial court there erroneously gave the jury this same stock instruction failing to restrict its application to the plaintiff alone. This court (Division III) reversed the judgment denying plaintiff relief relying solely on that error. It was pointed out that there was little evidence of contributory negligence on the plaintiff's part but that she was forced to overcome the considerations pointing to defendants' freedom from negligence *plus also the presumption that defendant was not negligent.*

[4] Such observations are pertinent here. With reference to the primary issue of whether Russell parked close to the curb[1] or whether his truck stood in such a position as to jut far out into the roadway, there was a sharp conflict of testimony. On the other hand, the evidence of negligence on the part of Mrs. Sciaroni is so slight as to constitute no proof at all. Accordingly, the error in giving the presumption to respondents might clearly have tipped the scales in Russell's favor. From these considerations it appears that the error in the instruction was prejudicial, necessitating a reversal.

As an aid to the trial court on a subsequent trial, other controverted instructions are discussed in the following pages.

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[1] The word "curb" as used herein and in the testimony, questions and instructions refers to the western margin of the boulevard. There does not appear to have been a concrete curb in the form in which it ordinarily obtains.

The court refused to give the following instruction:

"You are instructed that if you find that the defendants in this action stopped or otherwise parked their vehicle at a point in the highway other than a business or residence district, and that such roadway was not bounded by adjacent curbs, then a prima facie case of negligence has been established against the defendants. There is no duty upon the part of the plaintiff to prove that it was practicable for the defendants to park some other place than on the paved or improved or main traveled portion of the highway, but on the contrary, once the fact of having so parked has been established, it is encumbent upon defendants to prove that it was not practicable to park or stop at any other place."

[5] Appellants assert that by virtue of the court's failure to give this instruction, it in effect instructed the jury that the burden of proving the practicability of Russell's parking elsewhere was on the appellants, when the authorities are to the contrary. Thomson v. Bayless, 24 Cal. 2d 543, 546, 150 P.2d 413. However, the jury was fully and correctly instructed[2]

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[2] "You are instructed that at the time of the accident Section 582 of the Vehicle Code of the State of California provided as follows: 'Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.'"

"You are instructed that it has been established as a matter of law that the roadway at the place of the occurrence of the accident, which is the subject of this litigation, was a highway outside of a business or residence district within the meaning of Section 582 of the Vehicle Code."

"You are instructed that the terms 'paved' or 'improved portion of the highway' as used in Section 582 of the Vehicle Code, at the time of the accident mean that portion of the highway ordinarily used for vehicular travel."

"You are instructed that in ascertaining whether or not it was practicable to park a non-disabled truck, as is involved in the present litigation, off the highway, you must consider not only the physical conditions immediately to the right of the place at which the truck was parked, but also any other possible parking space to which the vehicle might reasonably be taken within a reasonable distance."

"You are instructed that the common meaning of the word 'curb' as applied to a state highway is a stone or row of stones or similar construction of concrete, wood or other material along the margin of the highway set aside for vehicular use and a restraint and protection to the adjoining sidewalk space."

"You are instructed that Section 588 of the Vehicle Code of the State of California in full force and effect at the time of the occurrence of this accident insofar as it is pertinent to this action reads as follows: 'Except as otherwise provided in this section every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within eighteen inches of the right-hand curb.' The above vehicle section just quoted is only applicable if you first find that the State highway at the point where the accident occurred was actually bounded by curbs within the definition of the same as given to you by the court."

"Conduct which is in violation of Section 526 or 582 or 588 of the Vehicle Code of the State of California just read to you constitutes negligence per se, that is, negligence as a matter of law. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he (or she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

"You have been instructed that conduct which was in violation of certain sections of the Motor Vehicle Code just read to you constitutes negligence per se, that this means that if the evidence supports a finding and you do find that a person did so conduct himself, it requires a preon the substance of section 582 of the Vehicle Code which was the basis of appellants' requested instruction. Moreover, appellants assumed the burden of proving and did prove that it was practicable for Russell to park elsewhere. No evidence to the contrary was introduced and in fact Russell himself virtually admitted he stopped at that location only for his own convenience. Hence, the needlessness of reading such instruction is clearly evident. Its rejection was a correct ruling.

[6] There was no error in the giving of the instruction that, pursuant to the Vehicle Code, section 526, a vehicle shall be driven within a single lane whenever a roadway has been divided into three or more clearly marked lanes of traffic. Contrary to appellants' argument that no evidence supports the giving of such an instruction, the record reveals testimony of appellant Caldwell that the highway consisted of six traffic lanes, three each way. The evidence established that such lanes were "clearly marked" either by painted lines or differences in the texture and composition of the highway surface. In any case, no prejudice is shown.

[7] Neither is there error in the giving of an instruction "that the terms 'paved' or 'improved portion of the highway' as used in section 582 of the Vehicle Code, at the time of the accident, mean that portion of the highway ordinarily used for vehicular travel." In Ketchum v. Pattee, 37 Cal.App.2d 122, 127, 98 P.2d 1051, 1054, it was held that "improved portion" of the highway, "mentioned in sections 582 and 584 of the Vehicle Code refers to a portion improved and ordinarily used for vehicular travel." The opinion on this point was in no sense dictum, as contended by appellants.

[8, 9] Appellants urge as error the court's instruction in regard to what constituted a curb. The instruction given was as follows: "You are instructed that the common meaning of the word 'curb' as applied to a state highway is a stone or row of stones or similar construction of concrete, wood or other material along the margin of the highway set aside for vehicular use, and a restraint and protection to the adjoining sidewalk space." Appellants requested an instruction to the effect that in determining whether or not a curb existed, the jury could not consider "any macadam or other paving, whether or not raised above the drainage or ditch * * * as curbing." Thereby, they sought to have the jury advised that as a matter of law the roadway at the point of the accident was not bounded by a curb. It is their contention that the sloping four feet, rising eight inches in that distance, cannot be a curb within the meaning of the Vehicle Code. However, that question was one of fact for the determination of the jury. Admittedly, the word "curb" usually connotes some sort of vertical barrier along the edge of the roadway, but there was expert testimony from the witness Harding, a civil engineer in charge of designing streets, that this slope was one of a number of types of curbing used in Los Angeles. He related that the city utilizes not only vertical cement curbs, but also those with varying amounts of slope, one of the most common being a concrete curb with a slope of 21 inches and a six inch rise. The purpose of such a slope is to provide a drainage gutter, to prevent erosion of the pavement and to define the limits of the roadway. These purposes are consistent with the functions of any type curbing. The witness further pointed out that the eight-inch rise in the

sumption that he was negligent. In this connection you are further instructed that such presumption is not conclusive; that it may be overcome by other evidence tending to show that under all the circumstances surrounding the event, the conduct in question is excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. You should, however, be cautioned that in applying this instruction to an alleged violation of Section 582 of the Vehicle Code, namely that section covering stopping, standing or parking outside of business or residence districts, a deliberate, unlawful parking in violation of said section for reasons of personal convenience only, is not excusable or justifiable."

slope on Lankershim boulevard was the "established elevation for a curb" and the "equivalent of the normal hike-up for a curb."

Appellants' requested instruction was also erroneous since it informed the jury that a curb could not be constructed of macadam or other paving. Curbing has been judicially defined to include wood, stone, cement or any other material. Lyman v. Town of Cicero, 222 Ill. 379, 78 N.E. 830. The court's instruction as given was correct.

Judgment reversed.

McCOMB and WILSON, JJ., concur.

105 Cal.App.2d 828

WHITE et al. v. WALSH et al.

Civ. 7903.

Sac. 6133.

District Court of Appeal, Third District, California.

Aug. 4, 1951.

Action for injunction and for other relief by Harriet O. White, and another, against Ed Walsh, and others. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment for the defendants, and plaintiffs appealed. The District Court of Appeal, Schottky, J. pro tem., held that the defendants were proceeding in a reasonable and proper manner to repair and raise elevation of their right of way across plaintiffs' land so that the right of way would be usable as a road.

Judgment affirmed.

1. Appeal and error 🔑931(1)

On plaintiffs' appeal from judgment, all conflicts would be resolved in favor of defendants.

2. Easements 🔑54

When once fixed, the location and extent of easement cannot be materially changed by either party without consent of the other, even though change might benefit the servient estate, but the owner of the easement can make the way as usable as possible for the purpose of the right owned so long as he does not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner thereof.

3. Trial 🔑28(1), 375

Conditions observed by judge or jury while inspecting the premises constitute independent evidence which may be considered by them in determining the issues involved.

4. Easements 🔑53

While a right of way is a privilege of passage over the land of another with implied right to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner, the owner of the right of way cannot so change the surface of the land as seriously to damage the usefulness of the servient estate.

5. Easements 🔑53

In action to enjoin defendants owning right of way across plaintiffs' lands from raising the right of way, evidence was sufficient to support findings that defendants were proceeding in a reasonable and proper manner to repair and raise elevation of right of way so that it would be usable as a road and that no damage would result to plaintiffs' land from such repairs.

6. Easements 🔑55

Where defendants were not asserting any claim to right of way greater than 16 feet in width, plaintiffs owning servient tenement were not entitled to injunction restraining defendants from using more than 16 feet.

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Kasch & Cook and Leo M. Cook, Ukiah, for appellants.

McCowen & McCowen and Hale McCowen, Ukiah, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiffs are the owners of agricultural land through which defendants and their predecessors in interest have a right of way for a road 16 feet wide which had been established by a judgment entered on March 12, 1948. The present action was commenced on September 20, 1949, it being alleged in the complaint that defendants "have hauled and placed thereon [the right of way], and also outside of the boundaries of the same, great quantities of rock and gravel, and have raised the elevation thereof", and that the effect of such work by defendants will be to "prevent and preclude the winter waters from flowing as they have been accustomed to do into the Russian River and said waters will back up and flood the lands of Plaintiffs and will remain thereon to the damage of said orchard and hop yard * * * of Plaintiffs." Plaintiffs sought a mandatory injunction compelling defendants to remove all rock and gravel placed upon said right of way and to restore the roadway to its previous condition, a prohibitory injunction enjoining defendants from raising the levels of the portions of the roadway which had not been raised, a declaratory judgment that defendants had no right to raise the level of the road and no right to travel outside the 16-foot limits previously established, and damages in the sum of $5,000.

Defendants denied substantially all of the allegations of the complaint with the exception of the existence of the previous judgment.

After a trial the court found that on March 12, 1948, a judgment was entered by which the predecessors of defendants were decreed to be the owners of a right of way *sixteen feet* in width; that a controversy has arisen as to whether defendants have the right to raise the height of the road; that defendants have raised the elevation of the road by placing gravel, rock and dirt thereon; that the drainage of water from plaintiffs' real property was not interfered with by such raising nor has it caused any damage to plaintiffs; that defendants are entitled to a right of way 16 feet wide and no wider, as fixed by the prior judgment, and that defendants have not widened it beyond the 16 feet; that the roadway was, at the time of trial, in excess of 16 feet in width, in places, but defendants do not claim a right of way greater than 16 feet in width and they have not threatened to use a roadway of any greater width.

Judgment was entered in accordance with said findings, it being decreed therein that plaintiffs take nothing by this action except that it was thereby declared that defendants have the use of the right of way only as fixed in the judgment (in the previous action); that defendants, so long as an undue burden on plaintiffs' land was not created thereby, have the right to raise the level of the right of way.

Plaintiffs have appealed from the judgment and urge a number of grounds for a reversal of the judgment.

Plaintiffs' principal contention is: "Defendants had no right to raise the road above its height on March 12, 1948; any increase in height which increased the burden on plaintiffs' land entitled plaintiffs to equitable relief to restore the 'status quo' as to height."

[1] Before discussing this contention we shall summarize briefly the factual situation as disclosed by the record, resolving as we must, all conflicts in favor of defendants and respondents. Plaintiffs are the owners of the servient tenement—agricultural lands devoted principally to fruit trees. Defendants Ford own the adjacent Ford Ranch to the north and a 16-foot right of way for a road across plaintiffs' property, said right of way having been established by the 1948 judgment, and being approximately 2600 feet long. Defendants Ed Walsh and Milton Ford operate a gravel and cement business on the "Ford Ranch" which has been in continuous operation since 1932. Prior to September, 1949, a portion of said right of way was even with or higher than the orchard and a portion was lower, and after a storm water would remain on portions of the right of way for as much as a month. In September, 1949, defendants Walsh and Milton Ford placed gravel and dirt on about 1000 feet of the right of way

at its northeast end, but did not place any material on the west end. The evidence is conflicting as to how much the elevation of the road was raised where the material was placed, but a fair deduction from the evidence would be that the raise was not less than 6 inches or more than 1 foot. Said defendants testified that they desired to raise the elevation of the right of way only to an elevation which would provide for drainage and planned to put on a hard surface so they could haul in the wintertime, but that they were stopped by plaintiffs after the material was placed on the first 1000 feet. The evidence showed that water still stands on portions of the right of way that have not been raised.

[2] In support of their contention appellants quote the well-settled rule stated in 9 California Jurisprudence page 952, as follows: "When once fixed * * * the location and extent of an easement cannot be materially changed by either party without the consent of the other, even though the change in question might benefit the servient estate."

And appellants also quote from 17 American Jurisprudence, page 1005, as follows: "The latter [owner of an easement] may make the way as usable as possible for the purpose of the right owned so long as he does not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner thereof."

Respondents do not dispute that the rule is as above stated, but argue that under the findings of the court, which they contend are amply sustained by the record, the raising of the elevations of the road did not interfere with the drainage of water from plaintiffs' land nor has it caused damage to plaintiffs. Defendants point out also that the trial court at the request of plaintiffs' counsel viewed the premises. The record shows that counsel for plaintiffs, shortly before the end of the trial, stated: "There is just one other matter, your Honor, as far as the plaintiffs' case is concerned. I believe that a viewing of the actual site by the Court would be of much more assistance than the testimony of witnesses or the pictures of the place." The Court, in expressing its willingness to view it, stated: "Looks like now would be a good time to look at it. Been quite a lot of water lately."

[3] As this Court said in Peckwith v. Lavezzola, 50 Cal.App.2d 211, at page 217, 122 P.2d 678, 682: "It is true that conditions observed by a judge or a jury, while inspecting the premises, constitute independent evidence which may be considered by them in determining the issues involved." And as stated in Gates v. McKinnon, 18 Cal.2d 179, at pages 182–183, 114 P.2d 576, 578: "The law is clear that when a view of the scene of an accident is made by the trier of facts the conditions observed and properly bearing on the case, is independent evidence which may be considered by the trier of facts in arriving at its decision." See, also, Neel v. Mannings, Inc., 19 Cal.2d 647, 654, 122 P.2d 576.

[4] No useful purpose will be served by discussing the decisions cited by appellants in support of their contention as there is no dispute as to the rule stated by them. But it is also the law, as stated in Ballard v. Titus, 157 Cal. 673, 681, 110 P. 118, 121, that a right of way is a privilege of passage over the land of another, "with the implied right, of course, under such circumstances, to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner." Of course this does not mean that the owner of the right of way may so change the surface of the land as seriously to damage the usefulness of the servient estate; and as stated in Burris v. People's Ditch Company, 104 Cal. 248, at page 252, 37 P. 922, 923: "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance. An easement of the character involved in this case is property, to the reasonable and profitable use and improvement of which, due regard being had to the rights of others, the owner is entitled."

And as stated in Zimmerman v. Young, 74 Cal.App.2d 623, at page 628, 169 P.2d 37, 40: "The right to use the property for road purposes carried with it a right to make necessary and reasonable improvements for the purpose for which it was intended to be used. The evidence does not show that the burden on the servient estate has been unreasonably increased, resulting in irreparable injury thereto."

[5] We are satisfied that the record supports the findings of the trial court, and that the court was fully justified in concluding that defendants were proceeding in a reasonable and proper manner to repair and raise the elevation of the road so that it would be usable as a road; that plaintiffs could not reasonably expect to use defendants' right of way for a road as a drainage ditch for a part of plaintiffs' land; and that no damage had resulted or would result to plaintiffs' land from the repairs that defendants were making to said roadway.

[6] Appellants contend also that they "are entitled, as a matter of right, to equitable relief against defendants' acts which constitute a continuous trespass on plaintiffs' property; and a sufficient use to base a prescriptive claim to the entire 22.2 foot wide physical road."

There was some evidence that at some points of the 16-foot right of way the road was wider than 16 feet and that some gravel and dirt had been found outside of the 16-foot right of way. The right of way was not fenced, the former judgment having provided that defendants should have no right to fence it; and it would not be surprising if the used portion of the road may have extended at some points beyond the 16-foot limit. The court found that defendants were entitled to a right of way 16 feet wide and no wider and that defendants have not widened it beyond the 16 feet; that the roadway was at the time of the trial in excess of 16 feet in width, but that defendants do not claim a right of way greater than 16 feet in width and they have not threatened to use a roadway of any greater width. It is difficult to understand how, under such findings and judgment, defendants could acquire a prescriptive right to a right of way of more than 16 feet in width. Furthermore, the record supports the court's finding that defendants have not widened the right of way beyond 16 feet, and in view of the fact that they do not claim the right to do so we do not believe that an injunction enjoining them from doing something that they have neither done nor claimed the right to do would be justified. In Hannah v. Pogue, 23 Cal.2d 849, the court said at page 858, 147 P.2d 572, 577: "Defendant Smith was improperly enjoined from entering plaintiff's land, for there was no evidence that he had ever entered without plaintiff's consent, or that he intended to do so."

No other points raised required discussion.

We are convinced that the record fully supports the findings of fact made by the trial court, and that the conclusions reached by it are supported by sound principles of law and equity.

The judgment is affirmed.

ADAMS, P. J., and PECK, J., concur.

ERICKSEN v. SOUTHERN PAC. CO.

Civ. 14687.

District Court of Appeal, First District,
Division 1, California.

Aug. 8, 1951.

Hearing Granted Oct. 4, 1951.*

Ove E. Ericksen sued the Southern Pacific Company under the Federal Employers' Liability Act for personal injuries because of defendant's alleged failure to provide plaintiff a safe place for performance of his services as an employee of defendant. From a judgment of the Superior Court of the City and County of San Francisco, Lyle T. Jacks, J., for plaintiff, defendant appealed. The District Court of Appeal, Bray, J., held that plaintiff was engaged in interstate

* Subsequent opinion 246 P.2d 642.

commerce when injured and that the evidence was sufficient to take to the jury the question whether plaintiff's fall from a lumber company's loading dock while inspecting ties for purchase by defendant was the proximate result of defendant's failure to provide plaintiff a safe place to work.

Judgment affirmed.

1. Commerce 🔑27(1)

The Federal Employers' Liability Act applies only to railroad employees engaged in interstate commerce. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Commerce 🔑27(8)

A railroad company's lumber inspector, injured while inspecting ties on lumber company's loading dock in Oregon for purchase by railroad company, which shipped some of ties accepted by him to other states and Mexico for use by such company and other railroad companies and used some of them in its main line, in new tracks, and as replacements, was furthering, that is, promoting or helping along present or future interstate commerce, and hence engaged in such commerce within Federal Employers' Liability Act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and servant 🔑265(3)

To recover damages under Federal Employers' Liability Act for personal injuries, employee must prove that injuries were proximately caused by employer's negligence. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and servant 🔑101(9)

Under Federal Employers' Liability Act, duty rests on employer to use reasonable care in furnishing employees safe place to work, and negligence within such act is violation of that duty. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Master and servant 🔑285(5)

Evidence was sufficient to take to jury question whether railroad company's lumber inspector's fall from lumber company's loading dock while inspecting ties placed by lumber company's employees on dock with ends even with or beyond edge of dock, so as to require him to lean over edge to inspect them, was proximate result of railroad company's failure to provide him with safe place to work after learning from him of type of such working place, so as to render company liable under Federal Employers' Liability Act for inspector's resulting injuries, though place was in lumber company's, not railroad company's, control and inspector was his own boss at scene of accident. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Master and servant 🔑107(2)

A railroad company, having notice of dangerous condition of lumber company's loading dock because of its employees loading of ties thereon with ends even with or extending beyond edge of dock, so as to require railroad company's inspector to lean over edge to inspect ties for purchase by such company, was liable for injuries to inspector as result of fall from dock to railroad track on ground of failure to provide him safe place to work, though dock was not under railroad company's control. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

7. Master and servant 🔑217(12)

A railroad company's lumber inspector's failure to insist that lumber company's employees, over whom he had no control, change their method of piling ties, to be inspected for purchase by railroad company, on lumber company's dock with ends even with or extending beyond edge of dock, or require them to remove ties separately, so that he could inspect ends without leaning over edge, and to make stronger complaint to his employer of conditions on dock than he did, did not bar his recovery of damages from railroad company under Federal Employers' Liability Act for injuries sustained in resulting fall from dock. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Damages 🔑132(6)

A jury's verdict, awarding 64 year old railroad lumber inspector $18,000 damages, of which about $15,000 was for pain, suffering and disability as result of crushing fracture of heel bone, necessitating his immobilization in cast at hospital for over a month, four returns to hospital for replacement of casts, and final return thereto for operation to relieve pain, followed by limitation of movements of foot, six months disability, difficulty in walking on uneven ground, and loss of about $3,000 in wages, was not so excessive as to indicate passion or prejudice of jury.

9. Appeal and error ⚷1004(3)

To upset jury's award of damages for personal injuries, verdict must appear to appellate court to be so excessive as to indicate that jury was motivated by prejudice or passion, particularly where motion for new trial on ground that verdict was excessive has been denied by trial court.

10. Appeal and error ⚷1001(1)
Master and servant ⚷289(15)

Whether injured employee, suing employer for damages under Federal Employers' Liability Act, was contributorily negligent is matter for determination by jury in first instance and by trial court on motion for new trial. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

11. Appeal and error ⚷1004(1)

As District Court of Appeal, on appeal from judgment on jury's verdict for plaintiff in injured employee's action against employer under Federal Employers' Liability Act, cannot say as matter of law that plaintiff was contributorily negligent verdict cannot be disturbed for lack of diminution of damages in proportion to amount of negligence attributable to employee. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

12. Damages ⚷127

While reviewing court, in determining whether jury's verdict awarding damages for personal injuries, was excessive, may consider amounts awarded in similar cases involving equally serious injuries, amount of damages must be determined in each case from its own peculiar facts and circumstances, and verdict cannot be held excessive as matter of law simply because amount thereof is larger than is allowed ordinarily in such cases.

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Dunne, Dunne & Phelps and R. Mitchell S. Boyd, San Francisco, for appellant.

Leo Fried, Oakland, William P. Callahan, San Francisco, of counsel, for respondent.

BRAY, Justice.

Action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. for failure to provide an employee a safe place for performance of services. A jury awarded plaintiff, the employee, $18,000 damages. Defendant appeals.

Questions Involved.

1. Was plaintiff at time of injury engaged in interstate commerce?

2. Is there any evidence of defendant's negligence?

3. Was the verdict excessive?

Facts.

There is practically no conflict in the evidence save as to the inferences which might be drawn therefrom. Plaintiff, 64 years old, has worked for defendant since 1918. He is a lumber inspector. Whenever defendant wanted to purchase lumber from a lumber company plaintiff would go to the latter's premises, inspect their product, and, at his discretion, accept suitable lumber, which he would grade and tally and accept for shipment. He was in complete charge of the inspection operation and was "his own boss." Three or four months prior to the accident he was sent to inspect ties at the Cheney Lumber Company at Central Point, Oregon, by his superior, defendant's chief lumber inspector. The dock where the ties were loaded was the property of the Cheney Lumber Company. The dock, approximately 150 to 200 feet long, was between 10 and 11 feet above the defendant's spur tracks. Cheney employees piled the ties on the dock. Plaintiff's duties were to examine ties and designate those acceptable. These were then pulled out by Cheney employees and loaded in defendant's freight car standing on the spur. Inspectors were instructed to turn the ties over and inspect all four sides. Generally this turning over was done by Cheney employees although occasionally plaintiff helped turn them over and load them. The ties could not be loaded without the inspector's approval. Also he directed the loading. The ties were the property of Cheney and did not become the property of defendant until accepted and paid for.

On the day of injury, the ties were piled about 7 feet high, about 15 ties high. The ends of some were even with the end of the dock while others were protruding beyond it a little. There was no room on the dock in front of the ends of the ties. Plaintiff was standing on the dock beside the pile of ties. He leaned over the edge to inspect the ends which "is the only way you could inspect them." He was standing on his right foot, leaning over the pile, his right hand against the pile, his left foot not on the dock but in the air. He was leaning over as far as he could with his back bent down. After he looked over the ties as far as he could reach and see he tried to step back and to step on his left foot. He was still off balance. Something was under that foot "whether it was a pebble or piece of wood or something" it threw him off and he fell to the railroad track. "* * * there was something under the bottom of my foot that made my ankle twist a little." He received the injury hereafter discussed. In a report to defendant made four days after the accident he stated, "stepped on piece of bark; lost balance, fell over edge of dock * * *"

1. Interstate Commerce.

[1] The Federal Employers' Liability Act applies only to employees of a railroad who are employed in interstate commerce. "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685 § 1, 53 Stat. 1404." 45 U.S.C.A. § 51.

[2] Of the ties accepted by plaintiff and loaded into defendant's cars, some were shipped by defendant to Mexico and other states for use by defendant and other railroads. Some were used by defendant's main line. Some were put in new tracks and others in replacements for old worn out ties. Some were put in the tracks without first being treated. Defendant contends that plaintiff was not engaged in any duty which could be considered under the above definition, as being in interstate commerce. Defendant relies strongly on Holl v. Southern Pacific Co., D.C., 71 F.Supp. 21. There plaintiff Holl was employed by the Southern Pacific which is engaged in both interstate and intrastate commerce. She was a clerk in the freight claim department. When a claim for lost or damaged freight came in, she wrote, from memory, on a form, the route over which the freight had travelled. From this, a typist made a form which went to the auditor who allowed the claim and apportioned the loss to the various carriers over the lines of which the shipment had been carried. In an action under the Federal Employers' Liability Act for injuries received in the scope of her employment the court held that her work "was in no way a part of interstate commerce or in furtherance of it." 71 F. Supp. at page 23. It pointed out, too, that "The plaintiff had nothing to do with the allowance of the claim, or distributing it to the carriers. Her work was one of a chain of acts, which finally resulted in the allowance of the claim." 71 F.Supp. at page 23. It is obvious that Holl's duties can in no wise be compared with those of plaintiff who selected ties which were then taken by the railroad to places where they were placed in the tracks used in interstate commerce. This act certainly was as much in furtherance of interstate commerce or as closely and substantially affecting such commerce as the acts in some of the cases cited with approval in the opinion in the Holl case as being acts in interstate commerce. Thus, in Harris

v. Missouri Pac. R. Co., 1944, 158 Kan. 679, 149 P.2d 342, employees loading barrels of oil to be used in filling lanterns and oil cans used in oiling railroad engines and machines; in Trucco v. Erie R. Co., 1943, 353 Pa. 320, 45 A.2d 20, a blacksmith's helper engaged in making locomotive parts; in Northwestern Pacific Ry. Co. v. Industrial Acc. Comm., 1946, 73 Cal.App.2d 367, 166 P.2d 334, a brakeman being transported on company conveyance after leaving his train one car of which was in interstate commerce; in Agostino v. Pennsylvania R. Co., D.C., 1943, 50 F. Supp. 726, a trackman employed in spreading cinder ballast in surfacing tracks; an employee of a roundhouse, the facilities of which were used in housing and preparing locomotives Zimmerman v. Scandrett, D.C.1944, 57 F.Supp. 799; a member of section crew on way to obtain tools, Patsaw v. Kansas City Southern Ry. Co., D.C.1944, 56 F.Supp. 897; a mechanic's helper assisting in repairing automatic stoker in a locomotive, Edwards v. Baltimore & Ohio R. Co., 7 Cir., 1942, 131 F.2d 366; a guard at a terminal, Albright v. Pennsylvania R. Co., 1944, 183 Md. 421, 37 A.2d 870; a signalman repairing lighting fixtures of a railroad station, Scarborough v. Pennsylvania R. Co., 1944, 154 Pa.Super. 129, 35 A.2d 603; an employee whose duty it was to clean up the railroad's tracks used partly to carry interstate commerce, Piggue v. Baldwin, 1942, 154 Kan. 708, 121 P.2d 183; an employee loading posts to be used in repairing roadway, Rainwater v. Chicago, R. I. P. Ry. Co., 1945, 207 La. 681, 21 So.2d 872; a railroad's emergency flood control worker, whose duty it was to fill sand bags and place them on a flat car which was to move over tracks used for movement in interstate commerce, the bags being placed along the tracks to protect them from existing flood waters, Skanks v. Union Pacific Railroad Co., 1942, 155 Kan. 584, 127 P.2d 431; a locomotive fireman on train engaged in moving empty coal cars coming from outside state to coal mines in state for loading and transporting coal to other states, Louisville & N. R. Co. v. Stephens, 1944, 298 Ky. 328, 182 S.W. 2d 447; were all held to be engaged in interstate commerce. Plaintiff here was "furthering, i. e., *promoting* or helping along, present or future interstate commerce." 71 F.Supp. at page 24. He "was doing something which laid the foundation for, and was in aid of another or subsequent act of interstate commerce or a step towards it." 71 F.Supp. at page 25. This was true even though it might be said that he was engaged in a "borderline occupations". 71 F.Supp. at page 25. In Shelton v. Thomson, 7 Cir., 148 F.2d 1, 3, the court said: "A car can not travel even in interstate commerce, without wheels." Neither can it travel without tracks laid on ties.

The holding of the courts on what constitutes service in interstate commerce has not been uniform. There are some jurisdictions where the interpretation has been a very limited and narrow one. Defendant has cited some of the cases which, while not on facts similar to those in our case, lend comfort to the contention that plaintiff was not acting in interstate commerce. However, those above mentioned taken from the Holl case established the better rule. A reading of the opinion in Northwestern Pacific Ry. Co. v. Industrial Acc. Comm., supra, 73 Cal.App.2d 367, 166 P.2d 334, in which a number of California decisions are reviewed shows that California follows the more liberal rule.

2. Negligence.

[3–5] To recover under the act, the employee must prove that his injuries were proximately caused by the negligence of the employer. Blunk v. Atchison, T. & S. F. Ry. Co., 97 Cal.App.2d 229, 217 P. 2d 494. Here the negligence charged is that the employer negligently failed to provide a safe place for plaintiff to perform his duties. "Under the Employers' Liability Act the duty which rests upon defendant is * * * to use reasonable care in furnishing its employees with a safe place to work * * *. Negligence as used in the act is the violation of that duty." Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal.App.2d 974, 977, 217 P.2d 45, 47. Plaintiff testified that in Longview, Tacoma, Eugene and Seattle (docks where plaintiff inspected lumber for defendant) there was a custom that the mills keep the lumber away from the edge of the dock "so you can step up and take a look at it." Most places have carriers and lift trucks "which give you ample place to walk around and inspect your lumber and also turn it and see every piece of it." About five weeks before the accident he discussed the condition of the platform at Central Point with his immediate superior (the one who sent him there). Plaintiff came near falling off one day and when he went to Portland (the superior's headquarters) "we started to talk about the different mills and how they piled their lumber and so forth and so on, and I suggested that it wasn't—they didn't leave room enough down at Central Point." The Cheney employees put the ties on the wharf in front of the place where defendant's car is spotted to receive them. Cheney did not have lift trucks to deposit the ties on the dock. The ties were unloaded from a six wheel lumber truck which brings them from the woods. Plaintiff did not tell them to move the ties back from the edge of the dock because "That wouldn't do any good," and because he did not have charge of the dock. Lots of times the ties were hauled in at night. It appears from plaintiff's testimony that plaintiff had no control over the manner in which Cheney employees placed the ties on the dock; that for the first three months they had piled them even with or beyond the edge of the dock; that in order to inspect the ends it was necessary to lean over the edge; that through information given by plaintiff to his superior after plaintiff had almost fallen off the dock, defendant knew that plaintiff was working in an unsafe place. This is sufficient to constitute negligence on the part of defendant in failing to provide plaintiff with a safe place in which to work. The fact that the place was not in the control of defendant but in Cheney does not change the situation. Defendant, after being warned, continued to require plaintiff to work there. It is no answer to say that plaintiff in a sense was his own boss at the scene. He had no control over Cheney employees (other than to have them turn the ties over for inspection and on acceptance to direct the loading of them on defendant's cars) nor over Cheney company. While it was an ordinary lumber dock and nothing inherently dangerous about it, it became a dangerous place to defendant's employee because of the custom of Cheney to so pile the ties as to require plaintiff to lean over the edge in order to perform his duties. The danger came from requiring plaintiff, in order to perform his duties, to place himself in a dangerous position with reference to the dock and pile. Thus, there was evidence from which the jury might reasonably (and did) infer that plaintiff's fall was the proximate result of defendant's failure to provide him with a safe place in which to work, after knowledge of the type of place. Douglas v. Southern Pacific Co., 151 Cal. 242, 90 P. 538, is not applicable here. There the employer had provided a safe pathway through its shop for its employees. Plaintiff was injured while taking another pathway which was dangerous. The court applied the rule that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous rather than the safe one cannot recover for an injury thereby sustained. The same rule was the basis of the decision in In re Emerson's Estate, 191 Iowa 1386, 182 N.W. 376. In our case, plaintiff's testimony was, in effect, that there was no choice of methods of inspecting the tie ends which protruded over the edge of the dock. The one he used was the only one available. In this respect, it is important that although the evidence shows that defendant employs other lumber inspectors, it did not produce any testimony that this method of inspection is improper. Lemmermann v. Pope & Talbot, 42 Cal. App. 192, 183 P. 467, like the Douglas case, supra, 151 Cal. 242, 90 P. 538, was not brought under the Employers' Liability Act and was a case in which plaintiff voluntarily selected a path of danger rather than the safe one open to him. The court held plaintiff's negligence to be the sole proximate cause of the accident. In Hontz v. San Pedro, L. A. & S. L. R. R. Co., 173 Cal. 750, 161 P. 971, it was held that plaintiff was guilty of contributory negligence as a matter of law where for no apparent purpose he left a place of safety and went to a place of danger. It was also held that defendant had met its duty of exercising reasonable care to see that the premises were in a safe condition. In Atlantic Coast Line R. Co. v. Davis, 279 U.S. 34, 49 S.Ct. 210, 73 L.Ed. 601, also cited by defendant and which is an action under the act, the circumstances were greatly different than in our case. The court there said 279 U.S. 34, 49 S.Ct. 210, 73 L.Ed. p. 603, that there were several places in which plaintiff could have stood to perform his duties, all of which were reasonably safe and well adapted to the performance of his work, but that he voluntarily abandoned a safe position and placed himself in a position of extreme danger in a place not furnished for the performance of the work, ill adapted thereto, and one of obvious danger. The court held that the sole cause of the accident was plaintiff's own negligence.

Defendant has cited cases to the effect that where a danger is obvious to the employee, the employer is under no duty to warn him of that danger. These cases have no application here. This action is not brought on the theory of failure to warn but on failure to provide a safe place to work. "The duty of warning and instruction is entirely distinct from and independent of the duty of furnishing reasonably safe premises and appliances, as much so as the duty of furnishing reasonably safe premises is distinct from reasonably safe appliances." W. A. Gains & Co. v. Johnson, 133 Ky. 507, 105 S.W. 381, 384.

[6] Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147, is relied upon by defendant, first, to show that defendant was under no duty to warn plaintiff. As stated above, this rule is not applicable here. Secondly, it is to show that defendant is under no duty to plaintiff because the dock was not under the control of defendant. The case discusses at some length the obligation of the employer to his employee where the latter is working on premises of a third party, and holds that, *in the absence of notice* of the dangerous condition of the premises, the employer generally will not be held liable. In our case, however, the employer had notice. In Small v. Ralston-Purina Co., Mo.App., 202 S.W.2d 533, cited by defendant, this rule is applied. It was pointed out that there was no proof that the employer railroad knew of the dangerous condition on the third party's premises and hence the general rule of non-liability applied.

[7] Defendant contends that plaintiff should have insisted that the Cheney employees change their method of piling ties on the dock, or else required them to remove the piles one by one, so that he could inspect the ends without having to lean over the edge of the dock; also that he should have made a stronger complaint to his employer of the conditions than he did. As to the first, he testified that he had no control over the Cheney employees in this respect. A realistic consideration of this situation indicates that plaintiff was in no position to cause Cheney to change its method of operation. As to further complaint to defendant and the fact that plaintiff knew of the danger, the situation is well covered by the following statement from 35 Am.Jur., § 139, p. 569: "Notwithstanding the theoretical liberty of every person to contract for his labor or services, and his legal right to abandon his employment if the conditions of service are not satisfactory, practically—by stress of circumstances, poverty, the dependence of his family, scarcity of employment, competition, or other conditions—the laborer frequently has no choice but to accept employment upon such terms and under such conditions as are offered."

3. Verdict.

[8, 9] Plaintiff suffered a crushing fracture of the heel bone. About a week after the accident, at the Southern Pacific Hospital a closed reduction with pin traction was done and he was immobilized in a cast. He remained in bed in traction for over a month. During that period three separate casts were placed on his foot.

He left the hospital August 1, 1947, on a temporary discharge to go home. He was ordered back and returned August 24, remaining three days when a new cast was put on. He returned September 29, remaining until October 2, receiving another cast. He returned October 30, remaining until November 1 and received another cast. December 29 he returned, obtained a new cast and remained until January 6, 1948. He returned March 4, remaining two days and was discharged to return to work. On returning to work he had "throbbing pain night and day" and usually used a stick for a cane. In November, 1948, he returned to the hospital. His ankle was so sore he had to lay off work the whole month. On the 5th of March, 1950, he returned to the hospital for an operation and was still there at the opening of the trial, April 3. (He was brought to court on a stretcher.) On March 17 the operation, a triple arthrodesis, was performed to relieve the pain from which he had been suffering nearly two years. That was a fusing of the three bones beneath the astragalus into a single joint. The side motion of his foot will be gone. The up and down motion is limited about 25 per cent. In turning the foot inward and outward there is about 50 per cent limitation. In all probability the pain will be eliminated. A disability for about six months after the trial was estimated. He will probably have some difficulty in walking on uneven ground. He will have to wear special shoes. Plaintiff's loss of wages including this estimated period of disability is approximately $3,000. The evidence is not clear as to plaintiff's exact age. The court instructed the jury that the life expectancy of a person aged 61 is 13.47 years. The verdict is $18,000, approximately $15,000 of which is for pain and suffering and disability.

Considering plaintiff's injuries, the fact that the evidence shows that he will always have a stiff left foot, that he will have difficulty in walking on uneven ground, the considerable pain he experienced, the present value of the dollar, plaintiff's life expectancy, and the fact that the claim of excessiveness was presented to the trial court on the motion for new trial and that the motion was denied, we cannot say that the verdict was such as to indicate passion or prejudice on the part of the jury. "Before this court can upset the award it must appear to us that it is so excessive as to indicate that the jury was motivated by prejudice or passion. Particularly is this so, where, as here, the trial judge on motion for new trial has passed upon the award. Nor is it a question of what damages this court would award in the first instance nor are awards in other cases necessarily a criterion of the proper award in the instant case. The types of injury, the age, physical condition, financial status of the various plaintiffs, and the value of the dollar at the time of injury, vary so greatly that it is almost impossible to find a case where the situation is on all fours with a case at bar." Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 421, 222 P.2d 122, 134.

[10–12] Defendant urges that plaintiff was guilty of contributory negligence and hence, under the act, while it will not bar recovery, "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee". Employers' Liability Act, § 53. Probably we can assume from the amount of the verdict that the jury made no diminution for contributory negligence. Whether an employee, under the circumstances of this case, was guilty of contributory negligence is a matter in the first instance for the jury to determine, and then on motion for new trial for the trial court. The jury were fully and fairly instructed on contributory negligence. As we cannot say as a matter of law that plaintiff was guilty of such negligence, we cannot disturb the verdict for lack of diminution, if there was such lack. The following quotation from Power v. California St. Cable R. R. Co., 52 Cal.App.2d 289, 292–293, 126 P.2d 4, 5, is applicable to other contentions made by defendant: "Furthermore and by way of comparison the company calls attention to verdicts rendered in numerous other cases. It is well settled, however, that there is no absolute rule for determining whether a verdict is excessive (Morgan v. Southern

Pacific Co., 95 Cal. 501, 30 P. 601), and while in passing upon the question the reviewing court may consider amounts awarded in similar cases involving equally serious injuries (Osrowitz v. Market Investment Co., 40 Cal.App.2d 179, 104 P.2d 681), in the final analysis the question in each case must be determined from its own peculiar facts and circumstances (Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8), and it cannot be held as a matter of law that a verdict is excessive simply because the amount may be larger than is allowed ordinarily in such cases."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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105 Cal.App.2d 711

PEOPLE v. GORDON et al.

Civ. 14640, 14696.

District Court of Appeal, First District, Division 2, California.

July 30, 1951.

Action by the People of the State of California against Donald Gordon, otherwise known as Don Gordon, doing business under the name and style of "Gordon's of Los Altos" and others to enjoin the selling of articles or products at less than cost and the practice of using articles or products as loss leaders. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., entered an order granting the People a preliminary injunction and defendant appealed. The District Court of Appeal, Nourse, P. J., held that Unfair Trade Practices Act does not violate the commerce or equal protection clauses of federal Constitution and that granting of preliminary injunction was not an abuse of discretion.

As modified, preliminary injunction affirmed, appeals from all other orders dismissed, and writ of supersedeas previously granted, dissolved.

1. Appeal and error 🔑436

The decision of the trial court having been once made after regular submission of a motion, its power is exhausted.

2. Injunction 🔑157

An order for a preliminary injunction can be validly made by minute order if such order by reference gives all required details of formulation but otherwise a formal written order is essential.

3. Appeal and error 🔑76(2)

Where comparison of minute order and formal written order granting preliminary injunction showed that minute order neither by reference nor otherwise contained in detail formulation of acts prohibited, the formal written order granting the preliminary injunction was the only final and appealable decision of the court.

4. Commerce 🔑8(1)

To invalidate a state statute under the commerce clause of the federal Constitution, more is required than vague generalities. U.S.C.A.Const. art. 1, § 8, cl. 3.

5. Commerce 🔑60(1)
Trade-marks and trade-names and unfair competition 🔑68(2.2)

Unfair Practices Act does not purport to regulate interstate commerce but was passed in exercise of state police power and is a legitimate and reasonable exercise of that power. U.S.C.A.Const. art. 1, § 8, cl. 3; Business and Professions Code, § 17000 et seq.

6. Trade-marks and trade-names and unfair competition 🔑68(2.2)

Unfair Trade Practices Act is not a price-fixing statute which conflicts with Sherman Anti-Trust Act, but merely fixes level below which producer or distributor may not sell with intent to injure a competitor. Sherman Anti-Trust Act, as amended 15 U.S.C.A. §§ 1–7, 15 note; Business and Professions Code, § 17000 et seq.

7. Trade-marks and trade-names and unfair competition 🔑68(2.2)

Unfair Trade Practices Act prohibiting selling of articles or products for less than cost or using articles or products as loss leaders when authorizing seller to meet legal prices of his competitors does not conflict with Sherman Anti-Trust Act under which price fixing under guise of interchanging price reports is prohibited. Sherman Anti-Trust Act, as amended 15 U.S.C.A. §§ 1–7, 15 note; Business and Professions Code, § 17000 et seq.

8. Constitutional law 🔑258
Trade-marks and trade-names and unfair competition 🔑68(2.2)

Provisions of Unfair Trade Practices Act excepting from prohibition thereof sales below cost made in good faith in order to meet legal prices of competitors is not so indefinite as to violate due process clause of federal Constitution. Business and Professions Code, § 17050(d); U.S.C.A.Const. Amend. 14.

9. Constitutional law 🔑240(1)
Trade-marks and trade-names and unfair competition 🔑68(2.2)

Unfair Trade Practices Act prohibiting below cost sales but excepting from prohibition thereof sales made below cost in good faith to meet legal prices of competitors does not violate equal protection clause of Fourteenth Amendment of the United States Constitution. Business and Professions Code, §§ 17000 et seq., 17050 (d); U.S.C.A.Const. Amend 14.

10. Constitutional law 🔑38

A statute valid on its face may be unconstitutionally applied.

11. Injunctions 🔑85(1)

Discriminatory enforcement of a criminal statute may be restrained.

12. Trade-marks and trade-names and unfair competition 🔑93(3), 95(1)

In action by people to enjoin certain alleged violations of Unfair Trade Practices Act, evidence did not establish that there was such purposeful discrimination in enforcement of act that there was an intentional violation of essential principle of practical uniformity or that because of the discriminatory character of enforcement of act granting state's request for a preliminary injunction was an abuse of discretion. Business and Professions Code, § 17000 et seq.; U.S.C.A.Const. Amend. 14.

13. Appeal and error 🔑954(1, 2)
Injunction 🔑135

The granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though evidence with respect to absolute right therefor may be conflicting, rests in sound discretion of trial court and order may not be interfered with on appeal, except for an abuse of discretion.

14. Trade-marks and trade-names and unfair competition 🔑95(1)

In action to enjoin defendant from violating Unfair Trade Practices Act complaint alleging that items of food and groceries and commodities were being sold by defendant in ordinary course of business for purpose of injuring competitors or destroying competition and affidavits and testimony of competitors as to injury to competition justified issuance of preliminary injunction based on showing of required intent by defendant to injure competitors or destroy competition. Business and Professions Code, §§ 17043, 17071, 17044, 17078.

15. Trade-marks and trade-names and unfair competition 🔑100

In action to enjoin defendants from certain alleged violations of Unfair Trade Practices Act, defendant's contention that preliminary injunction granted by trial court was not supported by substantial evidence, without citation or analysis of evidence adduced, was insufficient to sustain defendant's burden of showing an abuse of discretion in granting of preliminary injunction. Business and Professions Code, §§ 17000 et seq., 17044, 17050.

16. Trade-marks and trade-names and unfair competition 🔑68(2.17)

In action to enjoin certain alleged violations of Unfair Trade Practices Act, where defendant did not contend that he was making sales below cost in an endeavor to meet legal prices of competitors selling same article of product but that he was meeting actual prices of competitors, determination was justified that defendant had not brought himself under statutory exception. Business and Professions Code, § 17050(d).

17. Pleading ⚷63

Where a party relies on a statute which contains an exception in enacting clause, or clause creating and defining right or liability asserted, such exception must be negatived in initial pleading, but where exception occurs in proviso or in subsequent section of act, such exception is a matter of defense and need not be negatived.

18. Trade-marks and trade-names and unfair competition ⚷93(1)

Under Unfair Trade Practices Act prohibiting selling of articles or products at less than cost and practice of using articles and products as loss leaders section permitting sales below cost made in an endeavor in good faith to meet legal prices of competitors selling the same article or product being separately stated, is a matter of defense which need not be negatived or disproved by plaintiff. Business and Professions Code, §§ 17000 et seq., 17050 (d).

19. Trade-marks and trade-names and unfair competition ⚷100

In action to enjoin defendants from violating Unfair Trade Practices Act prohibiting selling of articles or products at less than cost, preliminary injunction which prohibited selling for less than cost or giving away would be modified to include statutory restriction that selling at less than cost or giving away would be prohibited only if done for purpose of injuring competitors or destroying competition. Business and Professions Code, §§ 17043, 17044, 17078.

20. Injunction ⚷208

A defendant must be able to determine from injunction what he may or may not do.

21. Injunction ⚷208

Where an injunction is too broad restriction should not be left to a construction with aid of statute.

Paul I. Myers, Los Altos, for appellant.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals in an action by the People to enjoin certain alleged violations of the Unfair Trade Practices Act, Bus. and Prof.Code, § 17000 et seq., to wit, the selling of articles or products at less than cost in the manner prohibited in § 17043 of that code and the practice of using articles or products as "loss leaders" prohibited in § 17044. The court granted without notice to defendant a temporary restraining order dated February 15, 1950. Defendant's motion to dissolve said order was denied after hearing on February 20, 1950. On April 3, 1950, after further hearing an order was entered in the minutes reading: "Cause herein, having been heretofore heard and submitted, the Court now makes its order granting a Preliminary Injunction to enjoin the defendant from selling below invoice or replacement cost, which ever is lower, subject to the exceptions on 'below cost' sales as set forth in the Business & Professional Code, Section 17050."

On April 13, 1950, notice of appeal from said three orders was filed, which appeal is numbered 14640. On May 25, 1950, the court filed a formal preliminary injunction, dated May 24th of wider extent than the minute order. Over and above selling below cost it enjoins offering for sale, distributing or offering to distribute, giving away or offering to give away or advertising with the intent to sell, distribute or give away and also engaging in the practice of using any article or product as a "loss leader." "Cost" and "loss leader" are defined in detail.

[1-3] From this formal injunction defendant appealed separately on June 30, 1950, which appeal is numbered 14696. The two appeals were consolidated by order of the court.

The first question presented is whether the minute order of April 3, 1950 or the formal order of May 24th is the final and appealable decision. Appellant contends that, as the minute order contained no direction for the preparation of a written order and no findings were required, this order under Rule 2(b) (2) of the Rules on Appeal finally disposed of the plaintiff's application and that the formal preliminary injunction is to be disregarded as a nullity, citing Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279. Such would certainly be the case if the court could validly dispose of the application for a preliminary injunction by the minute order. In Eisenberg v. Superior Court, 193 Cal. 575, 579, 226 P. 617, the Supreme Court citing from Holtum v. Greif, 144 Cal. 521, 525, 78 P. 11, said: " 'the decision of the trial court having been once made after regular submission of the motion its power is exhausted—it is *functus officio.*' " See also Holden v. California Emp., etc., Comm., 101 Cal.App. 2d 427, 225 P.2d 634; 14 Cal.Jur. 283. Moreover the appeal taken from the minute order would at any rate have divested the trial court of further jurisdiction in the same matter. Sacks v. Superior Court, 31 Cal.2d 537, 540, 190 P.2d 602. However the question remains whether the trial court could make its decision by a minute order or whether it could act only by making a formal written order. "The problem is one of trial court procedure, independent of the Rules on Appeal, since Rule 2 prescribing the time to file notice of appeal does not come into operation until there is an appealable judgment or order." Gwinn v. Ryan, 33 Cal.2d 436, 437, 202 P.2d 51, 52.

In Wheeler v. Superior Court, 82 Cal. App. 202, 255 P. 275, where also there was a minute order and a written order for a temporary injunction it was held that the minute order, incomplete as to the terms, could not be the basis of an injunction but that only the formal written order could have such effect, the court stating, 82 Cal.App. at page 209, 255 P. at page 278: "It is true that in some instances orders may rest upon the clerk's minutes, but it is also true that others require some formulation by the judge. This is particularly so in the case of injunctions. An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. In ordinary actions at law, it is the rule that the signature of the judge is not necessary to the validity of the judgment, but it has been the almost invariable rule in this state for decrees in equity to be so signed. (Citation.) There are many judgments whose entry involves nothing more than clerical or ministerial duties, such as a judgment for the recovery of specific real or personal property, or a fixed amount of damages, or one which is rendered generally that the plaintiff is not entitled to recover from the defendant. In such cases, the mere order for judgment is all that is needed for the clerk, but in many other actions, and especially those of an equitable nature, the form of the judgment and the character of relief that is to be granted are as much a subject for the exercise of judicial power as is the determination of the party in whose favor judgment is to be rendered."

The Wheeler case was cited by the Supreme Court in Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 737, 12 P.2d 1033, where it was held that while it has been declared to be an almost invariable rule that decrees in equity are signed by the judge, where the judge is satisfied that relief upon an application for a preliminary injunction may be granted in the language of the prayer or motion there is no rule statutory or otherwise, which requires that he make and sign a decision in writing, and the entry of his order, announced orally in open court, in the clerk's minute-book makes the decision a matter of record. We conclude from those authorities that an order for a preliminary injunction can be validly made by minute order if said order by reference provides all required details of formulation but that otherwise a formal written order is essential. Comparison of the minute order and the formal written order in this case shows that the minute order neither by reference nor otherwise contains detailed formulation of the acts prohibited. There is therefore here not present a situation in which the minute order can be considered a final and appealable disposition of the application for a preliminary injunction. Rule 2(b) (2) of the Rules on Appeal cannot influence the conclusion. Although, as pointed out in Pessarra v. Pessarra, supra, said rule was adopted to do away with the embarrassing old rule under which the question whether a minute order was final and appealable or not depended on the often unexpressed intention of the trial court, the rule remained that an appeal from a minute order does not lie if the proceeding was of such character that a formal order was required independent of the intention of the trial court. In Hirschberg v. Oser, 82 Cal.App.2d 282, 287, 186 P.2d 53, it was held that an order confirming a sale under section 785, C.C.P. must contain matters such as a description of the property which never appear in a minute order, that it requires a detailed formal order, and that therefore rule 2(b) (2) has no application but rule 2(b) (3) relating to orders not to be entered in the minutes is the applicable rule so that the date of entry for the purpose of appeal is the date of filing of the order signed by the court. A similar reasoning and conclusion seem in general applicable to orders for a preliminary injunction. We hold that only the formal written preliminary injunction was the final and appealable decision of the court in this case.

[4, 5] Appellant attacks the injunction on the ground of unconstitutionality of the provisions of the Unfair Practices Act on which it is based. It is contended that the Unfair Practices Act violates the Commerce Clause of the Federal Constitution, art. 1, § 8, cl. 3, because it necessarily establishes floors for prices of goods, affects the quantity of interstate shipments, and therefore constitutes a burden on interstate commerce. It is contended, but with insufficient reference to the record, that the commodities specified in the complaint as having been sold below cost had moved in interstate commerce. Even if we assume that the goods here involved had so moved the contention is without merit. To invalidate a state statute under the Commerce Clause more is required than such vague generalities. The Unfair Practices Act does not purport to regulate interstate commerce but was passed in the exercise of the state police power and was held by our Supreme Court to be a legitimate and reasonable exercise of that power. See Wholesale Tobacco Dealers v. National, Etc., Co., 11 Cal.2d 634, 643, 82 P.2d 3, 118 A.L.R. 486, where the purpose of the act is also analyzed. In United States v. Food and Grocery Bureau of Southern California, D.C., 43 F.Supp. 966, 972, it is said with respect to said act: "Certain it is that a State may, within its boundary, regulate trade practices, so as to prevent unhealthy competition." In Parker v. Brown, 317 U. S. 341, 360, 63 S.Ct. 307, 318, 87 L.Ed. 315, Chief Justice Stone said: "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. (Citations.) A *fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of these powers may materially affect it." Undoubtedly our act serves local ends and does not discriminate against out of state commerce. Parker v. Brown upholds the constitutionality of the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act, against attacks based on the Commerce Clause (and also on certain Federal Acts). The marketing program, as analyzed in that case, shows a so much more intensive interference with prices and an evidently so much stronger influence on the flow of commerce than can be attributed to the Unfair Practices Act that there can be no doubt that if such interference is not objectionable under the Commerce Clause the same must apply a *fortiori* to the Unfair Practices Act. Moreover, "state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment." Southern Pac. Co. v. State of Arizona, 325 U.S. 761, 770, 65 S.Ct. 1515, 1521, 89 L.Ed. 1915 and cases there cited. In this case no facts whatever have been adduced which afford any basis for judging the manner in which the act affects interstate shipments or burdens interstate commerce. The contention that the Commerce Clause as such independent

of further federal legislation invalidates the Unfair Practices Act must be rejected.

[6] However, appellant further argues that the act conflicts with the policy of the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by which Congress is said to have asserted its power in the field. Recently the United States Supreme Court in Schwegmann Brothers v. Calvert Distillers Corp., 341 U. S. 384, 71 S.Ct. 745 held the non-signer provision of a Fair Trade Act invalid with respect to goods in interstate commerce because they constituted minimum price fixing violating the Sherman Act and not permitted by the Miller Tydings Act. However our Unfair Practices Act must be distinguished from the Fair Trade Act in that the former is not a price fixing act. In Wholesale Tobacco Dealers v. National, etc. Co., supra, 11 Cal.2d 634, at page 655, 82 P.2d 3, at page 15, the Supreme Court said: "In its true sense it is not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. In all other respects price is the result of untrammelled discretion." Appellant contends that certain federal cases have held that activities of California grocers under our Unfair Practices Act constituted price fixing violating the Sherman Act. The cases do not so hold. In each case it was held that the grocers organization in question was actually a conspiracy to fix prices and that defendants could not hide behind our Unfair Practices Act which was *not* a price fixing Act. In United States v. Food and Grocery Bureau of Southern California, D.C., 43 F.Supp. 974, at page 980, one of the cases cited by appellant, Yankwich, J. said: "The Unfair Practices Act of California contains nothing which, in itself, is a violation of the anti-trust statute. * * * But when, under the guise of enforcing the Act, clear price-fixing and price stabilization activities are carried on, the protestations of lawful motive lack force." On appeal from this case the Circuit Court, 2 Cir., 139 F. 2d 973, stated that they agreed with the holding of the district court that the price fixing activities of appellants were not confined to effectuating the Unfair Practices Act and that therefore they were not required to determine whether enforcement of said act would violate the Sherman Act. However, they added that they agreed with the statement of our Supreme Court quoted above from the Wholesale Tobacco Dealers case, that our Unfair Practices Act was not a price fixing statute at all. Several cases with respect to Unfair Practices Acts of other States have also held that those statutes are not price fixing statutes. See Annotation 128 A.L.R. 1126, 1127–1128. There is then no conflict with the Sherman Act.

[7] Appellant further argues that he would commit a violation of the Sherman Act if he should investigate the *legal* prices of his competitors, to find out which prices he may meet pursuant to sec. 17050 (d), Bus. and Prof.Code. The federal cases cited by appellant for this proposition do not hold anything of the kind. They hold that price fixing under the guise of interchanging price reports violates the Sherman Act. The rule in this respect is most clearly expressed by Chief Justice Hughes in the latest case cited by appellant, Sugar Institute v. United States, 297 U.S. 553, 598, 56 S.Ct. 629, 642, 80 L.Ed. 859; "Dissemination of information is normally an aid to commerce. * * * A combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned." It is there further said that the Sherman Act is general and adaptable and that in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Under these principles there seems no danger whatever that appellant's scrutiny of the character of the prices of his competitors with relation to sec. 17050(d) Bus. and Prof.Code could be considered a violation of the Sherman Act.

[8] Appellant's contention that the provision of section 17050, sub. (d) violates due process because of the indefiniteness of the standard set, for which contention Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 is cited, has been expressly rejected by our Supreme Court in People v. Pay Less Drug Store, 25 Cal.

2d 108, 117, 153 P.2d 9, where the difference between the California statute and the one under consideration in the Zasloff case is pointed out.

Finally appellant contends that both the Unfair Practices Act as such and the manner of its application to appellant in this case violate the "Equal Protection Clause" of the 14th Amendment of the United States Constitution.

[9] The unconstitutionality of the act on that ground is argued without citation of any authority on the ground that large chain stores can purchase at lower price than individual grocers, who are prevented from competing with these larger concerns because they may not sell below their own higher costs. This reasoning was rejected with respect to the requirement of uniform operation of article I, section 11 of the California Constitution in Wholesale Tobacco Dealers v. National, etc., Co., supra, 11 Cal.2d 634, 661, 82 P.2d 3, 18, where it is said: "If there is any theoretical 'discrimination' resulting from the statute it is due to the very fact that the law is uniform in its operation, and does not classify." Moreover according to that decision the danger of unequal effect mentioned by appellant is remedied in the statute itself "by exempting from operation of the statute, any endeavor made in good faith to meet the legal prices of competitors." The latter argument seems decisive also with respect to the equal protection clause of the 14th amendment, without necessity to investigate whether without such provision the statute would violate that clause.

[10-12] The unconstitutional manner of application is predicated on the contention that appellant only was sued for violation of the Unfair Practices Act in the whole area whereas competitors sold or offered to sell at the same prices. As authority appellant cites the well known case Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. It is accepted also in California cases that a statute valid on its face may be unconstitutionally applied, Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805, and that discriminatory enforcement even of a criminal statute may be restrained. Downing v. California State Board of Pharmacy, 85 Cal.App.2d 30, 36, 192 P.2d 39; Wade v. City and County of San Francisco, 82 Cal.App.2d 337, 339, 186 P.2d 181. However in the latter case it was pointed out by this court that only deliberate or intentional discriminatory enforcement is a denial of the equal protection guaranteed by the Constitution, not mere laxity of enforcement. This rule does not apply only to enforcement of criminal statutes: the United States Supreme Court in Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, at pages 352, 353, 38 S.Ct. 495, 2 L.Ed. 1154, a tax assessment case, said: "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. * * * It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party." In our case the trial court was clearly of opinion that defendant had not proved such purposeful discrimination, for after stating that it is no defense that other persons in the area are also in violation of the act his memorandum decision continues "Presumably the Attorney General, in the usual course of his duties, will require all merchants now in violation of the act to conform to its provisions or to show cause why they also should not be enjoined." There is nothing in the evidence which could justify the conclusion that because of the discriminatory character of the enforcement of the act the granting of the preliminary injunction was an abuse of discretion. Before the year 1950 there seems to have been no enforcement of the provision against selling below cost in the area involved. The evidence shows that in the middle of January, 1950, some 20 persons were called

to San Francisco and told by Mr. Reardon, Assistant Attorney General, that no selling below cost would be allowed, but that time would be given until February 1 to conform to the act. Some grocers complied but appellant continued advertising below cost after February 1. Alleged in the complaint are violations between February 9 and 15, 1950, and the complaint was filed February 15, 1950. Appellant may have happened to be the first grocer against whom action under the new enforcement plan was taken or the Attorney General may have wished to try out one case first. There is no evidence of any circumstance which points to a purposeful discrimination.

Appellant's next major contention is that there is no substantial evidential support for the granting of a preliminary injunction. It is said that there was no substantial evidence that appellant acted "for the purpose of injuring competitors or destroying competition" as required by sec. 17043 and that there was no clear proof of injurious effect of his acts which according to sec. 17071 is presumptive evidence of said purpose, and further that the People had not proved that the competitor's prices which appellant showed that he was meeting were not legal prices of such competitors.

It was stipulated that defendant sold several groceries under his invoice or replacement cost. The verified complaint alleges "That said items of food and groceries and commodities were and now are being sold by said defendants in the ordinary course of business for the purpose of injuring competitors and destroying competition. That as a result of said sales, competitors of said defendants were injured, and are now being injured, and competition has been and is now being destroyed." Defendant denied this and stated in his affidavit that the sales have been made "in good faith to meet the *actual* prices of a competitor or competitors * * *." It would seem that the following language from People v. Black's Food Store, 16 Cal.2d 59, 61–62, 105 P.2d 361, 362, also a case under the Unfair Practices Act is directly applicable:

[13] "The authorities are numerous and uniform to the effect that the granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion. (Citations.)

"In the present case the applications for temporary injunctions were heard on the verified complaints which specifically allege that the merchandise was sold below cost 'for the purpose of injuring competitors and destroying competition'. Representatives of the defendants testified that they did sell, offer for sale and advertise the goods in question 'at prices below their invoice or replacement cost', but that they did so merely 'to increase the volume of our business', and that they had no intention of thereby 'injuring competitors' nor did they 'intend to destroy competition'. The evidence in this case therefore created a mere conflict on the material issue regarding the intention with which the goods were sold below cost. A sound discretion was therefore conferred upon the trial court to grant or deny the preliminary injunctions. It does not appear that discretion was abused."

[14, 15] In our case there was over and above the verified complaint an expert affidavit of Robert W. Hess, a competitor, to the effect that below cost sales and loss leaders are employed to divert trade from competitors to the actor and thereby injure competitors, that only larger merchants can take the loss on certain types of merchandise and make up from the increased sale on other items and that therefore the practice tends to eliminate small business from competition. Some oral evidence was to the same effect. The direct evidence of injury to competitors was not strong. One competitor (Maehl) testified that the practice had caused a reduction of 1½% in markup and a corresponding reduction in net profit mostly caused by defendant as one of the principal advertisers. Another competitor (Hergert) testified that he had lost customers to defendant Gordon. Hess, whose affidavit was mentioned above, testi-

fied that the advertised bargains caused his clients not to purchase such items in his store. Shopping lists picked up in his store showed that the customers bought Gordon's special items. The purchases of one steady customer decreased from around $150 to less than $50 a month. The witness Pieracci who had testified to the same effect as the affidavit of Hess retracted and testified that efficient small operators could withstand below price selling and that nobody in defendant's area went out of business. It cannot be said that it was an abuse of discretion to hold on the basis of such evidence for the purpose of granting a preliminary injunction that the required intent to injure competitors or destroy competition was present. Moreover, appellant has the burden of showing an abuse of discretion, Remillard Brick Co. v. Dandini, 47 Cal.App.2d 63, 117 P.2d 432, and his contention that the preliminary injunction is not supported by substantial evidence, without citation or analysis of the evidence adduced seems an insufficient showing. Compare Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 787, 296 P. 1088; Metzenbaum v. Metzenbaum, 96 Cal.App.2d 197, 199, 214 P.2d 603.

[16] With respect to the question whether appellant came under the exception of sec. 17050(d) permitting sales below cost made "In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product * * * " it must be noted that appellant did not contend that he was meeting the *legal* prices of a competitor but that he was meeting the *actual* prices of competitors. This evidently intentional deviation from the statutory language indicates that appellant wholly disregarded the question of the legality of the low prices of his competitors and it negatives good faith in that respect. The prices of some of his competitors, which he allegedly was meeting, and who were called as witnesses by him, proved to be below cost, and no evidence was introduced showing that these prices came under an exception which caused them to be legal. The trial court could therefore correctly hold that appellant had not brought himself under the exception of sec. 17050(d).

[17, 18] Appellant contends that a positive showing by the People that the prices which he tried to meet were not legal is required, the burden of proof of the exclusion of the exception being on the plaintiff. As authority appellant cites 49 C.J. 153, which however reads in part: "Where a party relies on a statute which contains an exception in the enacting clause, or clause creating and defining the right or liability asserted, such exception must be negatived in the initial pleading, but where the exception occurs in a proviso or in a subsequent section of the act, such exception is matter of defense and need not be negatived." See also, 71 C.J.S., Pleading, § 86. As the exception here involved is separately stated in a later section, the quoted text shows that the exception is a matter of defense which need not be negatived or disproved by plaintiff. Accordingly People v. Pay Less Drug Store, supra, 25 Cal.2d 108, 114, 153 P.2d 9, states that if sales below cost with the requisite intent are shown defendants are required to go forward with such proof as would bring them within one of the exceptions. Green v. Grimes-Stassforth S. Co., 39 Cal.App.2d 52, 102 P.2d 452, cited by appellant for the contrary position is a case of insufficient allegations of one of the requirements provided for in the section itself.

[19-21] Although we find no error or abuse of discretion in the granting of a preliminary injunction appellant's contention that the injunction as formulated is wider than permitted by statute and constitution and therefore in excess of the court's power, seems correct. Section 17078, Bus. and Prof. Code authorizes the court to enjoin the violation of any section of the act of which a provision has been violated. The formal injunction in this case is intended to enjoin violation of section 17043 and 17044 of the Code. However section 17043 prohibits selling at less than cost or giving away only if done "for the purpose of injuring competitors or destroying competition." The injunction contains no such

restriction. The importance of the restriction is emphasized by the fact that the Supreme Court in Wholesale Tobacco Dealers v. National, etc., Co., supra, 11 Cal.2d 634, 658, 82 P.2d 3, states that an absolute prohibition regardless of intent might well be unreasonable and therefore unconstitutional. Respondent's contention that all restrictions and exceptions provided for in the act should be considered incorporated by implication and that appellant cannot be prejudiced because in so far as an action covered by the injunction would not violate the Act the injunction could not be enforced by contempt proceeding is without merit. Defendant must be able to determine from the injunction what he may and may not do. Gelfand v. O'Haver, 33 Cal.2d 218, 222, 200 P.2d 790; Morris v. George, 57 Cal.App.2d 665, 677, 135 P.2d 195. When the injunction is too broad restriction should not be left to a construction with the aid of the statute. We shall therefore modify the injunction so as to contain the required restriction.

Appellant urges that also the appeal relating to the temporary restraining order and to the order denying the motion to dissolve it requires consideration. It has been held with respect to preliminary injunctions that they merge in the permanent injunction and that no appeal could be taken from the order granting the preliminary injunction after the permanent injunction had been granted. Sheward v. Citizens' Water Co., 90 Cal. 635, 638, 27 P. 439. Such appeal will have to be dismissed, certainly when the permanent injunction is affirmed on appeal. Southern California Railway Company v. Workman, 146 Cal. 80, 86, 79 P. 586, 82 P. 79; County of Tehama v. Sisson, 152 Cal. 167, 179, 92 P. 64. The same position is taken in Knight v. Cohen, 5 Cal.App. 296, 301, 90 P. 145 with respect to the situation actually present in this case, to wit, appeal from a temporary restraining order and order denying a motion to discharge it after a preliminary injunction has been granted.

The preliminary injunction dated May 24, 1950, is modified by adding at the end of its subdivision 1 the words: "if such act is done for the purpose of injuring competitors or destroying competition."

As modified said preliminary injunction dated May 24, 1950, is affirmed, the appeals of all other orders appealed from are dismissed, each party to bear its own costs on the consolidated appeals.

The writ of supersedeas granted by the court on October 13, 1950, until the further order of this court, is dissolved.

GOODELL and DOOLING, JJ., concur.

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105 Cal.App.2d 834

BASORE v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.

Civ. 18178.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1951.

Helen L. Basore, as administratrix of the estate of Lucy M. Basore, deceased, substituted in lieu of Helen L. Basore and Howard E. Basore, sued Metropolitan Trust Company of California, a corporation, and others, to recover the undistributed assets of a dissolved corporation, in the hands of the defendant as successor trustee. The Superior Court, Los Angeles County, Elmer D. Doyle, judge assigned, entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, White, P. J., held that a prior judgment rendered against plaintiff's decedent was res judicata of the present action.

Affirmed.

1. Judgment 🔑681

Where sister, as heir of predeceased brother, after surrendering his 150 shares and receiving correct liquidation payment from dissolved corporation, sued trustees of undistributed assets of dissolved corporation seeking to quiet title in herself as to such undistributed assets, judgment on merits in such action, denying the relief sought and determining that the fund was the property of other parties, was binding upon sister and upon her successors claiming under same right. Civ.Code 1939, § 403d; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14; Code Civ.Proc. § 1908.

2. Judgment ⟹686, 687

A judgment for or against decedent is conclusive for or against his personal representatives and those who succeed to his estate. Code Civ.Proc. § 1908.

3. Judgment ⟹713(2)

A judgment estops plaintiff in subsequent action against same parties, not only as to issues raised but also as to every other issue that might properly have been litigated, and not only is such estoppel effective where grounds for recovery in second action are identical with those previously pleaded in first, which such plaintiff failed to prove, but plaintiff is likewise barred where he failed to allege those grounds on his first suit.

4. Judgment ⟹724

The findings constitute the "decision of the court" as regards contention that, in determining question of res judicata, judgment alone should be considered and findings disregarded if outside scope of judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Decision of the Court".

5. Judgment ⟹687, 713(2), 720

Where sister, as heir of predeceased brother, after surrendering his 150 shares and receiving correct liquidation payment from dissolved corporation, sued trustees of undistributed assets of dissolved corporation seeking to quiet title in herself as to such undistributed assets, judgment on merits in such action denying the relief sought and determining that the fund was property of other parties would be res judicata as to subsequent action, brought by sister's administratrix against successor in interest of trustees named as defendants in prior action, where subsequent action sought only to revive issues raised in first proceeding or at most to raise issues that might have been raised in first action. Code Civ.Proc. § 597.

Bertram S. Harris, Los Angeles, for appellant.

Burr & Smith and James G. Dempsey, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment for defendant after trial before the court, sitting without a jury. The action was originally commenced by Howard E. Basore and Helen Basore individually, as the children and sole beneficiaries of Lucy M. Basore, deceased, but by appropriate order, Helen L. Basore, as the administratrix of the estate of said deceased, was substituted as plaintiff.

The action was brought to recover the sum of $2,886.18, representing the balance in the possession of defendant as successor trustee of the undistributed assets of Columbia Oil Producing Company, a corporation which had been dissolved by a decree of the Superior Court of the State of California in and for the County of Orange, on or about November 19, 1926. The question for decision is whether the issues involved in the present action are rendered res judicata by reason of a prior judgment against the decedent, Lucy M. Basore, in an action brought by her against the directors of the dissolved corporation and predecessor trustees of respondent. The trial court herein granted the motion of respondent, pursuant to section 597 of the Code of Civil Procedure, that the court first hear respondent on its defense of res judicata prior to considering other issues. After a hearing, the plea of res judicata was sustained and judgment entered for respondent.

Appellant's brief contains the following two points:

"A. The making and filing of the findings of fact and conclusions of law is the court's decision and amounts to the rendition of a judgment, which is not the judgment itself. The judgment is a separate order of the court.

"B. The opinion rendered by the trial court, orally or written, nor the findings and conclusions are not the adjudication unless they are carried into the judgment."

As near as can be ascertained from the foregoing propositions advanced by appellant, the contentions are, first, that since the judgment which is relied upon in support of the plea of res judicata merely adjudged that plaintiff's predecessor take nothing against the defendants, it does not appear on its face to be res judicata of the issues presented; and second, that resort may not be had to the findings or pleadings to discover what issues were determined by the former judgment. Consideration of the record discloses appellant's contentions to be without merit.

In support of its motion for judgment on its special defense, respondent introduced by reference the files of an action in the superior court of Los Angeles County, No. 476214, entitled "Lucy M. Basore, plaintiff, v. Judson Hillman, et al., defendants," from which it appeared that in 1942 Lucy M. Basore filed a complaint against the last directors of Columbia Oil Producing Corporation, a dissolved corporation, as trustees of its undistributed assets, seeking to quiet title in plaintiff to the then remaining sum of $4,689.98, and also to have Lucy M. Basore appointed trustee of the fund. By affirmative defense to this action No. 476214 it was shown that on February 16, 1940, in the Superior Court of Los Angeles County, in action No. 445061, judgment was entered adjudging that plaintiff Lucy M. Basore was entitled to the proceeds of 150 shares of stock of the dissolved corporation; that pursuant to said judgment Lucy M. Basore surrendered the stock certificate representing said shares and received the sum of $752.81 in full payment of all her right, title or interest in said shares. The entire file in this latter case No. 445061 was introduced into evidence in the present cause.

In case No. 476214 the complaint of Lucy M. Basore presented the issue as to who was entitled to the undistributed cash of the dissolved corporation: (1) the known but unlocated shareholders, now totalling 934.5 shares, who had not yet received a liquidation payment; (2) Lucy M. Basore, who as heir of a predeceased brother had surrendered his 150 shares and received the correct liquidation payment, or (3) all of the holders of the outstanding 3,418,891.5 shares, less the unlocated holders of 934.5 shares. In case No. 476214 the court found that since Lucy M. Basore pursuant to judgment in case No. 445061 had received a proportionate share of the last remaining assets of the dissolved corporation, she was not entitled to receive any of the remaining fund; that said remaining fund was owned by the then known but unlocated stockholders who had not received their proportionate share in liquidation of the assets of the dissolved corporation. The court concluded that Lucy M. Basore had no right, title or interest in any stock of the corporation or in any fund or property whatsoever held by the directors or trustees; that certain listed persons had vested interests in the remaining funds, and that such vested interests "cannot be divested by subsequent legislation such as Section 403d of the Civil Code; that such divesting would be in violation of the due process clauses of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 13 of the Constitution of the State of California." It was thereupon adjudged that plaintiff, Lucy M. Basore, take nothing by her complaint.

The trial court herein found that the judgment in said action No. 476214, entered in 1942, had not been appealed from, nor set aside, modified or reversed, but remains in full force and effect.

[1] It is plain from the foregoing that the issue of whether Lucy M. Basore should be awarded all or any part of the fund remaining in the hands of respondent trustee or its predecessors was finally determined against her on the merits in the prior action; and, as well, it was further determined that the fund was the property of other parties. The judgment in the prior action was binding upon her and upon her successors claiming under the same right. Code Civ.Proc. sec. 1908; Zaragosa v. Craven, 33 Cal.2d 315, 317, 202 P.2d 73, 6 A.L.R.2d 161.

[2] It is admitted that the present defendant trustee is the successor in interest of the trustees named as defendants

in the prior action, namely the members of the last board of directors of the dissolved corporation. The present plaintiff is the personal representative of the decedent who was the plaintiff in the prior action. "A judgment for or against a decedent is conclusive for or against his personal representative and those who succeed to his estate." (15 Cal.Jur. 202, sec. 225.)

No attempt is made by appellant to point out wherein the issues involved in her present action are any different from those involved in the previous action.

As was said in Papineau v. Security Bank, 45 Cal.App.2d 690, 695, 114 P.2d 629, 631, "Inasmuch, therefore, as the issue here presented was whether plaintiff had any interest in the trust, which was the same issue as was presented and adjudicated in the prior action, the decision there rendered forecloses any further inquiry on that issue."

[3] And in Steiner v. Thomas, 94 Cal.App.2d 655, at pages 658, 659, 211 P.2d 321, 323, it was said:

"It was correct procedure to try the issue of res judicata and to enter judgment against the plaintiff after the court had ascertained that the special plea was substantiated. Code Civ.Proc., sec. 597. * * * The documents offered as proof of the plea included, besides the file of 494, the files in the estate of Dorothea Thomas and in the Termination of the Joint Tenancy of Louis Henry Thomas, deceased. All such files were competent proof of a prior adjudication of the issue raised by the fifth amended complaint. Olwell v. Hopkins, 28 Cal.2d 147, 151, 168 P.2d 972. * * *

* * * * * *

"The judgment therefore was correct in decreeing that 494 was res judicata of the instant action. Code Civ.Proc., sec. 1908. A judgment estops the plaintiff from maintaining a subsequent action between the same parties, not only as to the issues raised but also as to every other issue that might properly have been litigated. The estoppel is effective not only where the grounds for recovery in the second action are identical with those pleaded in the first which he failed to prove *but he is likewise barred where he failed to allege those grounds in his first suit.* Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242; Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Slater v. Shell Oil Co., 58 Cal.App.2d 864, 868, 137 P.2d 713; Rest. Law of Judgments, sec. 63a." (Emphasis added.)

A complete answer to appellant's apparent contention that the trial court could not consider the findings in ascertaining the issues determined by the prior judgment is found in the case of Sutphin v. Speik, 15 Cal.2d 195, 201, 99 P.2d 652, 655, 101 P.2d 497, wherein the court said:

[4] "It is clear from an examination of the findings and judgment therein that plaintiff was adjudged in the prior action to be entitled to his percentage of the production of any wells then drilled on the particular premises regardless of where the wells were bottomed, or the source of the oil delivered by them. *The suggestion made by defendant that the 'judgment alone should be considered and the findings disregarded if outside the scope of the judgment' can have no force in view of the settled rule that the findings constitute the decision of the court.*" (Emphasis added.)

[5] The instant action is one in which the parties were the same as in a former action in which a final judgment was rendered on the merits, save and except that appellant herein is the personal representative of the decedent, who was the plaintiff in the prior action. As heretofore pointed out, a judgment in favor of or against a decedent is conclusive for or against his personal representative and those who succeed to his estate. The former action, therefore, constitutes a bar to the instant one which seeks to revive the issues settled in the first proceeding, or, at most, to raise issues that might have been raised in the first action. In either event, the former judgment is res judicata in the present ac-

tion. Olwell v. Hopkins, 28 Cal.2d 147, 152, 168 P.2d 972.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

105 Cal.App.2d 690

PEOPLE v. DIAZ.

Cr. 4616.

District Court of Appeal, Second District,
Division 3, California.
July 27, 1951.

Rehearing Denied Aug. 6, 1951.

Hearing Denied Aug. 23, 1951.

John Diaz was convicted in the Superior Court of San Luis Obispo County of murder of the first degree, R. R. Sischo, J., and from a judgment and order denying his motion for a new trial defendant appealed. The District Court of Appeal, Vallée, J., held that one alternate juror having been called prior to time that regular panel was impaneled and sworn, contrary to procedure prescribed by Penal Code, defendant was entitled to an additional peremptory challenge over the statutory twenty allowed to regular panel and as defendant exercised eighteen challenges to the regular panel and two to alternate jurors, refusal to permit him to exercise an additional two peremptory challenges to regular panel was reversible error.

Judgment and order denying a new trial reversed.

1. Criminal law 🔑1186(4)
Jury 🔑136(4)

Where alternate juror was called in murder prosecution and was seated before regular panel was impaneled and sworn rather than after as prescribed by statute, and defendant exercised two of the 20 peremptory challenges allowed him to the regular panel against alternate jurors, refusal to permit defendant to exercise 20 peremptory challenges to regular jury panel thereby deprived him of a trial by fair and impartial jury and was reversible error. Pen. Code, §§ 1070, 1089; Const. art. 6, § 4½.

2. Criminal law 🔑1048

Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue.

3. Criminal law 🔑1004

A defendant's fundamental rights are not lost because trial judge is not familiar with the law.

4. Criminal law 🔑1166½(8)
Jury 🔑135

The denial of the right of peremptory challenge is reversible error. Pen.Code, § 1070.

5. Jury 🔑135

The denial of the right of peremptory challenge is not a mere matter of procedure but is a denial of a substantial right. Pen. Code, § 1070.

6. Jury 🔑135

Right of peremptory challenge may not be abridged or denied. Pen. Code, § 1070.

7. Jury 🔑97(1)

The guarantee of right of trial by jury means an impartial jury.

George Finucane, Arroyo Grande, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal from a judgment of conviction of murder of the first degree rendered pursuant to a verdict, and from an order denying the motion for a new trial. Defendant was sentenced to imprisonment for life. His conviction occurred at the third trial after two juries had disagreed.

The sole point urged for reversal is that the trial court committed reversible error in refusing to allow defendant the number of peremptory challenges to which he was legally entitled.

Defendant was 67 years of age. He had lived for eight or ten years on a ranch about 3.2 miles from San Luis Obispo in the home of his nephew Frank Diaz, the latter's wife, daughter Josephine, 17 years of age, and other children. Between 8:00 and 8:30 p. m. on March 14, 1950, Josephine was killed by a shotgun fired through the window of the Diaz kitchen where she was washing dishes.

At the opening of the trial the court proceeded to impanel a jury. The names of seven jurors were drawn and they took places, designated by seat numbers 1 to 7, in the jury box. The following colloquy then occurred:

"The Court: The question has come up concerning the alternate juror.

"Mr. Grundell [District Attorney]: I would not only recommend but suggest that we have an alternate juror at this time. What do you think about it, Mr. Finucane?

"Mr. Finucane [Attorney for Defendant]: No objection by the Defendant, Your Honor.

"The Court: I think we'd better have one. The trial will take a good many days. If anything should happen to a juror, we'd lose all the time."

The names of five jurors were next called and they took seats 8 to 12 in the box. The name of a thirteenth juror, Mr. Christian, was then called and he took seat 13. The procedure followed in the selection of the alternate juror was not that prescribed by section 1089 of the Penal Code, which provides for the selection of an alternate immediately after the jury is impaneled and sworn.[1] The court examined the jurors generally. Several were excused and their places taken by others. Jurors 1 to 6 were examined by counsel for defendant and by the district attorney and passed for cause. Counsel for defendant then began examining Mr. Christian, alternate juror No. 13, when the following occurred:

"Mr. Grundell: Should we take them in order?

"Mr. Finucane: I'll ask. I don't know.

"Mr. Grundell: Does it make any difference?

"The Court: I don't see that it makes any difference, gentlemen. We're going to have thirteen here after you get thru. How you examine them makes no difference to me, if it doesn't to you. Go right thru them."

After the examination of Mr. Christian, alternate juror 13, had been concluded, jurors 7 to 12 were examined for cause. After completion of the examination for cause, the parties exercised peremptory challenges alternately. As his tenth peremptory challenge defendant excused Mr. Christian, alternate juror No. 13, saying, "I'll excuse the alternate juror, Mr. Christian." Mr. Burns took Mr. Christian's place in the box. Mr. Burns was challenged by the district attorney and Mr. Montgomery took his place. After the People had exercised thirteen peremptory challenges, and after the defendant had exercised fourteen, the following occurred:

"Mr. Finucane: May I ask the Court for an interpretation of Section 1089, which provides that, in the case of an alternate juror, that the prosecution and the Defendant shall each be entitled to as many peremptory challenges to such alternate juror as there are alternate jurors called. Does that mean that you may only challenge the alternate juror with one challenge, or does that increase the peremptories?

"The Court: No, I consider him the same as any other juror. I think that he should be subject to every challenge that any other juror is subject to.

"Mr. Finucane: All right, Your Honor. We'll challenge Mr. Montgomery."

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[1] "Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed an indictment or information for a felony, the trial is likely to be a protracted one, the court may issue an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as 'alternate jurors.' * * * provided, that the prosecution and the defendant shall each be entitled to as many peremptory challenges to such alternate jurors as there are alternate jurors called."

Mrs. Crye took Mr. Montgomery's place in seat 13. After defendant had exercised twenty peremptory challenges—eighteen to the regular panel and two to alternate jurors—the following occurred:

"The Clerk: That's Defendant number 20.

"The Court: Number 20.

"Mr. Grundell: Under that section, do you figure you have another peremptory.

"Mr. Finucane: Yes, sir; I do.

"Mr. Grundell: I haven't read it myself.

"The Court: Yes, if you want to exercise it on the alternate.

"Mr. Finucane: Well, that was the question I put to Your Honor. I didn't so understand the ruling.

"Mr. Grundell: I haven't read that section.

"Mr. Finucane: That is the second paragraph, I believe, Mr. Grundell.

"The Court: I have in mind the code section all right.

"Mr. Finucane: I have exercised one peremptory on an alternate.

"The Court: Yes.

"Mr. Finucane: That's right.

"Mr. Grundell: That's what it looks like it's tied down to, George.

"Mr. Finucane: I have exercised two on alternates.

"Mr. Grundell: Well, I think you'd have one for as many alternates as you have.

"The Court: I didn't understand my ruling to extend the number of peremptories that you might exercise.

"Mr. Finucane: Well, the section certainly anticipates 21 peremptory challenges.

"The Court: Yes, and where there is an alternate involved, I feel the 20 involve him too. I don't think it operates to extend your peremptories beyond the 20.

"Mr. Finucane: If the Court rules, I say that's all right. We haven't arrived at that stage yet.

"The Court: No, we haven't come to the problem yet.

"Mr. Finucane: No. I don't want to waive my rights under the section."

After two additional regular jurors were examined, one of whom was excused for cause, the following took place:

"Mr. Finucane: The defendant will ask to exercise another challenge under that code section.

"Mr. Grundell: I don't believe it's permissible, Your Honor.

"The Court: No. Let the record show that the Court rules that the Defendant has exhausted his peremptory challenges, and has no more to exercise.

"Mr. Finucane: Either as to the alternate or as to the regular panel now in the box?

"The Court: Yes.

"Mr. Finucane: All right.

"The Court: All right. Will you all please raise your right hand and be sworn"

The jury was then sworn.

At the close of the People's case, the defendant moved the court "for a mistrial on the ground that the Defendant has been deprived of a substantial right in regard to the matter of the selection and impaneling of the jury." The motion was denied.

If the offense is punishable with death or with imprisonment for life, the defendant is entitled to twenty peremptory challenges to the regular panel. Pen.Code, § 1070. If an order is made that one alternate juror be drawn, as was done here, the defendant is entitled to one peremptory challenge to such alternate juror. Pen.Code, § 1089.

It is obvious that defendant was denied the right of peremptory challenge given by Penal Code section 1070. The statute says that the defendant is entitled to twenty peremptory challenges to the regular panel. He exercised eighteen and was denied the right to exercise more. The statute says that the defendant is entitled "to as many peremptory challenges to such alternate jurors as there are alternate jurors called." One alternate juror was to be called. Defendant exercised two peremptory challenges to prospective alternate jurors. He was allowed only twenty peremptory challenges in all. He had a right to twenty-one in all: twenty to the regular panel and one to the prospective alternate.

Twelve jurors, not thirteen, were called in the selection of the regular panel. After the twelve regular jurors had been called and had taken their seats in the box, an alternate, Mr. Christian, was called and took seat 13.[2] The court and counsel for both sides recognized that he was an alternate and not one of the regular panel. Mr. Christian was peremptorily challenged by defendant. Mr. Burns was then called and took seat 13. Mr. Burns was peremptorily challenged by the People. Mr. Montgomery was then called and took seat 13. Mr. Montgomery was peremptorily challenged by defendant. Mrs. Crye was then called and took seat 13. Neither Mr. Christian nor Mr. Burns nor Mr. Montgomery nor Mrs. Crye was called or examined in the process of impaneling the twelve regular jurors. Neither Mr. Christian nor Mr. Burns nor Mr. Montgomery was challenged in the process of impaneling the twelve regular jurors. They were called, examined and challenged in the process of selecting an alternate. The challenges that defendant exercised on Mr. Christian and Mr. Montgomery were not challenges to one of the regular panel. No one of them was at any time treated as an additional member of the regular panel by either court or counsel. The fact that they were called to seat 13, examined and challenged in the course of impaneling the regular jurors, and were not called after the regular jurors had been impaneled and sworn as prescribed by section 1089, did not make them members of the regular panel. It cannot be said merely because defendant was erroneously allowed two peremptory challenges to alternates when he was only entitled to one that the thirteenth juror was called in the selection of the regular panel and not in the selection of an alternate. Having exercised two peremptory challenges on alternates, defendant had no right to peremptorily challenge Mrs. Crye who was the alternate finally selected. The twenty peremptory challenges used by defendant were not used on jurors who would have served as members of the regular panel. Only eighteen were so used. Two were used on alternates.

[1] The court denied defendant his right to exercise twenty peremptory challenges to the regular jurors and thereby deprived him of a trial by a fair and impartial jury. The fact that defendant exercised two peremptory challenges to two prospective alternates did not impair his statutory right to twenty peremptory challenges to the regular panel. We are of the opinion that the denial of twenty peremptory challenges to the regular panel was not a mere irregularity but was error which substantially affected the rights of the defendant. The Supreme Court of the United States has said: "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. 'The end of challenge,' says Coke, 'is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.' 3 Co. Inst. 27, c. 2. He may, if he chooses, peremptorily challenge 'on his own dislike, without showing any cause.' He may exercise that right without reason or for no reason, arbitrarily and capriciously. Co. Litt. 156b; 4 Bl. Comm. 353; Lewis v. U[nited] S[tates], 146 U.S. 370 [376], 13 S.Ct. 136 [36 L.Ed. 1011]. Any system for the impaneling of a jury that prevents or embarasses the full, unrestricted exercise by the accused of that right must be condemned." Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 414, 38 L.Ed. 208, 214.

[2, 3] This is not a case where a defendant took the chance of a trial by regular jurors whom he knew had not been impaneled in conformity with the statute

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[2] For clarity we diagram the seating.

						13
1	2	3	4	5	6	Christian Burns
7	8	9	10	11	12	Montgomery Crye

and, after an adverse verdict, claimed error; nor is it a case of a defendant leading a trial judge into error, and then complaining of it. Defendant was specifically and definitely told by the court that he would not be allowed more than twenty peremptory challenges to the regular panel and the alternate. It is not a case of a defendant merely being deprived of a right to exercise a peremptory challenge to the alternate juror who did not participate in the verdict. It is a case of the defendant being allowed only eighteen peremptory challenges to the regular panel when he was entitled to twenty. Under the circumstances, after the court had ruled, defendant was not required, as the attorney general intimates, to peremptorily challenge a particular juror of the regular panel, and thus antagonize the challenged juror, and perhaps others, in order to preserve his right. Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue. Pastene v. Pardini, 135 Cal. 431, 433, 67 P. 681; San Joaquin L. & P. Co. v. Barlow, 43 Cal.App. 241, 243, 184 P. 899; Ballsun v. Star Petroleum Co., 105 Cal.App. 679, 689, 288 P. 437; see, also, Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 100, 142 P.2d 741. Furthermore, it was the duty of the trial judge to safeguard the rights of the defendant. A defendant's fundamental rights are not lost because the trial judge is not familiar with the law. The fact that the alternate juror did not take the place of one of the "original jurors", Pen.Code, § 1089, magnifies the error.

[4] It has been consistently held that the denial of the right of peremptory challenge is reversible error. People v. Jenks, 24 Cal. 11, 13; People v. Ah You, 47 Cal. 121, 122; People v. Kohle, 4 Cal. 198; People v. Montgomery, 53 Cal. 576; Silcox v. Lang, 78 Cal. 118, 123, 20 P. 297.

Respondent contends that section 4½ of article VI of the Constitution applies and that the error was not prejudicial. Defendant contends the provision does not apply. The authorities sustain defendant's position. The constitutional provision reads: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const., art. VI, § 4½.

[5, 6] The denial of the right of peremptory challenge cannot be said to be a mere matter of procedure. The right is absolute. People v. Helm, 152 Cal. 532, 535, 93 P. 99. It is a substantial right. It has been said that it is one of the chief safeguards of a defendant against an unlawful conviction and that the courts ought to permit its freest exercise within the limitation fixed by the legislature. People v. Edwards, 101 Cal. 543, 544, 36 P. 7. As said by the Supreme Court of the United States in Hayes v. State of Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578, 580, experience has shown that one of the most effective means to free the jury box from persons unfit to be there is the exercise of the peremptory challenge. The right may not be abridged or denied. Arbitrary abridgment or denial of the right runs counter to principles vital to the integrity and maintenance of the system of a constitutional right of trial by jury.

[7] The guarantee of the right of trial by jury means an impartial jury. Cooley's Constitutional Limitations, 8th Ed., Vol. I, p. 676. All courts agree that the term "jury" wherever found in the organic law of the land includes the incident that the jury consist of twelve impartial persons—persons who stand indifferent between the parties. " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury guaranteed by the Constitution.' " People v. Harrison, 13 Cal.App. 555, 558, 110 P. 345, 346. See, also, People v. Wismer, 58 Cal.App. 679, 685, 686, 209 P. 259; People v. Bennett, 79 Cal.App. 76, 91, 249 P. 20; People v. O'Connor, 81 Cal.App. 506, 521, 254 P. 630.

In People v. Carmichael, 198 Cal. 534, at page 547, 246 P. 62, at page 67, the court, referring to article VI, section 4½ of the Constitution, declared: "It was never intended by this provision of the Constitution to take from the defendant in a criminal action his fundamental right to a jury trial or in any substantial manner to abridge this right. People v. Wismer, 58 Cal.App. 679, 688, 209 P. 259."

In People v. Wismer, 58 Cal.App. 679, 209 P. 259, after the defendant had exercised all of his peremptory challenges, he was compelled to accept a juror who was disqualified by reason of actual bias. The court held, 58 Cal.App. at page 687, 209 P. at page 263: "Section 4½ of article 6 of the Constitution has no application to the situation presented here. The right of trial by jury is fundamental—a right which came to us from the common law and as such guaranteed by the Constitution—and inseparably connected therewith (indeed, it is of the very essence thereof) is the right to a trial by a jury consisting of unbiased and unprejudiced persons. Hence, where, as here, it unquestionably appears that error has been committed in the disallowance of a challenge of a juror for actual bias, and the record discloses nothing indicating that the error was legally cured or in effect waived by the challenging party, the case cannot be saved from the fate of a reversal by an appeal to the terms of said section of the Constitution. This provision was not inserted in the organic law with the purpose of impairing the fundamental rights of the citizen or in any measure hampering the exercise or enjoyment thereof. Indeed, those rights cannot be destroyed or impaired so long as our present system of government exists."

In People v. Bennett, 79 Cal.App. 76, at page 91, 249 P. 20 at page 25, the court stated: "And it should always be remembered that, in the trial of a criminal case, any act or action of a trial court which must necessarily have the effect of denying to the accused a trial by a fair and impartial jury will not be excused or mitigated by the terms of section 4½ of article 6 of the Constitution. The right of a trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the Constitution, and the distinctive quality of that right—its very essence—is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issue tried by a jury consisting of unbiased and unprejudiced persons. The section of the Constitution just mentioned was never intended to impair the exercise of that right, nor, indeed, to embarrass in the least the exercise of any of the fundamental rights of the people. (Citations.)

"It must also be remembered that there is an obvious distinction between the matter of the procedure which the Legislature has established for the exercise of the constitutional right to a trial by jury and that right itself."

In People v. O'Connor, 81 Cal.App. 506, 254 P. 630, the defendant was denied the right to exercise the number of peremptory challenges to which he was entitled under the statute. It was contended that section 4½ of article VI applied. The court said, 81 Cal.App. at page 520, 254 P. at page 635: "As generally defined, 'procedure' includes in its meaning whatever is embraced by the the three technical terms, pleading, evidence and practice. 32 Cyc. 405. Had there been no denial of the exercise of any peremptory challenges, we seriously question whether this section has any application to the cause before us. This section must refer to pleading and procedure, as authorized by the Codes. Thus, to make it applicable to the pleadings, had there been any defects in the informations not affecting the substantial rights of the parties, as accorded by law, then, and in that case, the error should be held harmless.

"Likewise, if the court omitted to follow the procedure embodied by the Codes for the arraignment and trial of the defendants upon the informations filed against them and had committed some error in so doing, which did not affect the substantial rights of the parties, then such error in procedure would likewise be held harmless, but, it cannot reasonably be held that section 4½ of article 6 is so broad in its meaning as to permit the trial court to disregard the usual and ordinary procedure in the trial of a cause and adopt a new and entirely different manner from that recognized by law. Such a course is not a mistake in procedure, it is a substitution of procedure. What would excuse a mistake in procedure would not and could not be held to allow the creation of a course unprovided for by law. Mistake is one thing; a substitution is an entirely different thing. As we have said, the defendants were deprived of the right of trial by jury, as it should have been constituted by law, in that they were compelled to go to trial before jurors whom they were entitled to reject, which brings it in principle on a parallel basis with decisions of courts relative to the right of trial by jury. * * * In other words, to give the section of the Constitution application, the juror impaneled must be such a juror against whom the defendant has no legal objection and against whom he is not deprived of exercising any legal objection or right accorded him by law." See, also, Gulf C. & S. F. R. Co. v. Shane, 157 U.S. 348, 15 S.Ct. 641, 39 L.Ed. 727, 730; State v. Thompson, 68 Ariz. 386, 206 P.2d 1037, 1039, 1040; Benson v. State, 95 Tex.Crim. R. 311, 254 S.W. 793, 795; 24 C.J.S., Criminal Law, § 1900, P. 884; 4 So.Cal.L.Rev. 303, 306; 29 Cal.L.Rev.74, 76.

The record discloses that much publicity and notoriety had been given the case and the two previous trials. It was a matter of difficulty on the third trial to secure the fair and impartial jury to which the defendant was entitled. Some 83 prospective jurors were excused by the court for implied or actual bias on its own motion, on stipulation, and on challenges. Further, it is apparent that by the denial of defendant's right of peremptory challenge he was forced to accept persons who were not proper jurors, and was deprived of an opportunity to secure a fair and impartial jury.

One juror whom defendant was compelled to accept had formed an opinion that defendant was guilty, but stated that since reading about the two previous trials "there is an element of doubt." Another juror had sat through the first two trials; had attended the funeral of Josephine; and had gone to the cemetery with a sister of Frank Diaz, at which time the matter "of how this thing happened" was discussed. Another juror had read about the case, had formed an opinion as to the guilt of the defendant, but stated that he had no opinion at the time of the trial.

Of the many rights guaranteed to a defendant in a criminal case by the Constitution and the law, none is so important as that he shall be tried by a fair and impartial jury. A defendant is deprived of substantial rights if he has been tried and convicted by a jury which is not fair or impartial. It would be a mockery of justice to submit a cause to an unfair or partial jury. The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice.

Cases cited by respondent, such as People v. Estorga, 206 Cal. 81, 273 P. 575, People v. Hoyt, 20 Cal.2d 306, 125 P.2d 29, and People v. Rambaud, 78 Cal.App. 685, 248 P. 954, had to do with mere unprejudicial irregularities in the formalities and procedure attending the selection of a jury and are not in point. They did not involve the denial of the right of peremptory challenge. People v. Bugg, 79 Cal.App.2d 174, 179 P.2d 346, also cited by respondent is likewise not in point. In that case the court mistakenly told the defendant that he had exhausted his peremptory challenges. There was no intimation, as there was in the present case, that the defendant desired to exercise an additional peremptory challenge or that he would have done so had the mistake not been made. There was nothing to indicate, as there is here, that an objectionable juror had been forced on the defendant. In short, there was no denial of the right of peremptory challenge. Furthermore, the cases to which we have referred were not mentioned.

The judgment and the order denying a new trial are reversed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur generally in the foregoing opinion, but I think defendant used nineteen challenges of regular jurors and not eighteen. Montgomery was not subject to challenge as an alternate, and since he was excused by defendant that challenge must be counted as one exercised against the regular panel. This, however, is immaterial, since even then defendant would have used only nineteen instead of twenty challenges of regular jurors. Mrs. Crye was not subject to challenge, and had to be accepted as the alternate. Defendant was denied his right to exercise his twentieth challenge and was convicted by twelve jurors, any one of whom was subject to challenge.

It is as strange as it is deplorable that in this third trial of a murder case no one was familiar with the Penal Code section which governs the selection of alternate jurors, or took the trouble to read it. Everyone was at fault. Although the full statutory right may be waived, it may not be denied, and here there was no waiver. There is no escape from the fact that a miscarriage of justice resulted and that the judgment and order must be reversed.

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105 Cal.App.2d 796

DORN v. PICHININO et al.

Civ. 14627.

District Court of Appeal, First District,
Division 2, California.
Aug. 2, 1951.

C. D. Dorn, as executor of the estate of David Brown, also known as Dave Brown, deceased, sued R. N. Pichinino and others, to cancel and set aside the transfer of 100 shares of corporate stock, made by the testator to the named defendant's son. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., rendered judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained the trial court's finding that no undue influence had been exercised on behalf of the donee.

Affirmed.

1. Evidence 🔑591

Where defendant was called as witness by plaintiff, plaintiff would not be bound by defendant's testimony, but once such testimony was before court it would be substantive evidence in case for all purposes to which it was relevant, including contradiction of testimony of plaintiff's other witnesses. Code Civ.Proc. § 2055.

2. Evidence 🔑591

Under statute providing that party calling and examining adverse party as witness shall not be bound by his testimony and that testimony of such adverse witness may be rebutted by party calling him, testimony of adverse party is to be treated as though given on cross-examination, but such rule is confined to weight and effect of such evidence at time when cause is finally submitted after trial on merits, and has nothing to do with situation presented on motion for nonsuit or directed verdict, where such evidence is viewed quite differently. Code Civ.Proc. § 2055.

3. Fraud 🔑50

The burden of proving fraud rests upon person asserting it, except where confidential relations are involved, and in such situation there is presumption that any advantage was gained by undue influence. Code Civ.Proc. § 1963, subds. 1, 19; Civ. Code, § 2235.

4. Corporations 🔑139

The relationship between banker and depositor is not such a confidential relationship as will create presumption that any advantage in dealings between such parties was gained by undue influence, and therefore, where depositor's executor brought suit to set aside transfer of corporate shares, given by depositor to banker's son, because of alleged undue influence exerted by banker, burden of proving that banker had exerted undue influence over donor would be upon executor, and in carrying that burden he would not be aided by any presumption, but on contrary would have to overcome and dispel presumptions of innocence of wrong and fairness of transactions with which banker and his son were clothed. Civ.Code, § 2235; Code Civ.Proc. § 2055.

5. Evidence 🔑591

Where plaintiff examines his adversary for purpose of proving facts essential to his cause of action, and testimony given negatives existence of such fact, failure of proof results unless plaintiff produces other evidence sufficient to establish facts, but he has, of course, right to produce such evidence. Code Civ.Proc. § 2055.

6. Appeal and error 🔑1057(1)

Where final question asked by plaintiff's counsel on trial court's own suggestion and with trial court's help, opened door for all of testimony which each and all of five questions previously asked by plaintiff's counsel could have possibly brought out, there was no error in trial court's rulings on previous five questions, and fact that witness did not give responsive or satisfactory answer to final question did not add any force to assertion of error based on trial court's rulings on first five questions, but rather would detract therefrom.

7. Witnesses 🔑236(4)

In suit by donor's executor to cancel and set aside transfer of corporate shares made by donor to banker's son, in August, 1947, where plaintiff's counsel, seeking to elicit testimony bearing upon donor's state of mind, asked witness whether donor had had any discussions with her within one year before his death about control or possession of his moneys or securities, time element made question too broad, and therefore trial court did not err in sustaining objection thereto, especially since trial court had indicated by previous rulings that he would permit such inquiry if time element were confined to July and August of 1947. Civ.Code, § 2235; Code Civ.Proc. § 2055.

8. Corporations 🔑139

In suit by donor's executor to cancel and set aside transfer of corporate shares made by donor to banker's son, trial court did not err in striking testimony by plaintiff's witness relating to immaterial and inadmissible matters not bearing on donor's state of mind.

9. Evidence 🔑265(18)

In suit by donor's executor to cancel and set aside transfer of corporate shares made by donor to banker's son, where witness called by plaintiff's counsel to give evidence relating to donor's state of mind, freely admitted aural defect, trial court was entitled to consider such admission in connection with all of her testimony.

10. Appeal and error 🔑931(1), 989

On appeal by donor's executor from judgment in favor of donee in suit brought by executor to set aside transfer, all reviewing court would have to determine was whether the evidence, when viewed in light most favorable to donee, supported trial court's findings, and case was not one in which evidence would be required to be clear, satisfactory and convincing.

11. Appeal and error 🔑1010(1)

In cases where evidence must be clear, satisfactory and convincing, question as to whether it is of that character is primarily one for trial court, and its determination is not open to review on appeal if there is substantial evidence to support its conclusion.

12. Corporations 🔑139

In suit brought by donor's executor to set aside transfer of corporate stock evidence sustained trial court's finding that there had been no undue influence exercised on behalf of the donee and sustained the trial court's judgment for defendants.

◆

Anthony S. Devoto, San Francisco, for appellant.

Edward A. Cunha, Dean Cunha, San Francisco, for respondents.

GOODELL, Justice.

Plaintiff sued to cancel and set aside the transfer of 100 shares of Bank of America stock made by David Brown, a man in his late 70's, on August 19, 1947, about a year before his death. The principal defendant is Richard Wade Pichinino, a minor, the donee of the gift. His father, R. N. Pichinino, is also a defendant in his individual capacity, as well as guardian ad litem herein of Richard. The 100 shares have since become 120 by virtue of a stock dividend. The bank, which was joined as a defendant, has no interest in the litigation.

The case is exceptional in that the alleged undue influence is not charged, as in most cases, against the donee—a boy of 14 at the time—but against his father. The court in its findings held that there was no undue influence, and from the judgment entered thereon this appeal was taken.

The first witness called by the plaintiff (under § 2055, Code Civ.Proc.) was the boy's father, who testified substantially as follows:

At the time of the transaction he was head of the stock and bond department of the Number 1 Powell Street branch of the Bank of America in San Francisco and had been such for about 16 years. He "handled all the transfers of stock, the sale of stock and bonds, and the safe-keeping of items that come into the branch, the sale of government securities, and the purchase of them". It was not one of his functions to advise customers relative to the sale or transfer of stocks and bonds.

He met David Brown about 1930 or 31 at that branch, in connection with the cashing of coupons on some foreign bonds which Brown held. The acquaintance increased and continued during all those years. Brown never consulted, or was advised by, Pichinino respecting the buying or selling of stock. There were, however, many transactions in which he had helped Brown, one of which was a transfer of 87 shares of Bank of America stock and 289½ shares of Transamerica, from joint tenancy into Brown's sole name. After the death of Mrs. Brown in 1944, Brown in 1945 had caused those shares to be transferred into the names of Alice Schweitzer (his wife's sister) and himself as joint tenants. In 1946 or early 1947 Brown wanted to get this stock into his own name, but Mrs. Schweitzer would not consent. Brown, who came into the bank three or four times a day, consulted Pichinino as to his next move, and was told that if his sister-in-law would not assign, Brown would have to sue. Finally Mrs. Harriet Lewis, another sister of Mrs. Brown, came to the bank representing Mrs. Schweitzer, who was ill, and told Pichinino that her sister was willing to make the transfer provided Brown would relinquish his share in his wife's estate. Pichinino so informed Brown, who assented (and made the relinquishment), and Pichinino through his department attended to the transfer from the joint tenancy into Brown's own name.

After that transfer had been accomplished Brown told Pichinino "Well, you've been very kind to me. I desire to do something for you" who replied "You don't have to do anything for me, I'm only too glad to help you to get you out of this trouble." Brown continued to come into the bank daily, telling Pichinino what he wanted to do for him, to which he replied "I don't want nothing". Finally Brown said, "If I can't do something for you I'll do something for your boy" to which Pichinino replied, "If you want to do something for my son, that's entirely up to you." Brown then brought in a certificate for 100 shares and said "I want to make a gift of this 100 shares of the Bank of America to your son." After repeating that it was entirely up to him, Pichinino added "However, it would be better if you put this stock in your name as trustee, so you could get the benefit of the dividends while you are living" to which Brown replied, "That's perfectly agreeable to me." The certificate was then re-issued in the name of David Brown, trustee for Richard Wade Pichinino, and delivered to the father for the boy. Pichinino attended to the details, which duty was part of his department's routine business.

Pichinino gave further testimony under § 2055, which showed that Brown had a most friendly feeling toward him and called on him repeatedly for assistance in his personal affairs. For instance, one evening while defendant was attending the fights in San Jose he was called out of the hall over the loud speaker to find that Brown wanted him to come to San Francisco immediately, and he did so that night. When Brown went to the hospital during his last illness he had Pichinino's name put on his safe-deposit box, and had Pichinino attend to the payment of his hospital and nurses' bills for him. In October, 1947, he made a will in favor of Pichinino, but later made a new will (the one admitted to probate) which left nothing to him.

After the transaction in question Brown made a gift to a woman friend of his, and of his deceased wife, of 100 shares of Transamerica stock, making the certificate out to himself as trustee for her so he could collect the dividends while he lived (as had been done with the boy's certificate).

Appellant's first contention is that "the testimony of plaintiff's witnesses was *unimpeached* and *uncontradicted* and that he, as such executor, was therefore entitled to judgment cancelling said certificates, and that the trial court erred in holding otherwise."

[1, 2] The testimony just summarized was given by the only surviving witness to the transaction, and, while it is true Pichinino was an adverse witness and plaintiff was not bound by his testimony, once it was before the court it was, in the language of the Supreme Court, "substantive evidence in the case for all purposes to which it was relevant". (Goehring v. Rogers, 67 Cal. App. 260, 263, 227 P. 689, 690, in denying a hearing therein after a decision in this court). In Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 428, 15 A.L.R. 192, where the defendants (as here) testified only as adverse witnesses called by the plaintiff, the court said, "there is no merit in appellant's objection that *no testimony was taken in behalf of defendants,* because of the fact that the defendants were called only as plaintiff's witnesses." (Emphasis added.) Then, after quoting § 2055, the court continued: "This provision does not mean that such testimony may not be given its proper weight, but merely as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness (citation). In other words, such testimony is to be treated as though given on cross-examination." We hasten to add, parenthetically, that this rule is confined to the weight and effect of such evidence *at the time when a cause is finally submitted after a trial on the merits,* and has nothing to do with the situation presented on a motion for nonsuit or a directed verdict, where such evidence is viewed quite differently. This cause was submitted by defendants for decision on its merits as soon as plaintiff rested, hence the rule is fully operative in this case.

The testimony of Pichinino respecting the circumstances of the transaction stands (to use appellant's language) wholly "unimpeached and uncontradicted", and under the authorities just cited it was entitled to be given the same weight as if "taken in behalf of defendants" (Figari v. Olcese, supra). Judging from the outcome, the court gave it its full weight on the defense side. Further, his testimony dealing with the Brown-Schweitzer joint tenancy, was not only "unimpeached and uncontradicted" but corroborated by plaintiff's witness Harriet Lewis.

In deciding this case from the bench the court said: "I don't think the case has been proved by a preponderance of the evidence. I am satisfied there was a valid gift here, and I don't see any undue influence." This brings us to the question of the burden of proof—a question of no small importance in such cases as this e. g., Bank of America Nat. Trust & Savings Ass'n v. Crawford, 69 Cal.App.2d 697, 702, 160 P.2d 169, infra.

Despite the finding that there was no confidential relationship, appellant repeatedly presses the argument that *there was,* and, based on that *assumed premise,* seeks to shift the burden onto the defense.

Section 1963, Code Civ.Proc. contains two familiar disputable presumptions which are applicable here, first, subd. 1, "That a person is innocent of crime or wrong" and, second, subd. 19, "That private transactions have been fair and regular."

[3] In 12 Cal.Jur., p. 816, § 71, it is said: "Fraud is odious and is never presumed; it must be established by proof. The presumption always is in favor of fair dealing, except, perhaps, where confidential relations are involved. This presumption has been said to approximate in strength that of innocence of crime. The burden of proving fraud, therefore, rests upon the person asserting it. * * *" The next section (72) deals with presumptions arising from confidential relations. It points out that *in such a situation* there *is* a presumption (see § 2235, Civ.Code) that any advantage was gained by undue influence. Section 7 of the article on Fraud and Deceit (12 Cal.Jur. p. 713 et seq.) enumerates

the several relationships which supply the basis for a presumption of a confidential relationship, but that of banker-and-depositor or customer is not among them.

[4] In the trial court, then, the plaintiff had the burden of proving that defendant R. N. Pichinino had exerted undue influence over the donor, and in carrying this burden he was not aided by any presumption. On the contrary he had to overcome and dispel the presumptions of innocence of wrong, and fairness of transaction with which the defendants were clothed.

In plaintiff's examination of Pichinino under § 2055 he was questioned respecting the preliminary transaction arising out of a joint tenancy which had existed between Brown and Alice Schweitzer.

When asked "Did you make any threats to Mrs. Lewis at that time?" he answered "No, sir".

"Or to Mrs. Schweitzer at any time?" and answered "No, sir."

"Q. Did you threaten either or both of these ladies? A. No, sir.

"Q. That if they didn't give up that stock that you would do something? A. No, sir.

"Q. You did not? A. No, sir.

"Q. You made no threats of any kind to them? A. No, sir."

Although these questions were confined to a threatening of Brown's sisters-in-law, and not himself, the defendant's answers, if they admitted threats, might have supplied some evidence at least of a threatening tendency or disposition. Instead, the answers were clear-cut "No, sirs".

When asked by plaintiff's counsel "You didn't suggest to Mr. Brown that he do this?" he answered "No, sir." "Q. You didn't advise him to do it? A. No, sir."

Later he was asked by plaintiff's counsel: "Q. Now, Mr. Pichinino, after this will of * * * October 2d, 1947, was executed by Mr. Brown * * * did you make any threats to Mr. Brown? A. I did not.

"Q. Did you threaten Mr. Brown that if he made another will that you'd send him to an asylum? A. I did not.

"Q. Did you at *any* time make such a threat to Mr. Brown? A. No, sir.

"Q. At *no* time. A. No, sir." [Emphasis added.]

Had the defendant admitted threatening Brown, or had he answered hesitantly, evasively, or equivocally, plaintiff would have been well on his way toward proving, out of the defendant's own mouth, the pressure which plaintiff had the burden of establishing. Instead, his answers were positive, definite, clear-cut, and unequivocal. Whatever emphasis the witness might have expressed in his answers "No, sir" and "I did not", and his appearance and demeanor on the stand, were matters wholly within the observation and the province of the trial judge.

An examination such as this, under § 2055, "is often exploratory", Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604, 609 and this examination might fairly be so characterized.

The examination included questions respecting threats around October 2, 1947, which was over a month after the transfer in question and hence remote therefrom, and not directed to the time of the claimed pressure respecting the boy's stock, but they included, also, questions respecting *any* threats and threats "at *any* time", which, of course, included the precise time under inquiry.

[5] The defendant's denials of *any* threats, and his testimony that he did not "suggest to Mr. Brown that he do this" or "advise him to do it" (meaning make the gift), left the plaintiff without any direct or competent proof of threats at or around the time of the transfer, or any evidence of activity on the part of Pichinino toward procurement, inducement, persuasion, or pressure. "It is elementary that if a plaintiff examines his adversary under section 2055, for the purpose of proving a fact essential to his cause of action, and the testimony given negatives the existence of the fact, a failure of proof results unless the plaintiff produces other evidence sufficient to establish the fact. He has, of course, the right to produce such evidence."

Kambourian v. Gray, 81 Cal.App.2d 783, 788, 185 P.2d 27, 29.

Appellant, while repeatedly arguing that a confidential relationship existed, cites no authority whatever which involves banker-and-customer dealings or where the facts are anywhere nearly comparable with these facts. He cites such cases as Bank of America Nat. Trust & Savings Ass'n v. Crawford, supra, 69 Cal.App.2d 697, 701, at page 702, 160 P.2d 169, 172, *where the trial court found a confidential relationship to exist* and the appellate court pointed out that *because of its existence* the burden shifted to the defendant to prove that the transfer "was entirely voluntary, uninfluenced by his [donor's] relationship with defendant or by adverse pressure of any sort."

Appellant also cites Estate of Graves, 202 Cal. 258, 259 P. 935, and from its language constructs a formula of five "well established facts which are recognized as being indicative of undue influence or subversion of one's volition." But that case was one where *the jury found that a confidential relationship existed,* hence it belongs in the same category as the Crawford case. One of the five elements so listed is *opportunity.* But in the Graves case itself it was said 202 Cal. at page 262, 259 P. at page 936, that: "mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with interest, or a motive to do so, does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on her testamentary act."

In the case at bar there was not only a failure of proof of any pressure, but there was definite evidence to the contrary in Pichinino's testimony under § 2055 which was, after all, "in behalf of defendants." Figari v. Olcese, supra [184 Cal. 775, 782, 195 P. 429].

Appellant cites 4 Cal.Jur. p. 778, which deals with "Gifts or benefits from a principal to one occupying a fiduciary or confidential relationship to him * * *" which, again, begs the question, since the trial court found no such relationship. Moreover, in the interest of accuracy it should be noted that that text was written before the court in Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 599, 289 P. 613, 614, pointed out that independent advice *in cases of a confidential relationship* (which that case was) was not indispensable, although it was a "circumstance to be considered in determining whether the gift should be avoided". For these reasons the text invoked is not in point.

Appellant's remaining contention is that the "court committed reversible error by rulings made in the rejection of evidence."

The first attack under this head involves the following series of five questions asked plaintiff's witness Harriet H. Lewis, designed to bring out the donor's state of mind about the time of the transfer in August, 1947:

"Did you have any conversations with him relative to his dealings with Pichinino?;

"Mrs. Lewis, shortly before August of 1947, did Mr. Brown ever express to you his opinion of Mr. Pichinino?;

"During August of 1947, did Mr. Brown discuss with you Mr. Pichinino and his opinion of him?;

"During August, 1947, did Mr. Brown discuss his relations with Pichinino?", and

"Did Mr. Brown ever discuss with you the control or possession of his moneys and securities?"

An objection to each was sustained in turn.

That the theory on which each of these questions was asked was thoroughly grasped by the trial judge appears from his remarks in sustaining the objection to the first. His remarks show that he considered the testimony admissible, if developed by proper questions, for he then said, referring to appellant's authorities: "those authorities very definitely state that the question can only call for the state of mind or intent of the declarant, and you can't go any further than that. The rule is when the intention or state of mind of the alleged donor is involved evidence of declarations made by him before or after the transaction is admissible, though the declarations were not made in the presence of the adverse party. Your question is too broad. It doesn't call for the state of mind of the declarant."

These remarks contain a fair general summary of the decision now relied on by appellant to support his claim of error, namely, Nanny v. H. E. Pogue Distillery Co., 56 Cal.App.2d 817, 824, 133 P.2d 686. The judge's attitude was directly opposite to that appearing in some cases, e. g., Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604, where a judge indicates in advance that a proffered line of testimony will *not* be admitted.

After sustaining the objection to the fifth question of the series, the court volunteered the suggestion that "You can ask for conversations that will show a state of mind," whereupon counsel asked: "Mrs. Lewis, during July or August of 1947, did you have any conversation with Mr. Brown relative to his money and securities?"

That question fairly embraced everything that counsel was seeking to bring out by his series of questions, and opened up the whole subject. There was an objection but the court ruled: "I will allow that conversation subject to a motion to strike. It is difficult for the Court to know beforehand whether or not the conversation will bear on the question of intent. First, the question is, did you have a conversation with Mr. Brown relative to his property or estate * * * in July or August of 1947?" After the witness had given several answers defense counsel interrupted, but the court said "Let's get the whole conversation and see if there is anything material" and she proceeded with her testimony. Defendants then moved to strike "the last three answers". The last four questions and answers were

"Q. Did he say anything else? A. We said [sic. "*we*" not "*he*"] 'We hope you realize what you are doing'.

"Q. What did he say? A. 'He's going to do great things. He can do anything down at the bank.'

"Q. By 'he' he meant whom? A. Mr. Pichinino.

"Q. * * * Did he say anything else? A. No, he didn't say anything else about it, because we didn't pursue the subject further. We just visited."

The court remarked: "And I am granting the motion to strike because the only declarations you are entitled to are those which bear upon the intent of the declarant with reference to the transaction at issue. In other words, you can show his intent with reference to the transfer of this particular item of stock * * *. All the questions and answers here have nothing to do with his intent as to the transfer of that stock * * *. It doesn't show his state of mind with reference to the transfer of this stock. All this testimony has shown is that he regarded him as a very important figure down at the bank." The last three answers were struck out, but the rest of the testimony of Mrs. Lewis remains in the record.

[6] There was no error in the rulings on the five questions since the final question asked by plaintiff's counsel *on the court's own suggestion and with the court's help* opened the door for all the testimony which each and all of the five questions could have possibly brought out. The fact that the witness did not give a responsive or satisfactory answer after she was finally permitted to express herself does not add any force to appellant's assertion of error but, rather, detracts therefrom.

[7] Appellant next attacks the sustaining of an objection to this question asked plaintiff's witness Elizabeth Knowlton: "Did he ever have discussions with you within * * * one year before his death about the control or possession of his moneys or securities?" The form of the question followed somewhat that finally asked of Mrs. Lewis, except that instead of being confined to July and August, 1947, as that question was, this took in the whole year before Brown's death. That, alone, made it too broad, and there is no reason whatever why it could not have been cast in exactly the same form with respect to the time element as that ultimately asked of Mrs. Lewis. The judge having allowed it in her case (and even phrased it himself) he certainly must have, consistently, allowed it again. There was no error in that ruling.

[8] And, finally, appellant attacks the court's ruling in striking out all Mrs. Knowlton's testimony with the exception of that "with respect to the conference at which Brown, herself and Pichinino were present." It is not necessary to state this testimony; it is sufficient to say that it related to immaterial and inadmissible matters not bearing on the donor's state of mind. Nanny v. H. E. Pogue Distillery Co., supra. Appellant merely *asserts* reversible error without suggesting any reason or supplying any authority.

[9] After the striking out of the bulk of Mrs. Knowlton's testimony, she volunteered that "Due to the difficulty with my hearing, most conversations, unless I was paying definite attention, I didn't hear at all * * *." This aural defect, freely admitted, was for the trial court to consider in connection with *all* her testimony. She also testified (and it remained in the record) that she heard Pichinino remark that "if Mr. Brown didn't stop writing so many wills the court would adjudge him incompetent."

To sum up: appellant opened his argument with the positive assertion that "the testimony of plaintiff's witnesses was *unimpeached* and *uncontradicted*". The plaintiff's witnesses were the donor's two sisters-in-law, his brother-in-law, Mrs. Knowlton, Mrs. Spofford and the plaintiff-executor. We have already dealt with the testimony of Mrs. Lewis. With respect to the testimony of the others it is sufficient to say that it was favorable to plaintiff's side.

On the other hand, on the defense side there was the direct testimony of Pichinino, given under § 2055, which detailed the transaction itself, which showed that the gift of the 100 shares was *conceived by the donor* and was not made on the advice, suggestion, urging or pressure of Pichinino (see Estate of Wieling, 37 Cal.2d 106, 230 P.2d 808; Smith v. Lombard, 201 Cal. 518, 524–525, 258 P. 55); which showed also that no threats had been made by Pichinino either to the sisters-in-law or to the donor, and which showed that Pichinino had himself suggested, after the donor had determined to make the gift, that the certificate should be made out (as it was) in the donor's name as trustee for the boy. This defense testimony was to be weighed against that given on the plaintiff's side, and to a large extent and in important details it was uncontradicted.

[10–12] All this court has to do is to determine whether the evidence, when viewed in the light most favorable to the respondents, supports the findings. Even in cases where the evidence must be "clear, satisfactory and convincing" (of which this is not one) the question whether it is of that character is primarily one for the trial court, and its determination is not open to review on appeal if there is substantial evidence to support its conclusion. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3. In the instant case there was ample evidence to support the findings.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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105 Cal.App.2d 821

COPELAND v. KERN COUNTY et al.

Civ. 4329.

District Court of Appeal, Fourth District, California.

Aug. 3, 1951.

Rehearing Denied Aug. 27, 1951.

Hearing Denied Oct. 1, 1951.

Action by J. R. Copeland against the County of Kern, and others, to enjoin county from constructing, or expending money in constructing, certain county highway except in conformity with law relating to construction of such highways by county. The Superior Court of Kern County, Stanley Murray, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Barnard, J., held that statutory provision allowing counties to purchase materials and do highway construction by day labor did not limit work to new construction work, but included maintenance, and that term "day labor" did not preclude use of regular county

road crews and prisoners confined in county road camp in constructing of such highways.

Judgment affirmed.

1. Highways 🔑112, 113(2)

Under statute providing that in any county employing competent engineer as road commissioner, board may have any work upon county highways done under supervision and direction of such engineer and that such work may be done by purchasing material and having work done by day labor, or, by letting contract to lowest responsible bidder, for both work and material, or, by purchasing material and letting contract for work, work which may be done is not limited to new construction work as distinguished from labor and maintenance, but includes both new construction and maintenance work. Streets and Highways Code, § 1075.

2. Highways 🔑112

Under statute providing that in county employing competent engineer as road commissioner, board may have work upon county highways done under supervision and direction of such engineer and that such work may be done by purchasing material and having work done by day labor, words "day labor" do not preclude regular trained road crews of county from engaging in such work nor do they contemplate that only inexperienced and casual day laborers are to be hired, but regular road crews and prisoners from county road camp, as well as casual employees, are available for such work. Streets and Highways Code, § 1075(c).

See publication Words and Phrases, for other judicial constructions and definitions of "Day Labor".

3. Highways 🔑112

County has authority to use its regular road crews or prisoners from county road camp for construction of new, or maintenance of old, county highways. Streets and Highways Code, §§ 2006, 2009.

4. Constitutional law 🔑26

The state Constitution is not a grant of power but is limitation or restriction on powers of legislature and such limitations are to be construed strictly and are not to be extended to include matters not covered by language used. Const. art. 10, § 6.

5. Convicts 🔑7

Constitutional provision that labor of convicts shall not be let out by contract to any person or firm and that legislature shall, by law, provide for working of convicts for benefit of state does not limit power of legislature to provide for use of road camp prisoners for construction and maintenance work on county highways. Const. art. 10, § 6.

6. Highways 🔑130½

Whether prevailing wage provisions of labor code were applicable to wages to be paid to regular county road crew employees and prisoners from county road camp in constructing county highway would not be determined in action by taxpayer to enjoin county from constructing county highway, in view of fact that record did not disclose all essential facts and it had been stipulated that board of supervisors had predetermined prevailing rates of per diem wages for public construction work in locality and because remedy by way of injunctive relief, with resulting injury to public, would be neither necessary nor proper for such purpose. Labor Code, §§ 1720, 1770, 1771; Pen.Code, §§ 273h, 4017.

P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, all of San Francisco, Oscar F. Catalano, Bakersfield, for appellant.

Roy Gargano, County Counsel, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action by a taxpayer to enjoin the county and certain of its officers from constructing or expending money in constructing a certain county highway "except in conformity with the law respecting the construction of such highways by counties." The complaint alleged that in constructing this road the defendants have been violating certain statutory and constitutional provisions, and will continue to do so unless restrained. The prayer is for an injunction restraining them (1) from constructing this highway in the manner alleged or from "attempting to circumvent" the statutes requiring this work "to be performed by contract let in the manner and form therein made and provided"; and (2) from constructing said highway or using county funds therefor "so long as persons confined in the Industrial Farm and Road Camp" of said county are used in said work.

The cause was submitted on stipulated facts, including the following:

On December 27, 1949, construction of 2½ miles of new county highway was begun under the direction and supervision of the county road commissioner, who had been ordered and directed by the board of supervisors to proceed with this work. It was estimated that the work would cost over $40,000, and over $24,000 had already been spent. The work was being done by using regular maintenance employees of the county, and prisoners in the County Industrial Farm and Road Camp. An average of 20 maintenance employees were so employed as tractor operators, motor graders, truck drivers, compressor operator and powdermen. The board of supervisors did not determine the prevailing rate of per diem wages in this locality for workmen employed on this highway. It had, however, predetermined the prevailing rates of per diem wages for public construction work in this locality, which rates were higher than the rates paid to the same classifications of workmen employed in this work. The maintenance employees here employed were paid a monthly salary at rates set forth in the county salary ordinance.

In addition, an average of 20 prisoners from the County Industrial Farm and Road Camp were used in this work as laborers and jackhammer operators. These persons were supplied by the superintendent of the camp upon request of the superintendent in charge of the work, and they worked under the supervision of a foreman on the job. They were paid 20¢ a day. The board of supervisors had not specifically authorized or directed the employment of these prisoners in this work, and they did not work under the supervision of a person appointed for that purpose by the sheriff. The prisoners were employed under a general resolution of the board of supervisors authorizing the use of such prisoners on "other public works of the county" when their services were not needed "on the projects of said road camp and farm." The amount paid these prisoners was less than the prevailing rate of per diem wages for laborers and jackhammer operators in that locality.

The court found that the stipulated facts were true, and entered a judgment denying "the plaintiff's prayer for injunctive relief." The plaintiff has appealed from that judgment.

It is first contended that the law does not permit the county to use its regular road crews or prisoners confined in a county road camp, in "constructing" such a highway. It is argued that the sole authority by which respondents could construct this highway is to be found in article 1, chap. 4, division 2 of the Streets and Highways Code; that when the cost of construction exceeds $3000 this article requires that the work be let on contract to the lowest bidder; that the only alternative is found in section 1075(c), which provides that in counties having a single road commissioner such work may be done by purchasing the materials and having the work done by "day labor"; that "day labor" means labor that is hired and paid for by the day; that the regular road crews are employed on a permanent basis on a monthly salary; that the work of county road camp prisoners is involuntary slave labor and cannot be considered "day labor"; and that it follows that the work as being done is unauthorized and unlawful and should be enjoined. It is further argued that section 1075(c) relates to the construction of new roads, being the only authority for such work other than having it done by contract, and that the law contemplates the use of regular road crews only on ordinary maintenance work.

[1, 2] The provisions of this article of this code are not limited to new construction work, as distinguished from labor and maintenance.

Sections 1070 to 1075 expressly refer to any work upon a county highway, which would include both new construction and maintenance work. The words "day labor" are used not only in 1075(c), but in 1073 and 1074 and their meaning, whatever was intended, applies equally to new construction and maintenance work. These statutes refer to both kinds of work and it seems unreasonable to believe that the legislature intended that the county should be compelled to let its trained regular road crew sit idly by in order that any new construction should be done by inexperienced and casual "day labor", in the strictest sense of that term. It seems more reasonable to believe that the words "day labor" were there used for the purpose of distinguishing between work done under contract and work by employees hired by the board. This seems more reasonable since these sections do not distinguish between new construction and maintenance work, and since sections 1024 and 1029 of that code, as formerly in force, provided that all road commissioners, county and district, should employ all men, teams and equipment necessary "to do all highway work other than that let by contract", without any limitation that such men be employed by the day only. If it be assumed that the words "day labor" as used in 1075 (c) are to be thus strictly construed, the fact remains that all of the provisions of that section are permissive only, as provided in section 16 of that code.

[3] It cannot be said that section 1075 (c) is the sole statutory authority permitting the county to construct this highway. Whatever was originally intended, such work is now authorized by section 2009, as we interpret that section. Formerly, section 1075 only applied to those counties which had a single road commissioner for all its road districts, as permitted by section 1029, with the duties set forth in section 1024. In 1947 these provisions of sections 1024 and 1029 were repealed, and sections 2006 and 2009 were adopted. The first of these sections requires the appointment of a single road commissioner in each county, and the second reads in part, as follows:

"The board shall determine the general policies of the county as to county highway matters and the same shall be carried out and administered by the road commissioner. The commissioner shall employ such assistants and employees as may be necessary, subject to the approval of the board of supervisors of the salary or other compensation to be paid, * * *".

While section 1075 still remains, permitting the work to be done in the several ways there outlined, section 2009 gives to the board of supervisors broad powers with respect to county highway matters and, in referring to the hiring of employees by the county road commissioner, expressly mentions "salary or other compensation to be paid" with the approval of the board. This is sufficient to authorize the county to use its regular road crews in such work and we are able to find no statute which forbids this being done.

[4, 5] What has already been said applies also to the use of prisoners from the county road camp, in the absence of any other provision preventing such use. Such use is expressly authorized by Government Code Section 25359 and sections 273h and 4017 of the Penal Code. The appellant further contends in this connection that these code sections, purporting to authorize the working of such prisoners, are void and unconstitutional since section 6, article X of the Constitution provides that the labor of "convicts" shall not be let out by contract to any person or firm, and that "the Legislature shall, by law, provide for the working of convicts for the benefit of the State."

It is argued that prior to the adoption of this section of the constitution the legislature had full powers over the subject of punishment for crime (State v. McCauley, 15 Cal. 429); that under the principle of *expressio unius, exclusio alterius,* which must be applied, the adoption of this section necessarily took away the power which the legislature formerly had in this connection, and supplanted it with a "specific power of narrower scope"; that the word "convicts" in section 6 refers to persons convicted of felony and confined in state prisons, and does not include persons convicted of a misdemeanor and confined in county jails or road camps; and that the effect of section 6 is to so limit the power of the legislature that it may provide only for the working of persons confined in state prisons, and then only when the work is for the benefit of the state itself and not the counties. Appellant's contention, if correct, would apply to the first part of section 6 as well as the latter part, with the unique result that this section, while prohibiting the contracting out of convicts to private persons, would permit the legislature to provide for the contracting out of misdemeanants to private parties, but would prohibit any provision for working misdemeanants for the benefit of the public. It is well settled that the state constitution is not a grant of power, but is a limitation or restriction on the powers of the legislature. Such limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used. Collins v. Riley, 24 Cal.2d 912, 152 P.2d 169. Whether the narrow interpretation of the words "convicts" and "for the benefit of the State", here contended for, was ever intended may well be questioned. If it be assumed that it was, the entire limitation would relate only to persons confined in the state prisons, and the original power of the legislature in this regard would otherwise remain in force. In any event, this section of the constitution in no way limits the power of the legislature to provide for the working of road camp prisoners in the manner here involved.

[6] The appellant further contends that the law does not permit the county to employ either its regular employees or its prisoners on public work at "less than the prevailing wage rate." It is argued that since this work was "Public work" as defined in section 1720 of the Labor Code the provisions of sections 1770 and 1771 of that code are applicable, both with respect to regular county employees and county prisoners and that it follows that the county must pay them the prevailing rate of per diem wages while so engaged.

The respondents argue that these provisions of the Labor Code do not apply to persons employed by a county since Article XI, Section 5 of the Constitution gives to the board of supervisors full control over the appointment and compensation of county employees, thus removing all power in that regard from the legislature; that the provisions of the County Civil Service Enabling Law, Gov.Code, secs. 31100–31113, clearly indicate that the provisions of the Labor Code have no application to county employees; and that, in any event, the supervisors fixed the salary of these employees by an amendment to the county salary ordinance on September 26, 1949, which is both a sufficient compliance with section 1770 of the Labor Code and made final by that section. It is further argued that the application of these provisions of the Labor Code to the work done by county prisoners would be contrary to the spirit and purpose of the Prison Farm and Road Camp Law, Deering's Gen.Laws, Act 3593 and would destroy its usefulness.

It is unnecessary to here decide the question thus raised. If the prevailing wage provisions of the Labor Code are applicable many questions of fact are involved in determining whether or not they have been complied with. The meager record before us is not sufficient to disclose all of the essential facts. It was stipulated that the board had predetermined the prevailing rates of per diem wages for public construction work in this locality. This may have been properly done, and have become final under section 1770 of the Labor Code. That the rates so established were higher than those here paid would not necessarily be conclusive as shown by several cases in this state where similar questions have been adequately presented and decided. If the supervisors were in error in any respect in fixing or paying the compensation for the work here involved ample remedies were available to anyone injured thereby, and no such drastic remedy as restraining the doing of the work, with its resulting injury to the public, was either necessary or proper. The only judgment entered, and appealed from, is one denying "injunctive relief." Nothing is here presented which requires a reversal of that judgment.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

105 Cal.App.2d 726

CITY OF LOS ANGELES v. MORGAN et al.

LOS ANGELES ROCK & GRAVEL CO. v. McKENNA.

Civ. 17946.

District Court of Appeal, Second District, Division 1, California.

July 30, 1951.

Rehearing Denied Aug. 27, 1951.

Hearing Denied Sept. 27, 1951.

The City of Los Angeles, a municipal corporation, brought condemnation action against Emma M. A. Morgan, and others, and Los Angeles Rock and Gravel Company, a limited partnership, title owner of record, filed a cross-complaint against Catherine A. McKenna, who asserted claim under recorded quiet title decree entered in favor of her predecessor in interest. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., ruled that the partnership was absolute owner of the property and that cross-defendant had no interest therein, and cross-defendant appealed. The District Court of Appeal, Hanson, J., pro tem, held that where the quiet title decree, entered and recorded in 1924, was obtained without service, it was void and could be attacked, directly or collaterally at any time, and was not constructive notice of contents of decree nor of cross-defendant's alleged interest in the property.

Judgment affirmed.

1. Judgment 🔑17(1)

Under due process clause of federal constitution, personal judgment rendered without service or process on, or legal notice to, a defendant is not merely voidable, but void, in absence of a voluntary appearance or waiver.

2. Judgment 🔑17(1)

A judgment void for lack of service is as ineffective in state where it was rendered as it is outside of that state.

3. Judgment 🔑386(4)

If invalidity of a judgment void for lack of service is apparent by inspection of judgment or judgment roll, it may be vacated upon motion at any time after its entry.

4. Judgment 🔑386(4), 419

If invalidity of judgment void for lack of service is not apparent by inspection of judgment or judgment roll, it may be set aside by motion, if such motion is filed within time allowed by statute, otherwise, challenge permitted is limited to an action in equity to vacate the judgment. Code Civ. Proc. § 473.

5. Process 🔑148

In condemnation action wherein title to land was disputed by person who asserted recorded quiet title decree entered in 1924 in favor of her predecessor in interest and against predecessor in interest of title owner of record who challenged decree for want of service, evidence was admissible to impeach sworn return of service and to challenge fact of service.

6. Judgment 🔑419, 443(1)

A false affidavit of service constitutes extrinsic fraud because it prevents party from having his day in court, and court of equity will relieve party from judgment rendered without service of process, either actual or constructive, when no opportunity has been given him to be heard in his defense.

7. Judgment 🔑386(4)

In absence of service of process upon party, he has no duty to take affirmative action at any time thereafter to preserve right to challenge judgment, though he may have had actual knowledge of judgment, since judgment is void.

8. Judgment 🔑419

In a proper case, a court of equity has authority to refuse to exercise its jurisdiction by declining to grant affirmative relief from a void judgment entered without service of process.

9. Judgment 🔑485

A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers, because it is a nullity and can be neither the basis nor the evidence of any right whatever.

10. Judgment 🔑456(1)

Where objective of an action is to vacate a judgment for want of jurisdiction of court to enter it and not because of irregularities in obtaining it, such as errors in exercise of jurisdiction, fraud in procurement of judgment or clerical mistakes therein, neither laches nor ordinary statutes of limitation may be invoked as a defense, because judgment is a nullity whether want of jurisdiction appears on face of judgment or is shown by evidence aliunde.

11. Judgment ⟹486(1)

A "voidable judgment" is one rendered by a court acting within its jurisdiction although in an erroneous manner or as a result of irregularity.

See publication Words and Phrases, for other judicial constructions and definitions of "Voidable Judgment".

12. Judgment ⟹489

A judgment shown by evidence to be invalid for want of jurisdiction is a "void judgment" or at all events has all attributes of a void judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Void Judgment".

13. Judgment ⟹288

A recorded decree which is void for want of jurisdiction is not constructive notice of its contents or of the fact that it is actually recorded.

14. Mortgages ⟹154(4)
Vendor and purchaser ⟹231(1)

Purpose of recording statutes is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles or interests, whether valid or invalid, which may affect their rights as bona fide purchasers and so as to protect them before they part with money. Civ.Code, §§ 1213–1215.

15. Judgment ⟹288, 490(1)

Quiet title decree entered and recorded in 1924 against predecessor in interest of title owner of record but obtained without service was void and could be attacked by anybody anywhere at any time, directly or collaterally, and was not constructive notice to title owner of record of its contents, nor was it constructive notice that title was vested of record in successor in interest to holder of decree. Code Civ.Proc. §§ 338, subd. 4, 473.

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Ray L. Chesebro, City Attorney, by Arthur Wm. Green, Deputy City Attorney, Los Angeles, for plaintiff.

Catherine A. McKenna, in propria persona.

Vaughan, Brandlin & Wehrle, Holbrook & Tarr, Lawrence L. Otis, Gilbert E. Harris, and James F. Healey, Jr., by J. R. Vaughan and Pat B. Trapp, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

In this action by the City of Los Angeles to condemn a parcel of land, originally subdivided into 39 residential lots, the trial court ruled that respondent, Los Angeles Rock and Gravel Company, a limited partnership, was the absolute owner of the property, and hence entitled to the condemnation award, and that appellant Catherine A. McKenna had no right, title or interest in the property.

The trial court found that the respondent had a perfect title of record deraigned from its predecessor corporations, the initial one having acquired the property prior to 1923 from the then title owners of record. Moreover, the court found that respondent and its predecessors had been in continuous and actual possession of the realty involved for more than 20 years "under claim of right * * *" and had held it "adversely, openly and notoriously without let or hindrance or claim thereto by defendant Catherine A. McKenna, or any other person whomsoever."

The chain of title under which appellant Catherine A. McKenna claims stems from stray deeds executed by persons who at the time of making the deeds were total strangers to the record ownership of the land purportedly conveyed. In the McKenna chain of title there appear two deeds executed in January, 1923, one by H. B. Hunt and the other by J. W. Wood to a woman by the name of J. Truitt as grantee. Neither one of the grantors had any title of record. The appellant, who appears here *in propria persona,* testified that the woman J. Truitt was a "dummy" who held such "title" as she had acquired through the deeds for one Smith, a client of appellant. Shortly after J. Truitt acquired her deeds suit was instituted in February, 1923, in her behalf to quiet her title to the property therein described by an attorney named

Trusten P. Dyer, who at the time or very shortly thereafter became a co-partner with appellant in the practice of the law. In July, 1923, after the decree had been entered appellant was substituted into the case as co-counsel with Dyer. The predecessor corporation of the respondent, which was the title owner of record of the property, was not named as a party defendant in the Truitt title quieting action, but purportedly was served under the name of one of the fictitiously named defendant corporations. The sworn return of service of summons in that action made by one Henry Hunt, who was not called as a witness in the instant case or whose absence was not accounted for, states that service was made on one Lewis, vice-president of the Los Angeles Rock and Gravel Company. The trial court in the instant case found that no person by the name of Lewis was ever a vice-president of the corporation or otherwise employed by it and that the return of service was "wholly and wilfully false, fraudulent and fictitious."

The decree in the quiet title action signed April 12, 1923, recites that personal service was made as follows: "Los Angeles Rock and Gravel Co., A Corporation sued under the fictitious name in the complaint of John Green, (a corporation) by serving M. Lewis, Vice President of the Corporation." The decree was recorded in the recorder's office on March 27, 1924.

Such interest as the "dummy" J. Truitt acquired by the deeds mentioned and through the decree in the quiet title action passed to appellant sometime prior to 1929. What the consideration was is not shown by the evidence in the instant case. During all the years here in question the taxes against the property have been paid by respondent or its predecessors. Likewise during all those years the appellant has evinced no interest in the property by any claim made to it, although the jury by its condemnation award valued the property at $240,000.00. To be sure the appellant made a claim, which the trial court found was spurious—and rightly so—, that appellant in 1929 sold gravel rights, and not the fee, in the lands to respondent's predecessor. Appellant did, in fact, sell gravel rights in a parcel of land—*miles removed*—to respondent's predecessor.

As grounds for reversal appellant contends (1) that the recording on March 27, 1924, in the County Recorder's office of the quiet title decree obtained by J. Truitt gave constructive notice of its contents to the Gravel Co., i. e., among other things, that it had been served with process, and if in fact this was untrue it was yet incumbent upon the company to attack the decree within three years for fraud, if fraud there was in obtaining the decree (Code Civ. Proc., sec. 338, subd. 4); (2) that the respondent, when it acquired title by conveyance in 1943 from its immediate predecessor, had constructive notice of the contents of the J. Truitt decree because it was then of record and that title was then vested of record in the appellant by deed to her from J. Truitt; and (3) that the evidence seeking to impeach the sworn return of service and the finding of the court that service had not been made was inadmissible. A recital of the controlling precedents will suffice to answer all the errors assigned.

[1-4] Under the due process clause of the federal constitution a personal judgment rendered without service of process on, or legal notice to, a defendant is not merely voidable, but void, in the absence of a voluntary appearance or waiver. McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 344, 61 L.Ed. 608. Such a judgment "is as ineffective in the state [where it is rendered] as it is outside of it." McDonald v. Mabee, supra. If the invalidity of the judgment is apparent by an inspection of the judgment or the judgment roll it may be vacated upon motion at any time after its entry. People v. Greene, 74 Cal. 400, 16 P. 197. If, however, the invalidity is not thus apparent, it may be set aside by motion, if such motion is filed within a reasonable time, i. e., not longer than the time set forth in Code Civ.Proc., sec. 473. Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452. Otherwise, the challenge permitted is limited to an action in equity to vacate the judgment. People v. Davis, 143 Cal. 673, 77 P. 651.

[5,6] Where it is contended, as here, that the court had no jurisdiction to enter the decree for want of service upon respondent's predecessor, evidence is admissible to challenge the fact of service. Ever since the decision in Lapham v. Campbell, 61 Cal. 296, it has been the accepted rule in this state that a sworn return of service of a summons may be impeached by evidence that contradicts it. As was aptly said by Mr. Justice Vallée in Sipe v. McKenna, 88 Cal.App.2d 1001, 200 P.2d 61, 64 (in which appellant herein was respondent): "It has long been established that a false affidavit of service constitutes extrinsic fraud. A party is thus prevented from having his day in court. Courts of equity will relieve a party from an unjust judgment rendered against him when, without service of process, either actual or constructive, no opportunity has been given him to be heard in his defense. Bernhard v. Waring, 213 Cal. 175, 180, 2 P.2d 32; Parsons v. Weis, 144 Cal. 410, 416, 77 P. 1007; Herd v. Tuohy, 133 Cal. 55, 62, 65 P. 139; Martin v. Parsons, 49 Cal. 94, 100."

[7,8] Moreover, the rule is equally well established that in the absence of service of process upon such a party there is no duty on his part even though he has actual knowledge to take any affirmative action at any time thereafter to preserve his right to challenge the judgment. What is initially void is ever void and life may not be breathed into it by lapse of time. In saying this we do not imply that a court of equity may not refuse to exercise its jurisdiction in a proper case by declining to grant affirmative relief. Restatement, Judgments, § 129. We have no such case here. Moreover, if a plaintiff chooses to obtain a judgment that is void for want of service of summons upon a defendant, he and his privies may not complain that the law does not subsequently accord to them a so-called "right" which has never existed. Cf. 15 Cal.Jur., Judgments, § 143.

As was said in Lapham v. Campbell, 61 Cal. 296 at page 300: "No one is called to act in a judicial proceeding in which jurisdiction over his person has not been obtained. And although he be a party named in the proceeding, yet if jurisdiction over him be not obtained, he has no duty to perform in relation to the proceeding, for the non-performance of which he is chargeable with mistake, inadvertence, surprise, or excusable neglect, and, as he is not chargeable with any of those things, he is not called upon to avail himself of any of them as ground for a motion to set aside the judgment; nor is he chargeable with *laches* or want of diligence for not knowing of the proceedings or judgment. The party procuring a judgment against another without due process of law, or by fraud, takes it at his peril, * * *"

[9] Likewise in Forbes v. Hyde, 31 Cal. 342, 348 (oftentimes quoted by the Supreme Court) it is said: "A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever."

[10–12] Where an action such as the one we have here, has as its objective vacating a judgment for want of jurisdiction of the court to enter it and not because of irregularities in obtaining it, such, for instance, as errors in the exercise of jurisdiction, fraud practiced in procuring the judgment or clerical mistakes therein, neither laches nor the ordinary statutes of limitation may be invoked as a defense. Whether the want of jurisdiction appears on the face of the judgment or is shown by evidence aliunde, in either case the judgment is for all purposes a nullity—past, present and future. Cf. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728. "Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right * * It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void * * * No action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality." 1 Freeman on Judgments, 5th Ed., sec. 322, pp. 643–644. The rule just quoted applies to void and not voidable judgments. In that connection it is proper to observe that the line is carefully drawn between judgments which are wholly void and those that are merely voidable, i. e., rendered by a court acting within its jurisdiction although in an erroneous manner or as a result of irregularity. 1 Freeman on Judgments, 5th Ed., § 322, page 645, note 16; see also 49 C.J.S., Judgments, § 449, p. 878. Unfortunately, the courts in an endeavor to differentiate between judgments which on their face or on the judgment roll affirmatively disclose their invalidity and those which do not, have described the former as "void judgments" and the latter as "voidable judgments." Nevertheless, the courts generally are careful to point out that a judgment shown by evidence to be invalid for want of jurisdiction is a void judgment or at all events has all the attributes of a void judgment. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728. In the Restatement of Judgments the phrase "voidable judgments" is not used at all in its classification of judgments. It is not amiss here to add that while the phrase "void judgment" is convenient, it is a contradiction in terms. If a judgment is void it is not a judgment.

[13–15] An instrument that is void *ab initio* is comparable to a blank piece of paper and so necessarily derives no validity from the mere fact that it is recorded. Cf. New England Bond & Mortgage Co. v. Brock, 270 Mass. 107, 169 N.E. 803, 68 A.L.R. 371. As a consequence the record thereof is not constructive notice of its contents or of the fact that it is actually recorded. The purpose of our recording statutes, Civ.Code, §§ 1213–1215, is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles, or interests in it whether valid or invalid, which may affect their rights as bona fide purchasers and so as to protect them before they part with their money. Accordingly, it is obvious that invalid documents are not entitled to be recorded, but if they are recorded, they do not give constructive notice. 45 Am.Jur., p. 481; cf. Meley v. Collins, 41 Cal. 663 (forged deed).

To the same effect is Haight v. Vallet, 89 Cal. 245, 26 P. 897. In that case the trial court instructed the jury that "A forged deed conveys no title, right, or interest; it is absolutely void, and as though never made, except, if duly recorded, it is constructive notice of that fact." With respect to this instruction the court said: "The latter clause of this instruction is clearly erroneous * * *."

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

SOMMER v. METAL TRADES COUNCIL OF SOUTHERN CALIFORNIA et al.

Civ. 18251.

District Court of Appeal, Second District, Division 2, California.
July 27, 1951.

Rehearing Denied Aug. 13, 1951.
Hearing Granted Sept. 24, 1951.*

Herman C. Sommer, doing business as the Comwel Company, sued the Metal Trades Council of Southern California, affiliated with the American Federation of Labor, and others, to restrain defendants from picketing plaintiff's place of business, job sites, customers and suppliers. From an order of the Superior Court of Los Angeles County, W. Turney Fox, J., restraining such picketing, defendants appealed. The District Court of Appeal, Moore, P. J., held that the Jurisdictional Strikes Act is not unconstitutional as in conflict with the right of free speech and that picketing to force an employer to violate a valid state statute should be enjoined.

Order affirmed.

1. Constitutional law ⟹275(2)
Labor relations ⟹284

The Jurisdictional Strikes Act is not unconstitutional as in conflict with the right of free speech. Labor Code, §§ 1115–1120; U.S.C.A.Const. Amend. 1.

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* Subsequent opinion 254 P.2d 559.

2. Constitutional law 🔑275(2)

Free speech is not an absolute and unqualified right, especially with respect to picketing, which involves patrol of particular locality and may induce action irrespective of nature of ideas being disseminated by picketers. U.S.C.A.Const. Amend. 1.

3. Labor relations 🔑283

A state, within constitutional bounds, may limit certain forms of labor activity to such extent and in such manner as Legislature determines to be for society's best interest in furthering state's social and economic policies.

4. States 🔑4.16

Congress has no power to fix public policy of state.

5. Labor relations 🔑836

Courts should enjoin picketing when employed to coerce an employer to violate a valid state statute or city ordinance.

6. Evidence 🔑20(1)

It is common knowledge that jurisdictional dispute among labor organizations in motion picture industry provoked extreme violence and resulted in substantial economic loss without noticeable gains to wage earners in such industry.

7. Constitutional law 🔑70(3)

The wisdom of legislation is not for courts to determine, nor is it generally their duty to define state's public policy.

8. Labor relations 🔑836

Illegality of striking employees' purpose provides complete basis for injunctive relief against conduct, such as picketing, which would otherwise be held permissible exercise of fundamental rights.

9. Labor relations 🔑913

The Jurisdictional Strikes Act applied in employer's suit to enjoin picketing by labor union repudiated in favor of another independent union by plaintiff's employees in election, though picketing and defendant's negotiations with plaintiff commenced before organization of independent union, where two unions were in hostile array when plaintiff sought injunctive relief and was granted restraining order. Labor Code, §§ 1115–1120.

10. Appeal and error 🔑931(1)

On appeal, trial court's findings are implied to be in accord with plaintiff's proof by affidavits as in trial on spoken testimony.

11. Appeal and error 🔑996

On appeal, respondent enjoys advantage of every inference fairly to be drawn in his favor from evidence.

12. Appeal and error 🔑954(1)

A restraining order, granted by trial court in exercise of sound discretion on implied findings, can be disturbed by appellate court only on clear showing of abuse of such discretion in view of all circumstances involved.

13. Labor relations 🔑940

In suit to restrain picketing by labor union, allegations in complaint as to general nature of plaintiff's operations and another union's filing of petition before National Labor Relations Board for order directing plaintiff to recognize petitioner as plaintiff's employees' exclusive bargaining agent, and affidavits that hearing was held and election ordered by Board, were insufficient to compel finding or warrant inference that plaintiff was engaged in interstate commerce or that interruption of his activities by defendant directly burdened or obstructed free flow of such commerce so that proceeding before such Board was not plaintiff's sole remedy. Labor Code, §§ 1115–1120; Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

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Arthur Garrett, Los Angeles, Todd & Todd, San Francisco, for appellants.

Gibson, Dunn & Crutcher, by William French Smith, Los Angeles, James R. Hutter, Los Angeles, of counsel, for respondent.

MOORE, Presiding Justice.

The court below by appropriate order restrained appellants from picketing respondent's place of business, his products, job sites, customers and suppliers; from engaging in any activities to cause such customers, suppliers and subcontractors and their respective employees to cease to do business with respondent, and from representing him as unfair.

The complaint embraces two causes of action. The first alleges the unlawfulness of appellants' picketing and other concerted activities as being used (1) to coerce respondent to recognize one of the unions as the collective bargaining representative of respondent's employees notwithstanding the majority of such employees did not desire to join such union and the latter did not represent the workers, and (2) to bring pressure on respondent to discharge his present employees and employ in their stead appellants' members only. The second cause of action is predicated upon the theory that the activities of appellants described in count I were in violation of the Jurisdictional Strikes Act, Labor Code, sec. 1115 to 1120,[1] and being unlawful should be enjoined.

Negotiations were initiated by some of the appellants in July, 1949, for the purpose of inducing respondent to require his employees to join one of appellant unions and demand was then made (1) that members of appellant unions be employed by respondent to do the latter's work instead of his current employees; (2) that respondent execute a collective bargaining agreement with appellants and their affiliates. In September, Local No. 1 of the Workers Association of Manufacturers and Builders of Auto Service Stations, an independent union of respondent's employees, petitioned the National Labor Relations Board for an order directing respondent to recognize it as the exclusive collective bargaining agent of his employees. In answer to appellants' demands that respondent choose one of them to become his bargaining agent, he refused to recognize any of such unions as the representative of the majority of his employees on the ground that he did not know which group, if any, represented his employees. Respondent at that time agreed to recognize any union representing the majority of his workers. Appellants sought to organize said employees but met with no success, although respondent cooperated in arranging a number of meetings of his employees with the agents of appellants.

On March 10, 1950, pursuant to their petition filed with the National Labor Relations Board, an election was held by the independent union to determine whether it or a union selected by appellants was to become the representative of respondent's employees. Twenty-five out of 37 members participating having cast their votes for the independent union, it became the agent for respondent's employees. But still appellants' demands persisted. They continued their intermittent picketing of respondent's place of business, his jobs and job sites, his customers and subcontractors, warning all to desist from patronizing respondent or be subjected to a boycott by appellant trade groups. Their secondary boycotts and picket lines did not diminish in intensity and respondent's business suffered immeasurable harm through loss of at least ten new construction contracts and by being forced to abandon construction jobs.

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[1] Sec. 1115. "A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful."

Sec. 1116. "Any person injured or threatened with injury by violation of any of the provisions hereof shall be entitled to injunctive relief therefrom in a proper case, and to recover any damages resulting therefrom in any court of competent jurisdiction."

Sec. 1117. "As used herein, 'labor organization' means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer.

"As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or labor organiaztion."

Sec. 1118. "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer."

Sec. 1119. "Nothing in this chapter shall be construed to interfere with collective bargaining subject to the prohibitions herein set forth, nor to prohibit any individual voluntarily becoming or remaining a member of a labor organization, or from personally requesting any other individual to join a labor organization."

Jurisdictional Strikes Act Valid

[1] In Senn v. Tile Layers Protective Union, 1937, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229, Justice Brandeis suggested the right of labor groups to be protected in their concerted activities by the free speech provision of the constitution. The legislature of this state in 1937 declared its policy as to labor organizations by section 923 of the Labor Code.[2] Ten years later, that body, evidently having grown restive at the frequency of strikes for so many different causes, determined that strikes should not occur by virtue of or on account of a contest between labor groups. The six new sections added to the Labor Code declare a jurisdictional strike to be against public policy, sec. 1115; provide for injunctive relief to one who is injured by such a strike, sec. 1116; define "labor organization," "person," and "jurisdictional strike," secs. 1117, 1118. But the right of collective bargaining was expressly reserved, sec. 1119.

Whether such statutes comprising the Jurisdictional Strikes Act are valid is the question posed by this appeal. Basing their contentions upon (1) Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S. Ct. 746, 84 L.Ed. 1104; Building Service v. Gazzam, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, (2) upon the California cases Lisse v. Local Union, 2 Cal.2d 312, 41 P. 2d 314; McKay v. Retail Auto Salesmen, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists, 16 Cal.2d 379, 106 P.2d 403; Magill v. Building Service Employees, 20 Cal.2d 506, 127 P.2d 542; In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190, and (3) upon the fact that their picketing was peaceful, appellants assert that the act in question is violative of the free speech doctrine of the federal constitution, and is therefore void.

The Act satisfies every constitutional requirement and is not in conflict with the right of free speech as guaranteed by the federal constitution. Picketing, boycotting and other forms of concerted union activity are now identified with the basic freedoms guaranteed by the First Amendment. Building Service Union v. Gazzam, supra, 339 U.S. at page 536, 70 S.Ct. at page 786; In re Blaney, 30 Cal.2d 643, 647, 184 P.2d 892. However, it has been declared just as firmly that this alliance between the constitution and the right of organized labor to picket and engage in other peaceful, concerted activities for legitimate labor goals is not complete. Following the Thornhill and Carlson decisions the federal Supreme Court made more soundings and new calculations. Giboney v. Empire Storage and Ice Company, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834; Building Service Union v. Gazzam, 339 U.S. 532, 537, 70 S.Ct. 784, 94 L.Ed. 1045; Int. Brotherhood v. Hanke, 339 U.S. 470, 474, 70 S.Ct. 773, 94 L.Ed. 995; Hughes v. Superior Court, 339 U.S. 460, 464, 70 S.Ct. 718, 94 L.Ed. 985.

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[2] Labor Code, sec. 923. "In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. [Enacted 1937.]"

In 1948, one Joseph Giboney was convicted under a statute enacted to prevent combinations in restraint of trade. While one objective of his union's drive was to better wage and working conditions, it caused Giboney to violate a Missouri statute. In order to succeed, the unions planned to make it impossible for nonunion peddlers to buy ice to supply their retail trade. Having pledged all wholesale ice distributors but one not to sell to the nonunion peddlers, they undertook to subdue the one recalcitrant, Empire Storage and Ice Company, by use of the picket line. The express purpose of the picketing was to compel Empire to agree to stop selling to the nonunionists. But because they were trying to force Empire to violate a penal statute, Missouri Revised Statutes, sec. 8308, R.S.1949, § 416.090, Mr. Justice Black without a single dissent, Giboney v. Empire Storage and Ice Company, 336 U.S. 490, 498, 69 S.Ct. 684, 687, 93 L.Ed. 834, proceeded to declare: (1) There is nothing in the Constitution which precludes a state from adopting and enforcing a policy of preventing combinations to restrain freedom of trade. (2) Merely because a picket line is often protected by the guaranties of the First and Fourteenth Amendments in disseminating information, such guaranties do not afford labor unions immunity against laws enacted to restrain trade combinations, "unless * * * labor unions are given special constitutional protection." (3) "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws." (4) Constitutional freedom for speech and press does not extend its immunity to speech or writing when they are used as an integral part of conduct in violation of a valid criminal statute. The Giboney decision was followed by International Brotherhood v. Hanke, supra, wherein the court held that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech." [339 U.S. 470, 70 S.Ct. 775.] About the same time it held in the Hughes case that "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations." [339 U.S. 460, 70 S.Ct. 721.]

[2] The holding against Giboney is akin to the court's conclusion in other controversies involving the violation of state laws as in the case of speakers convicted for holding meetings in a street contrary to city ordinances. Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 267. Free speech is not an absolute and unqualified right. This is especially true with respect to picketing for "while * * * a mode of communication it is inseparably something more and different * * * 'more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'" Mr. Justice Frankfurter in Hughes v. Superior Court, quoting in part Mr. Justice Douglas in Bakery & Pastry D. & H. Local v. Wohl, 315 U.S. 769, 775–776, 62 S.Ct. 816, 86 L.Ed. 1178.

[3, 4] Accordingly, the most recent pronouncements of the high court have limited the holdings of the earlier decisions such as Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104. The later decisions have made it clear that a state may within constitutional bounds limit certain forms of labor activity to such extent and in such manner as the legislature shall determine for the best interest of society in furthering the state's desired social and economic

policies. The cited cases have recognized that it is the state itself which can best determine its own public policy since such determination depends on a knowledge and appraisal of local, social, and economic factors. Congress has no power to fix the public policy of California. Riviello v. Journeymen Barbers, etc., Union, 88 Cal.App. 2d 499, 506, 199 P.2d 400. Therefore, the legislature's findings and judgment upon matters of such vital force deserve the respect of finality. International Brotherhood v. Hanke, 339 U.S. 470, 475, 70 S. Ct. 773, 94 L.Ed. 995.

In Building Service Employers International Union v. Gazzam, supra, the court affirmed a judgment of a Washington court enjoining picketing aimed at coercing plaintiff's employees to join defendant's union, although the workers had previously voted against joining. The union, however, had continued demands that the employer sign a contract recognizing the group as the employees' bargaining representative. The state Supreme Court had affirmed the judgment granting the injunction on the ground that it was against the state's public policy to compel an employer to coerce his employees to join a union. The United States Supreme Court, on the strength of the Giboney case affirmed the State Court with a unanimous opinion. A similar holding was announced in Carpenters & Joiners Union v. Ritters Cafe, 1942, 315 U.S. 722, 726, 62 S.Ct. 807, 86 L.Ed. 1143.

[5] By International Brotherhood of Teamsters, etc. v. Hanke, supra, injunctions were upheld prohibiting picketing in an effort to compel a closed shop in a business conducted by the owner himself without employees. The Supreme Court refused to interfere with the state's determination that such picketing was unlawful, saying, "it is not for this Court to question a State's judgment in regulating only where an evil seems to it most conspicuous." The court pointed out also that it could not conclude that the state's decision "has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." By the foregoing authorities it is made definite that the courts should enjoin picketing when employed to coerce an employer to violate a valid state statute or a valid city ordinance.

The problem presented here, as it was in the cited decisions, is one of striking a balance between the constitutional protection of the free speech aspects of concerted labor activities and the reserved power of the state to establish limits of permissible contest open to both factions in a labor dispute.

State May Declare and Enforce Its Public Policy

In the Act under consideration, supra, the legislature has declared jurisdictional strikes to be against the public policy of the State and unlawful. Such strike is defined as "a concerted refusal to perform work for an employer or any other concerted interference with an employer's business, arising out of a controversy between two or more labor organizations" over which group is the rightful representative of the employees for collective bargaining purposes, or as to which group should have the exclusive right to have its members work for an employer.

Thus, the legislature has determined that where two or more unions are contesting for representation rights or work assignments and are unwilling to settle the question in a peaceful and impartial manner, but rather seek to direct coercive and concerted activity against the employer, there is no legitimate end of labor thereby being served. Such determination cannot be said to be unreasonable.

[6] The act in question was passed subsequent to the disastrous jurisdictional dispute which occurred among labor organizations in the motion picture industry. It is common knowledge that that dispute provoked extreme violence and resulted in substantial economic loss without noticeable gains to the wage earners in the industry. Moreover, the legislature was made aware of, and has recognized, the helpless position of an employer caught in the midst of such industrial strife. While he is certain to suffer substantial and irreparable injury as a result of the concerted action of his employees accompanied by bitter contro-

versy, yet he cannot coerce, restrain or interfere with their activities in order to assist them in making a decision. Labor Code, sec. 923. Neither can he in a jurisdictional strike proceed to recognize one union as against another without subjecting himself to continued harassment by that other.

[7] The Act is aimed at what the legislature reasonably felt to be a substantial evil and an activity deemed contrary to the public policy of this state. The wisdom of such legislation is not for the determination of the courts; neither is it generally their duty to define the State's public policy. See Park & Tilford Import Corp. v. Teamsters, 27 Cal.2d 599, 609, 165 P.2d 891, 162 A.L.R. 1426.

The Hot Cargo Decision Not Pertinent

Appellants contend that the Jurisdictional Strike Act differs little from the so-called "Hot Cargo Act," declared to be invalid. In re Blaney, 30 Cal.2d 643, 184 P.2d 892, 897. That statute was annulled as "too sweeping, vague and uncertain * * * permits the prior censorship of matters undeniably protected by the constitutional guarantee of free speech and press." The court pointed out that under the broad provisions of that Act, should a union merely agree to give newspaper publicity to a dispute between its members and their employers, if thereby some other employees of some other employer were induced to withhold services from their employer, the original agreement and publicity could be enjoined. Thus the "Hot Cargo Act" attempted to regulate the method by which all activities of labor groups are to be conducted without regard to the purpose or goal of the union.

The Jurisdictional Strikes Act, however, does not purport to be so broad in its prohibition, enjoining activity only in so far as it arises out of a stated and limited situation, that is, a jurisdictional dispute between two or more unions as to which shall have the right of recognition or assignment of work.

[8] Moreover, as above observed, since the publication of the Blaney decision the United States Supreme Court has seen fit to declare that picketing and other labor activities are not completely allied with free speech and that the states are not without power to prescribe certain restraints and limitations toward their control. Prior to the Blaney decision there were virtually no guides for state courts to follow. See Blaney decision, supra, 30 Cal.2d at page 658, 184 P.2d at page 892. To the federal cases may now be added many decisions of California and of other states upholding legislative limitations imposed upon picketing and kindred union activities where the objective is forbidden by a state law. Northwestern Pacific Railroad Company v. Lumber & Sawmill Workers Union, 31 Cal.2d 441, 189 P.2d 277; Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343; City of Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal.App.2d 36, 210 P.2d 305; Kold Kist Inc. v. Amalgamated Meat Cutters, 99 Cal.App.2d 191, 221 P.2d 724; Fashion-craft Inc. v. Halpern, 313 Mass. 385, 48 N.E.2d 1; Schwab v. Moving Picture Machine Operators Local, 165 Or. 602, 109 P.2d 600; Markham & Cullow, Inc. v. International Woodworkers, 170 Or. 517, 135 P.2d 727. Illegality of purpose on the part of striking employees provides a complete basis for injunctive relief against conduct which would otherwise be held "permissible exercise of fundamental rights." City of Los Angeles v. Los Angeles B & C Trades Council, supra [94 Cal.App.2d 36, 210 P.2d 309.]

Origin of This Controversy

[9] Appellants contend that inasmuch as their picketing and negotiations with respondent commenced prior to the time the independent union appeared on the scene, we are not here concerned with activity "arising out of" a true jurisdictional dispute and consequently the Jurisdictional Strikes Act has no application. Such contention is not supported by the record. Only after there were two unions in the arena did the respondent seek injunctive relief. At the time the court granted the restraining order the unions were in hostile array. Each asserted a superior claim to be respondent's employ-

ees' representative. Appellants were openly declaring their purpose to defeat respondent if he declined to yield to their demands while respondent in support of his refusal to yield stood upon the Jurisdictional Strikes Act. Although appellants' union was repudiated at the ballot box in favor of the independent group, still the former continued their efforts to "break" respondent.

Findings Favor Respondent

[10–12] On the issues presented by the complaint more than 20 affidavits were filed. The findings are impliedly in accord with the proof of respondent, the same as in the case of a trial on spoken testimony. Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453; Brainard v. Brainard, 82 Cal. App.2d 478, 480, 186 P.2d 990. On appeal respondent enjoys the advantage of every inference fairly to be drawn from the evidence. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 695, 87 P.2d 349. Based upon the implied findings, the court in the exercise of a sound discretion granted the restraining order. Such order can be disturbed only upon a clear showing of abuse of such discretion, in view of all the circumstances involved. Trujillo v. Trujillo, 71 Cal.App.2d 257, 260, 162 P.2d 640; Kosloff v. Kosloff, 67 Cal.App.2d 374, 379, 154 P.2d 431. No abuse of discretion on the part of the trial court having been shown, no reason appears for a reversal of the order.

Interstate Commerce

[13] In a supplemental brief belatedly filed, appellants urge as a further ground for reversal that the record reveals respondent to be engaged in interstate commerce and therefore his sole remedy lies with the National Labor Relations Board under the Labor-Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq. The answer to this contention is that the record before us does not support any determination that respondent's activities bring him within the sphere of federal jurisdiction. As bearing on the issue we have only the allegations in the complaint briefly describing the general nature of respondent's operations, the further allegations that the independent union filed a petition before the National Labor Relations Board and the affidavits showing that thereafter a hearing was held and an election ordered.

Such evidence is not sufficient to compel or infer a finding that respondent is engaged in interstate commerce or that the interruption of his activities directly burdens or obstructs the free flow of commerce. Indeed, the complaint and affidavits indicate a contrary determination. The fact that respondent filed charges of unfair labor practice with the National Board is not determinative in view of the fact that such charges were dismissed without the jurisdictional question having been raised.

It follows that it is not necessary to consider the problem whether Congress in the 1947 act did intend to preclude State activity in this field.

Order affirmed.

McCOMB and WILSON, JJ., concur.

HOCKING v. TITLE INSURANCE & TRUST CO. et al.

L. A. 21917.

Supreme Court of California, in Bank.

Aug. 10, 1951.

Rehearing Denied Sept. 7, 1951.

Action by Dorothy L. Hocking against Title Insurance and Trust Company and Riverside Title Company for damages allegedly sustained by reason of a defect in the title to certain land purchased in a subdivision. The Superior Court, Riverside County, John G. Gabbert, J., gave judgment for the defendants and the plaintiff appealed. The Supreme Court, Schauer, J., held that the fact that the subdividers had not complied with a city ordinance dealing with the subdividing of land did not affect the marketability of her title to the land, and plaintiff failed to state a cause of action against defendants under the title policies.

Judgment affirmed.

Carter, J., dissented.

Prior opinion 226 P.2d 24.

1. Easements ⚿17(4)

Title to a subdivision lot embraces an easement to use all streets disclosed on recorded subdivision map.

2. Insurance ⚿138(1), 152(3)
Municipal corporations ⚿43

Sections of ordinance of Palm Springs which provide that before city council may accept a subdivision map it must obtain from owners of property an agreement and bonds providing for grading and paving of streets in the subdivision, simply prescribe requirements, and did not affect title to lots therein plotted, and such sections did not affect the validity, discharge or enforcement of title insurance contract, and were not part of such contract.

3. Insurance ⚿426½

Where purchaser of unimproved lots in subdivision received grant deed therefor, but subdivider failed to comply with city ordinance requiring posting of bonds and agreements providing for grading and paving streets prior to filing subdivision map with city council, and county recorder in violation of Subdivision Map Act accepted the subdivision maps of record, marketability of title to land was not affected, but the market value of the property was merely impaired, and purchaser could not recover against insurer under title policy. Business and Professions Code, §§ 11500 et seq., 11626.

◆

Wing, Wing & Brown and Merrill Brown, Banning, for appellant.

Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., Los Angeles, and Sarau, Adams, Neblett & Sarau, Riverside, for respondents.

SCHAUER, Justice.

Plaintiff, in reliance on a policy of title insurance, seeks to recover from defendant title insurance companies for damages she claims to have sustained by reason of what is asserted to be a defect in the title to certain land purchased by her in the city of Palm Springs, county of Riverside. Judgment on the pleadings was rendered in defendants' favor, and plaintiff appeals. The issue presented is whether plaintiff's complaint states a cause of action (see Union Flower Market, Ltd. v. Southern California Flower Market, Inc., (1938), 10 Cal.2d 671, 673, 76 P.2d 503; Seeger v. Odel (1941), 18 Cal.2d 409, 412, 115 P.2d 977, 136 A.L.R. 1291). We have concluded that the judgment must be affirmed.

Plaintiff alleges: She purchased for the sum of $13,550 two unimproved lots in a subdivision in Palm Springs and received a grant deed therefor. Approximately one month later plaintiff purchased from defendants a policy of title insurance insuring her in a sum not in excess of her purchase price of $13,550 against loss or damage which she might sustain (1) by reason of title to the lots not being vested in plaintiff in fee simple, (2) by reason of unmarketability of plaintiff's title, (3) by reason of any defect, lien or encumbrance on such title. The lots are described in the policy as "Lots 5 and 10 of Vista Del Cielo No. 3, as shown by Map on file in Book 21 page 55 of Maps, records of Riverside County, California." The policy contains a provision setting forth certain exceptions to its coverage.[1] However, plaintiff did not (she alleges) have a "title as insured by defendants" in that the City Council of Palm Springs, in violation of a city ordinance numbered 39[2] "purportedly approved and accepted" by "Resolution No. 1970" a subdivision map of the property involved "without first obtaining from owners of said subdivision" agreements and bonds providing for the grading and paving of the streets in the subdivision, as required by the ordinance; the county recorder of the county of Riverside, in violation of the terms of the Subdivision Map Act (Bus. & Prof. Code, Div. 4, Pt. 2, Ch. 2) and in particular of section 11626[3] of the Business and Professions Code, "purportedly accepted, recorded and filed" the subdivision map of record. The land in the subdivision "is now and has always been open, barren desert land and not improved as set forth in Section 9" of the city ordinance relied upon by plaintiff; the city refuses to issue building permits "in said purported subdivision" by reason of the failure to comply with such ordinance; "it would cost" plaintiff in excess of $13,550 "to make the improvements required" by the city ordinance.

Plaintiff contends that "by virtue of the absence of the bond supported agreement to grade and pave the streets" she does not have a fee simple title in Palm Springs "subdivision lots," that "whatever title she does have is defective by reason of the absence of the bond supported agreement," and that defendants are consequently liable to her under the terms of the title insurance policy. In this connection she points out that "Street improvements obviously enhance the value of subdivision lots," that

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[1] Such provision reads as follows:

"The Company does not, by this policy, insure against loss by reason of:

"1. Easements or liens which are not shown by the public records (a) of the District Court of the Federal District (b) of the county, or (c) of the city, in which said land or any part thereof is situated;

"2. Rights or claims of persons in possession of said land which are not shown by those public records which impart constructive notice;

"3. Any facts, rights, interests, or claims which are not shown by those public records which impart constructive notice, but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by a correct survey;

"4. Mining claims, reservations in patents, water rights, claims or title to water;

"5. Any governmental acts or regulations restricting, regulating, or prohibiting the occupancy or use of said land or any building or structure thereon."

[2] Sections 9 and 10 of the ordinance, as pleaded by plaintiff, read as follows:

"(9) Street Improvements.

"The subdivider will be required to improve or to agree to improve the land dedicated for streets, highways and public ways. Such improvements shall include the grading of all such rights-of-way to a sufficient standard that all portions of the subdivision are easily accessible by motor vehicle traffic and all streets and highways shall be treated with a permanent pavement of standard type of a width not less than 20 feet.

* * *

"(10) Posting of Bonds.

"If the improvement work above referred to be not completed satisfactorily, the owner or owners of the subdivision will be required, before the acceptance of the final map, to enter into an agreement with the City Council whereby in consideration of the acceptance by the City Council of the highways offered for dedication the owner agrees to furnish the equipment and materials necessary, and to complete the work specified in the agreement. To assure the City that this work will be completed, two bonds must be furnished, one in a sum equal to the cost of the work estimated by the City Planning Commission and the other a bond for the security of the material, men and labor in a sum equal to one-half of the estimated costs. The bonds must be furnished by a surety company, approved by the City Council and filed with the City Clerk."

[3] Section 11626 provides: "Except as provided in Section 11537 [not here material], no final map of a subdivision shall be accepted by the county recorder for record unless there has been a compliance with all provisions of this chapter and of any local ordinance.

"The recorder may have not more than 10 days to examine the final map before accepting or refusing it for recordation."

"obviously the sales value of such property is a long ways from the sum of $13,550.00 which she paid for the property, if it has any value at all," and that "Certainly no one would pay that price for two small areas of vacant, unimproved desert land." She expressly disclaims any contention that the refusal of the city to issue building permits constituted a breach of the title policy,[4] but does state in the petition for hearing by this court that her "information concerning the actions of the City Council and the County Recorder was obtained after the issuance of the policy and resulting from the information of the City that it would refuse and had refused any building permits in the subdivision by reason of the absence of the bond supported agreement to grade and pave the streets."

Plaintiff relies upon the rule of construction of title policies set forth in National Holding Co. v. Title Ins. & Trust Co. (1941), 45 Cal.App.2d 215, 220–221, 113 P.2d 906, 909, quoting from The Coast Mutual Building-Loan Ass'n v. Security Title Ins. & Guar. Co. (1936), 14 Cal.App.2d 225, 229, 57 P.2d 1392, as follows: "Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect, and to that end doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor.

" 'The courts have also announced a rule * * * to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured * * *. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed. Where the language and terms of a policy are framed and formulated by the insurer, every ambiguity and uncertainty therein should be resolved in favor of the insured.' (14 Cal. Jur., p. 445.)

" 'The rule thus stated is supported by an unbroken line of authorities, a few of which are the following: [Authorities cited.]' "

Plaintiff also cites the statement appearing in Smith v. Bank of America Nat. Trust & Savings Ass'n (1936), 14 Cal.App.2d 78, 85, 57 P.2d 1363, quoting from Skelly Oil Co. v. Kelly (1931), 134 Kan. 176, 5 P.2d 823, 824, that "The word title has a variety of meanings. It sometimes connotes the means by which property in land is established, as in the expression 'chain of title.' It sometimes means 'property' or 'ownership' in the sense of the interest one has in land. A common meaning is complete ownership, in the sense of all the rights, privileges, powers and immunities an owner may have with respect to land."

In Sheehy v. Miles (1892), 93 Cal. 288, 292, 28 P. 1046, the following appears: "In the case of Turner v. McDonald, 76 Cal. 177, 18 P. 262, this court said: 'A perfect title must be one that is good and valid beyond all reasonable doubt'; and in that case it was conceded by counsel upon both sides that a title, to be good, 'should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable titles, and should be fairly deducible of record.' It would seem, in fairness to the vendee, that the foregoing requirements should be held absolutely necessary, in order to fully satisfy the covenant of perfect title. Certainly such a condition of title must exist before it can be said to be good and valid beyond reasonable doubt. [Citations.]"

Other definitions of title are: "The words 'good title' import that the owner has the title, legal and equitable, to all the land, and the words 'defective title' mean that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land." (Copertini v. Oppermann (1888), 76 Cal. 181, 186, 18 P. 256; Bates v. Howard (1894), 105 Cal. 173, 184, 38 P. 715.) "A person who has contracted to purchase real estate is entitled to a perfect title; and if the estate or interest of the vendor is subject to defeasance upon the happening of a contingent event or the nonperformance of a condition, the title tendered is not perfect or 'marketable.' Hence, where the vendor brings suit for specific performance, the purchaser may successfully defend the action upon the ground that the estate of the complainant is contingent or defeasible." (22 Cal.Jur. 818, sec. 22, Remainders and Reversions.) "A seller frequently agrees to furnish a 'good and perfect title.' Such an agreement imports a title that must not only be good in point of fact, but it must also be apparently perfect when exhibited—that is, free from reasonable objection, such as litigation, palpable defects and grave doubts fairly deducible of record, and unencumbered." (7 Cal.Jur. 751–752, sec. 31, Covenants; see also 25 Cal.Jur. 626–629, sec. 125, Vendor and Purchaser.)

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[4] Such refusal would appear to fall within the fifth exception to the policy, quoted in footnote 1.

"Much learning has been expended in giving definitions as to good and marketable titles. The following appears to be one supported by the weight of authority, to wit: 'A marketable title, to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept.' [Citations.]" (Staton v. Buster (1926), 79 Cal.App. 428, 432, 249 P. 878, holding wife's signature to deed to community real property acquired prior to 1917, in addition to that of husband, not required to convey good and marketable title to such community realty; see also Mertens v. Berendsen (1931), 213 Cal. 111, 1 P.2d 440.)

[1] In reliance upon the general principle that "All applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms" (4 Cal.Jur. 10-Yr.Supp. 138, sec. 186, and cases there cited; see also Lelande v. Lowery (1945), 26 Cal.2d 224, 226, 157 P.2d 639, 175 A.L.R. 1109), and upon the further statement that "It is the general rule that applicable municipal ordinances are 'law' within the rule that every contract is made with reference to, subject to, and presumably in contemplation of, existing law" (110 A.L.R. 1048), plaintiff urges that Palm Springs ordinance No. 39 was a part of the contract of title insurance issued to her by defendant, and that violation by the city council of such ordinance and violation by the county recorder of the Subdivision Map Act, constituted a breach of the title policy. She further contends (apparently because the policy describes the lots by reference to the recorded subdivision map) that by the terms of the policy she was assured of a perfect title to "subdivision lots." It is established law in this state that the title to such a lot embraces an easement to use all of the streets disclosed on the subdivision map. (Danielson v. Sykes (1910), 157 Cal. 686, 689, 109 P. 87, 28 L.R.A.,N.S., 1024.) Since, says plaintiff, "the Palm Springs subdivision ordinance required these easements to be in a certain condition, namely, graded and paved" and "As such conditions did not exist in this matter," plaintiff's title is not perfect. With respect to the statement in Smith v. Bank of America Nat. Trust & Savings Ass'n (1936), supra, 14 Cal.App.2d 78, 85, 57 P.2d 1363, that "A common meaning [of the word title] is complete ownership, in the sense of all the rights, privileges, powers and immunities an owner may have with respect to land," plaintiff further urges that "an owner of a subdivided lot in the City of Palm Springs would regard among his 'rights and privileges' with respect to his lot the graded and paved streets." She argues additionally that such a Palm Springs lot owner has an "'immunity' of significance and value, for if the streets are not improved the city can improve them and charge him a proportion of the price of the improvement by virtue of the various improvement acts

contained in the Streets and Highways Code. * * *"

Plaintiff also contends that the acceptance and recording of the subdivision map in violation of existing law "results in the entire subdivision being in a litigious state as the same is either wholly void or voidable," and she is deprived of a record title. She admits inability to find a case in point, but urges that the provisions of section 11626 of the Business and Professions Code, allegedly violated by the county recorder, are mandatory, and that the Subdivision Map Act is for the protection of the public. (See Smith v. Bach (1920), 183 Cal. 259, 262, 191 P. 14.) She therefore urges application of the general rule stated in 50 Am.Jur. 43, 44, section 20, as follows: "There are numerous instances of instruments or proceedings held to be void because of the failure to comply with a statutory provision relating thereto. This is true of mandatory provisions, compliance with which is a condition precedent to the privilege conferred. In fact, a mandatory provision in a statute has been defined as one the omission to follow which renders the proceeding to which it relates illegal and void."

It is defendants' position that plaintiff confuses title with physical condition of the property she purchased and of the adjacent streets, and that "One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable." The truth of this proposition would appear elementary. It appears to be the condition of her *land* in respect to improvements related thereto (graded and paved streets), rather than the condition of her *title* to the land, which is different from what she expected to get. Defendants also point out that under the provisions of section 11628[5] of the Business and Professions Code acceptance of the subdivision map by the recorder constituted such map a public record, reference to which in plaintiff's deed furnished her with a good record title, a title which is legally marketable whether or not a purchaser is available.

[2] Concerning the rule of construction making applicable laws part of a contract, defendants rely upon the statement in Wing v. Forest Lawn Cemetery Ass'n (1940), 15 Cal.2d 472, 473, 476, 101 P.2d 1099, 130 A.L.R., 120, that "This rule, however, should be limited to those laws which are 'applicable' and which affect 'the validity, construction, discharge or enforcement of the contract', [citations] and care should be taken that its application is not extended to lengths which approach absurdity." It is defendants' argument that Palm Springs ordinance No. 39 simply prescribed certain requirements which were to be met before the city council accepted a subdivision map, and did not purport to affect the title to the lots therein plotted, and, further, such ordinance did not affect the "validity, discharge or enforcement" of the title insurance contract. We are persuaded that defendants' position is well taken. Not only do the ordinance provisions pleaded and relied on by plaintiff fail to suggest an intention to affect either land titles or title insurance contracts, but plaintiff has cited no authority and we are aware of none which would extend the rule of construction upon which she relies to import an undertaking (other than an express one) by the contracting parties that, prior to the making of the contract, other persons (here, the subdivider and the city council) had complied with all laws which might have a bearing upon the value of the land (here, as affected by the physical condition of adjacent streets), the title to which is the subject matter of the contract.

[3] Although it is unfortunate that plaintiff has been unable to use her lots for the building purposes she contemplated, it is our view that the facts which she pleads do not affect the marketability of her *title* to the land, but merely impair the

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[5] Section 11628 provides: "When any final map is presented to the county recorder and is accepted by him, he shall so certify on the face thereof and shall fasten the same securely in a book of maps of subdivisions or of cities and towns which he shall keep in his office. Upon acceptance by the recorder, the final map shall be a public record."

market *value* of the property. She appears to possess fee simple title to the property for whatever it may be worth; if she has been damaged by false representations in respect to the condition and value of the land her remedy would seem to be against others than the insurers of the title she acquired. It follows that plaintiff has failed to state a cause of action under the title policy.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The issue here presented is whether a title insurance company is liable for a defective title which it has insured. The majority opinion holds that it is not, proceeding upon the premise that plaintiff obtained a merchantable title, and losing *only,* it is said, substantially the entire value of the property. That is to say, the basic theory of the majority is, that the defect ran to the value of the property rather than the title. This is a misconception of the legal problem involved herein.

The facts are clear: Plaintiff purchased the property and received a grant deed therefor, describing it as two numbered lots in a certain block according to a subdivision map purportedly on record. The subdivider had failed, however, to comply with the city ordinances dealing with subdividing land and the state Subdivision Map Act. Bus. & Prof.Code, §§ 11500 et seq.

I believe the majority opinion is erroneous from any angle of approach. The defect goes to the merchantability of the title whether we look at its effect on the value of the property, or technically, at the title. It is conceded that the title insurance policy guarantees the title to be merchantable.

From the technical standpoint of title, the Subdivision Map Act must be examined. Thereunder, title to easements in streets do not pass until the map of the subdivision is "duly recorded." Bus. & Prof. Code, § 11615. No map may be recorded until compliance has been had with *all* the provisions of the act and local ordinances. Id., § 11626. It may be said, therefore, that there is at least a grave doubt that the streets were ever dedicated to the public or that plaintiff, as an abutting owner, obtained a private easement therein. But the conveyance of the property to plaintiff was made according to a map which showed streets, and hence his title on its face, would seem to embrace them as an appurtenance. See Owsley v. Hamner, 36 Cal.2d 710, 227 P.2d 263. And defendant by insuring the marketability of his title thereby guaranteed also the title to at least a private easement in the streets. Moreover, it was of importance to his title that the title to an easement for the streets be dedicated to and accepted by the city, for without it he could not compel a dedication or acceptance. Certainly, if title is conveyed which shows frontage on a public street, it is defective if there is no public street, or the existence thereof is gravely doubtful, and it has been so held. Cleveland v. Bergen Bldg. & Imp. Co., N.J. Ch. 55 A. 117; Morris v. Avondale Heights Co., 218 Ky. 356, 291 S.W. 752. It has been held that *deprivation* of an easement that was supposed to be appurtenant to the property conveyed is a defect in the title to the property making it non-merchantable. Monogram Development Co. v. Natben Const. Co., 253 N.Y. 320, 171 N.E. 390.

Mention has been made in the foregoing discussion of the existence of at least grave doubt as to the quality of the title with respect to the easements public and private. That is all that is required to render a title unmarketable. The rule is stated in Mertens v. Berendsen, 213 Cal. 111, 113, 1 P.2d 440, 441: "* * * a 'marketable title' has been defined generally as one *free from reasonable doubt.* * * * 'Such a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. It must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that *no flaw or doubt will arise to disturb its market value.* * *'" (Emphasis added.) The holdings of the case are thusly summarized: "Title to land has been defined as the means whereby an owner has the just possession of his property. A good or perfect title, within the meaning of contracts for the sale of real property, is one which is free from litigation, palpable defects and grave doubts, which consists of both legal and equitable titles and is fairly deducible from the record. Such a title is one which is not only good in point of fact but which, when exhibited, is free from any reasonable objection. One contracting for such a title may demand a conveyance with such proof of title as will arm him with the recorded means of vindicating its validity in after times—a good or perfect record title. He is not required to accept a title depending upon matters which rest in parol, such as one which can be shown to be good as the result of an action instituted for the purpose of reforming defects existing in any deed which is necessary to make the chain of title complete, or one which rests upon the statute of limitations. Nor is he required to rely upon an oral statement of the vendor as to the state of his title. If there should appear to be such an uncertainty about the title arising from the record as to affect its market value, a court of equity will not compel its acceptance, and the vendee may recover the purchase money paid by him.

"*Marketable title.*—A marketable title to real property is one in which there is no doubt involved, either as a matter of law or of fact,—in other words, a good and perfect title, one free from reasonable doubt or pending litigation." 25 Cal.Jur. 626. Here there is more than a reasonable doubt whether plaintiff has any easement in the street and whether the city has any interest or obligation in the street. Indeed the doubt has become a certainty because the city has refused permission to use the property at all for building, all of which springs from the defect in the title, consisting of the subdivider failing to comply with the law, a prerequisite to a clear chain of title where land is subdivided. It was the defendant's business and responsibility to ascertain whether there had been obedience to the law in perfecting the subdivision.

In addition to the foregoing, in connection with the refusal of the city to issue a permit for the erection of a building on the property, such refusal plainly renders the property practically worthless. Obviously that is a defect in the title. It is something of record which renders the property valueless. It is of more serious consequence than a restrictive covenant which prohibits certain uses of the property.

It is suggested in opposition to the foregoing discussion that the policy of insurance excepts from the coverage any governmental regulation restricting the use of the land. Clearly, that has no application to the title to the easement as affected by subdivision map laws, for the title to the property is involved, and it is a regulation as to how titles might be acquired. If the law required a witness' signature to a deed to validate it, non-compliance therewith would not permit the insurer to invoke the exception. Its business is to insure against imperfections in instruments in the chain of title. Here the map must meet certain requirements, as does a deed, and is, in effect, an instrument in the chain of title, a defect in which must be found by the insurer as a part of the risk assumed by it. *Here it was not anything that was done or not done by the city that caused the imperfection in the title.* The *subdivider*, by failing to follow the law caused the title to be in doubt, the same as if a grantor had given a void deed. The action of the city in denying the permit is merely one of the incidents flowing from the faulty title. Strictly construing the policy against the insurer, as we must, the exception can only embrace things, such as zoning regulations, which are no part of the chain of title and have no effect upon it. As above seen, the map requirements are, on the other hand, the same as deed requirements, that is, for land to be conveyed in parcels, certain procedure must be followed and certain documents must be executed and recorded. Moreover, it should be noted that the exception in the policy concerns itself solely with the *use or occupancy* of the property. The map regulations, however, deal with the right to *convey* and it is obvious that plaintiff did not get a clear title to the property by the conveyance in question.

I would therefore reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

37 Cal.2d 656

PEOPLE v. CHAVEZ.

Cr. 5197.

Supreme Court of California, in Bank.

Aug. 10, 1951.

Felix Chavez was convicted in the Superior Court of Colusa County, Ben R. Ragain, J., of first degree murder and sentenced to death, and he appealed. The Supreme Court, Edmonds, J., held that errors in instructions on the degree of murder were not prejudicial and that requested instructions on murder in perpetration of felony were properly refused.

Affirmed.

1. Criminal law 🔑823(17)
Homicide 🔑308(1)

Instruction that there need be no considerable space of time devoted to deliberation or between formation of intent to kill and act of killing, to constitute first degree murder, was erroneous in use of word "considerable" but did not justify reversal where jury was given complete and explicit instructions on heat of passion and other matters. Const. art. 6, § 4½.

2. Criminal law 🔑1186(4)
Homicide 🔑286(3)

Instruction that whether killing is willful, deliberate and premeditated is answered by statute referring to killing by certain means or in perpetration of felony was erroneous, since statute affects only degree of murder, but was not prejudicial. Const. art. 6, § 4½; Pen.Code, § 189.

3. Criminal law 🔑823(5)
Homicide 🔑286(2)

Instruction defining "malice" in terms of section 7 of Penal Code was improper but not prejudicial where "malice" as element of murder was also defined in language of section 188. Pen.Code, §§ 7, 188; Const. art. 6, § 4½.

4. Criminal law 🔑814(3)

Where defendant, admitting homicide, denied attempt to have intercourse with victim, but evidence for prosecution indicated completed rape of victim, under either view of evidence there was no mere attempt to commit a felony and no basis for instruction defining attempt.

5. Criminal law 🔑808½

Instruction defining first degree murder in language of statute was not erroneous because including murder committed in attempt to perpetrate felonies, though evidence did not show mere attempt to commit felony. Pen.Code, § 189.

6. Criminal law 🔑800(2)

Failure to define "perpetrate" in instruction was not error, since the word has no technical meaning peculiar to the law.

7. Criminal law 🔑1144(14)

Reviewing court must assume that jurors understood the term "perpetrate" in its ordinary meaning.

8. Criminal law 🔑814(3)

In absence of evidence that defendant intended to commit any felony other than rape and murder, both of which were defined by court, instruction concerning other crimes would have no evidentiary basis and failure to define "felony" or enumerate and define other particular felonies was not error.

9. Criminal law 🔑1186(4)

In giving instruction on burglary in murder prosecution, court could properly have stated that rape and murder, which defendant allegedly entered house to commit, were felonies, but failure to do so was not prejudicial where court correctly answered juror's question to the effect that murder committed during burglary is a felony. Const. art. 6, § 4½.

10. Homicide ⚷18(1)

To bring a homicide within statute defining first degree murder as that committed in perpetration of specified felonies, killing need not have occurred "while committing," "while engaged in" or "in pursuance of" felonies, and need not have been a part of the felony or attempted felony in an actual and material sense, and have resulted as a natural and probable consequence thereof. Pen.Code, § 189.

11. Homicide ⚷18(1)

Proof of strict causal relationship between felony and homicide is unnecessary to constitute first degree murder. Pen. Code, § 189.

12. Homicide ⚷18(1)

The statute defining first degree murder as including homicide committed in perpetration of specified felonies is enacted for protection of the community and residents, not for benefit of lawbreaker, and obviates rather than requires necessity of technical inquiry as to whether there has been completion, abandonment, or desistance of the felony before homicide was completed. Pen.Code, § 189.

13. Homicide ⚷18(1)

Homicide is committed "in the perpetration of felony" if killing and felony are parts of one continuous transaction. Pen.Code, § 189.

See publication Words and Phrases, for other judicial constructions and definitions of "In the Perpetration of Felony".

14. Homicide ⚷289

Requested instructions that to constitute first degree murder, because committed in perpetration of rape, defendant must have killed "while committing" or "in pursuance of" rape, and killing must have been part of the rape, attempt to commit rape or burglary, in an actual and material sense and have resulted as a natural and probable consequence thereof, were properly refused. Pen.Code, § 189.

15. Homicide ⚷289

Instruction explaining relationship between felony and homicide committed in perpetration thereof more explicitly than in words of statute making such homicide first degree murder, even if necessary under some circumstances, was unnecessary where evidence conflicted as to whether felony was attempted or committed, but showed clearly that if felony was committed, homicide was part of a single continuous transaction. Pen.Code, § 189.

16. Criminal law ⚷770(3)

Jury need not unanimously agree as to which of several possible theories would support conviction of first degree murder, and instruction to that effect was properly refused.

◆

Ralph W. Rutledge and Richard E. Patton, Colusa, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Wallace B. Colthurst, Deputy Attys. Gen. and Daniel E. Weyand, Dist. Atty., Colusa, for respondent.

EDMONDS, Justice.

Felix Chavez has been convicted of the murder of Constance (Connie) Navarro and sentenced to death. His appeal from the judgment and from the order denying a new trial presents only the question as to whether the homicide was a murder of the first degree.

The record shows testimony which may be summarized as follows:

Connie owned a bar and cafe in Colusa, known as the Michoacan, where she employed Gloria Uribe. Chavez, a Mexican citizen, came to Colusa from a neighboring ranch around 6 p. m. He called at the Michoacan to see Connie, whom he had known for some time. Not finding her, he then visited numerous bars and intermittently returned to the Michoacan looking for Connie. When he came back about 3:30 a. m., Connie, Gloria, and Gloria's friend Shorty were preparing to leave.

Chavez asked Connie to drive him to the ranch where he worked. She refused to do so. Connie, Gloria and Shorty then closed the bar and proceeded to the house where Connie and Gloria roomed.

This house, which was about a block and a half away, had a double entrance door which opened into the front room. There was a window on each side of the door. The remainder of the one-floor building was divided into smaller rooms, with a hall extending through the middle of the building.

On the rear of the building there was one door, and a window. One room was occupied by Connie as a bedroom and another by Gloria. A yard in the rear of the house could be entered from the alley by a gate.

Gloria, Shorty and Connie approached the house through the alley. Connie entered the rear door of the house; Gloria and Shorty followed her. The lights were on in the yard and a rear room of the house. Gloria turned on the light in her room after she locked the back door.

Connie went to her room. Gloria and Shorty entered Gloria's room. Gloria remained about five or ten minutes and then left to get a glass of water. She did not see anyone else in the house at that time.

When she returned to her room Shorty, who was drunk, was asleep on her bed. Shortly thereafter, she heard footsteps in the hall and someone turned off a light. Gloria thought she heard Connie gasp. She called out to Connie, but received no answer.

She still heard voices and then a noise like the bedsprings moving. She then started to Connie's room to see who was there. When she came into the hall, she saw that the closet lights were on as well as those in a rear room.

The door to Connie's room was wide open. Connie was lying in bed on her back, clad in a half slip and brassiere. Chavez was on top of Connie, facing her and holding Connie's hands and wrists. He had a knee on each side of Connie. He was wearing all of his clothes with the exception of his shoes.

Gloria asked Chavez what he was doing there and how he had come in, as she had locked the door. At first he did not answer and then said, "I am not doing nothing to her". He added that he had come in through the window. Connie said, "Take him off me", "He has a knife in his hand". Gloria grabbed Chavez by the shoulder. The blade of the knife was open and she struggled with him for possession of it.

Connie, meanwhile, jumped from the bed and put on her shoes. She grabbed the knife and cut herself. She told Chavez and he said he did not intend to do it. However, neither of the women could secure the knife and Chavez refused to give it to them. He then pushed Gloria to the wall in the hall, closed the knife and put it in his pocket.

Connie started to walk into the next room where her clothes were. Chavez was behind her and Gloria was standing by the door. When Connie started to put on her skirt, Chavez grabbed her by the shoulder and said something that Gloria could not hear. Connie replied, "Let me go. Why don't you go? You've done enough."

Chavez did not reply but stood there. Connie pushed him aside and, as he grabbed her by the shoulders, she said, "Let me go". She had her skirt around her neck at this time. Going to the window in the front room, she looked out, turned and pulled on her skirt.

Chavez put his hand in his right trouser-pocket, took out his knife, opened it and stabbed Connie in the left side near the abdomen. When he first struck her she said, "Please don't kill me, Felix". As Gloria ran from the room she heard Connie repeat the statement.

Gloria ran to her room and found Shorty asleep. The light in the yard was out and the door locked. She ran out of the alley to the sheriff's office and reported that a man was trying to kill Connie. When she returned with an officer, they came through the back door and went directly to the front room, where they found Connie lying on the floor in front of the double doors to the house. Her dress was partly down around her arms and her skirt was pulled up. On the floor next to the body was a wallet belonging to Chavez.

A physician arrived while Connie's body was comparatively warm. He testified that she had been recently assaulted and was dead. An autopsy showed multiple stab wounds involving the lower extremities, the upper extremities, the back, part of the face, and the chest wall. Death resulted from massive hemorrhage caused by a knife wound which reached the heart.

Three days later Chavez was apprehended by Stockton police. He was then carrying a spring knife with a corrugated black bone handle and a single blade which was operated by pressing a button. The knife blade was two and one-half to three inches long. His clothes were not bloodstained. When the officers attempted to book Chavez at the jail he fought with them.

By other evidence, statements said to have been made by Chavez were presented to the jury. The record includes testimony that while the sheriff of Colusa county and two deputies took Chavez to Colusa in an automobile, John Chavez and the appellant had a conversation in Spanish. No promises of immunity or threats of any kind were made to the appellant and he admitted that he killed Connie with the knife which the Stockton police took from him. In relating the events of the evening of the killing, he stated he was looking for Connie. She had promised him that some day she would go to his camp but she did not do so. He was angry and went to her house, intending to kill anybody that he found with Connie and then kill himself.

The appellant then told John Chavez that he hid in the alley and saw Gloria and a man go into Connie's house. He walked up to the back door, and found that it was locked. He then unscrewed the light bulb from the socket by the door, tore the screen from a window, which had a pane of glass missing, and entered the house through the window. After he was in the house, he took off his shoes and walked along the hall slowly with his open knife in his hand, intending to kill anybody he found with Connie, and "to get" Connie.

He found Connie's room and saw her lying in bed. She was asleep. She awakened and said, "Felix, you scare me". He pushed Connie back on the bed and had intercourse with her, still holding the open knife in his hand.

When Gloria walked in and asked him what he was doing there, the two women wrestled with the appellant for possession of the knife, but did not succeed in getting it. He put it in his pocket and followed Connie into the next room. Connie asked him how he got into the house. He told her that he had entered through a window. She walked to the front room and looked through the window to see if the screen was torn. She said, "Don't be a fool you fool. Get out. Stay out of here." Felix became infuriated, opened his knife and stabbed her. She fell and "he got right on top of her again, and finished doing the job that he started".

In a conversation with Mary Allread, a police matron who also acted as a Mexican interpreter, the appellant was asked certain questions. No promises of immunity or threats were made to him. In answer to these questions, Chavez stated that he entered Connie's house through the window with the intention of killing her, because she wanted to leave him for other men and he was the laughing stock of Colusa. He had a knife in his hand when he entered her room and still had it in his hand when he had intercourse with her. After the difference between rape and voluntary intercourse was explained to him, Chavez said that he raped her.

At the trial, the appellant took the stand in his own defense. He told the jury that every eight or twelve days, for some months before the homicide, Connie had visited him at the various ranches where he worked. However, prior to the night he killed her, he had not seen her for approximately three or four weeks except at her bar.

On the various occasions when she visited him, which were usually at night, she would stay for a couple of hours and they would go to bed. He asked Connie to leave her husband and join him, but she refused as her husband was ill. He gave her about $375 because he cared for her.

Continuing his testimony, Chavez said that when he approached Connie's house, he saw Gloria closing the door, and heard someone's voice. He found the back door locked, cut the screen, and entered through the window. He stated that he entered secretly because he did not want Gloria to know of his presence, believing her to be ignorant of his affair with Connie. He removed his shoes and left them as he entered the hall.

Chavez told the jury that he found Connie asleep in bed, clad in a slip. When she awakened, he was on the floor, kneeling beside her with the knife in his hand, the blade being open because it was stuck. He told her not to be afraid, got up from the floor, and sat on her bed. He kissed her and she started leaning back, "sort of offering her [self]" to him. Chavez attempted to hide the knife from her, but she saw it and tried to take it from him.

Connie told him to go, testified Chavez, an asked how he had entered the house. He told her that he had come in through the door.

Chavez denied that he had sexual intercourse with Connie or that he was on top of her holding her arms when Gloria entered the room. However, he admitted that while struggling with Connie for possession of the knife, Gloria entered the room and asked, "Who is that?" Connie replied, "'It is Felix'", and Gloria said, "What's the idea of bring out a knife." The two girls then tried to take the knife from him, and in the course of the struggle Connie received a cut on her hand. He then closed the knife and put it in his pocket. Connie went into a small room across the hall where she cleaned her hand with a piece of cloth. He then told Connie, "Honey, come to me." She replied, "Please don't you ever call me 'Honey' again", and he said, "Well, but we have been honeys."

According to the testimony of Chavez, Connie said to Gloria, "Let's see which way this man came in." Connie went into the front room and looked out of the window. He followed her "with intentions of preventing her of going out to call the police". He was standing about four feet behind Connie and Gloria was approximately two or three yards behind him. Connie then asked, "Why are you following me?" "[T]hen I say", Chavez testified, "'I am not following you' But my intentions were not to let her out because I thought she was going out." Connie then turned to him and said, "Well, I already told you. I am used to this—to go around with men in Colusa."

This statement, testified Chavez, made him mad and "Then that's when I hit her". He stabbed her in the abdomen and Connie "mentioned the Virgin Mary". Chavez did not remember how many times he stabbed her before she fell to the floor, but stated that, as she tried to fight back with her fists and to grab the knife, he stabbed her near the face, below the face and in the body. As she fell to the floor, Chavez dropped his knife. Connie cried out, "You already kill me." In concluding his story, Chavez said, "Then I picked [up] the knife this time, then I finished it." He did not remember how often he struck her with the knife while she was lying on the floor. Connie repeated, "You already kill me." After he finished stabbing her, he left by the door. He knew she was dying when he left her because he "heard that she was breathing very slowly". He had not spoken during the killing, and heard nothing except Connie's plea to the Virgin Mary and her cry, "You already kill me."

Chavez testified that, earlier in the week, he had purchased the knife with which he killed Connie. He also said that, a few days before the homicide, he tried to buy a pistol. When he left Connie's house, he intended to go to Mexico. He knew that he had killed Connie, and it was wrong. "That's why I was trying to get away", he explained.

Jose Arriola, a witness for Chavez, testified that he was working with him on Buffum's ranch at the time Connie was killed. Connie had been out to the ranch several times to visit Chavez, the first time being about six months before the homicide. She usually came every week or ten days in the evenings, driving a gray car. Arriola said he was present when Connie and Chavez went into the appellant's room. The last time she came to the ranch she promised Chavez to come and see him again but told him that he was not to talk to her in town. The witness could not remember any specific dates when Connie was present at the ranch.

Chavez does not question the sufficiency of the evidence to support the verdict. He admits having committed the homicide but contends that, under proper instructions, the jury would not have convicted him of murder of the first degree.

After giving the statutory definitions of murder and malice, the court instructed the jury as follows:

"There need be, however, no considerable space of time devoted to the deliberation or between the formation of the intent to kill and the act of killing. It is only necessary that the act of killing be preceded by, and be the result of a concurrence of will, deliberation, and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing."[1]

This instruction, contends Chavez, "destroyed the logical distinction between first and second degree murder provided for by statute." More specifically, he complains of the sentence reading, "There need be, however, no considerable space of time devoted to the deliberation or between the formation of the intent to kill and the act of killing." It was error, he argues, to give this instruction and to refuse the one submitted by him which omits the quoted sentence and defines "deliberate" and "premeditate" in accordance with the definitions given in People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8.

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[1] The court also gave the following additional instruction on premeditation and deliberation:

"Murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

"To constitute this type of crime, the killing must be accompanied and must be preceded by a clear, deliberate intent to take life, and intent to kill which must be the result of deliberation and premeditation so that it must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other condition such as precludes the idea of deliberation.

"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second.

"All murder which is perpetrated by any kind of wilful, deliberate, and premeditated killing is murder of the first degree. To constitute this kind and degree of homicide the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion or other condition such as precludes the idea of deliberation.

"The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to commit the unlawful act causing death.

"If you find that the killing was not deliberate and premeditated, or if you entertain a reasonable doubt whether the killing was deliberate and premeditated, then in such case you cannot find the defendant guilty of murder in the first degree.

"When upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or of the second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

"Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find him guilty, as to the degree of his offense."

[1] The instruction here challenged was held to be erroneous in People v. Carmen, 36 Cal.2d 768, 228 P.2d 281. But, conceding that it should not have been given, the mandate of section 4½ of Article VI of the Constitution must be considered in determining whether the error prejudiced the rights of the appellant.

Chavez's defense was that, as he killed Connie in a "heat of passion", the crime was only manslaughter. Consistently with his testimony that he entered the house with no felonious intent, did not commit an act of rape upon Connie, but killed her only because he was infuriated by her remark, "Well, I already told you. I am used to this—to go around with men in Colusa", Chavez requested and the court gave complete instructions on the issue of manslaughter. The phrase "heat of passion" was clearly defined in accordance with the principles stated in People v. Valentine, 28 Cal.2d 121, 169 P.2d 1, and People v. Wells, 10 Cal.2d 610, 76 P.2d 493. The differences between manslaughter and murder in both degrees were stated. The importance of the element of malice was explained. Adequate provocation and its relation to the term "heat of passion" was discussed at length and both terms were adequately defined. In accordance with People v. Valentine, supra, the jury was instructed that the existence of provocation which is not sufficient to reduce the offense to manslaughter may nevertheless raise a reasonable doubt as to the commission of murder in the first degree. Moreover, the jury was clearly and emphatically told that any doubt as to the degree of the crime must be resolved in favor of Chavez.

In short, the jury was given complete and explicit instructions concerning the particular issue presented by the testimony of Chavez that the homicide was committed in a heat of passion provoked by Connie's remark. Under these circumstances, and considering the entire record in accordance with the constitutional mandate, it cannot be said that the erroneous use of the word "considerable" in the general instruction on premeditation justifies a reversal of the judgment.

Also challenged is the instruction which states that in two classes of homicide the Legislature "has taken upon itself the responsibility of saying that they shall be deemed and held to be murders in the first degree". The court declared that where the killing is perpetrated by certain means, or in the perpetration or attempt to perpetrate one of enumerated felonies, "the question 'Is the killing wilful, deliberate, and premeditated?' is answered by the statute itself, and the jury has no option but to find the prisoner guilty of murder of the first degree".

[2] Such an instruction has been held to be an incorrect statement of the law. "In such a case the question which the statute (Pen.Code, § 189) answers affirmatively is not, 'Is the killing willful, deliberate and premeditated?'; it is, 'Is the killing murder of the first degree?' Killings by the means or on the occasions under discussion are murders of the first degree because of the substantive statutory definition of the crime." People v. Bernard, 28 Cal.2d 207, 211, 212, 169 P.2d 636, 639; People v. Valentine, supra, 28 Cal.2d at pages 135, 136, 169 P.2d 1.

However, it is not shown how the instruction, although erroneous, prejudiced Chavez. In neither the Bernard nor the Valentine case was the error said to have been prejudicial. Here, the argument merely is that it tended to confuse the jury, but, considering the entire record, there is no reasonable basis for that conclusion.

[3] Chavez also complains of an instruction defining "malice" in the terms of section 7 of the Penal Code. That defini-

tion, said the court in People v. Waysman, 1 Cal.App. 246, 248, 81 P. 1087, is not "appropriate in a case of this kind, and would be better omitted altogether". However, it was held that there was no prejudice because "malice" as an element of the crime of murder also was defined for the jury in the language of section 188 of the Penal Code. The present record shows that both of these instructions were given and, for the reasons stated in affirming the Waysman conviction, Chavez was not prejudiced.

In connection with the instructions on murder in the attempt to perpetrate burglary or rape and in the perpetration of burglary or rape, the prosecution requested an instruction defining an attempt to commit a crime. It was not given, although the court did define rape and burglary. Chavez assigns this omission as error, contending that it was necessary for the court on its own motion, to define an attempt. But with complete inconsistency he also argues that, because under any view of the evidence the homicide was not committed in the attempt to perpetrate a felony, no instruction on attempt should have been given.

[4] Chavez correctly states that the evidence does not show a homicide in the attempt to commit a felony. If his testimony concerning the killing is accepted as true, he neither committed nor attempted to commit any felony. According to his story, he entered the house with no felonious intent, and did not attempt to have, nor did he have, sexual intercourse with Connie.

The prosecution, on the other hand, showed that Chavez broke into and entered the house with the intent to kill anyone that he found with Connie and "to get" Connie. Gloria testified that she was present at the time Chavez was "on top of Connie" who was lying in bed, clad in a half slip and brassiere. At that time, Chavez had an open knife in his hand, which he later used to kill Connie. The record also includes testimony concerning conversations with Chavez during which he admitted that when he entered the house he intended to kill Connie because she wanted to leave him, and that he raped her just prior to killing her. Whichever view of the evidence is accepted, there was no attempt to commit a felony, and no basis for an instruction defining an attempt.

[5] Chavez does not specifically complain of the instruction to the jury which, in defining murder of the first degree, included one committed in an attempt to perpetrate certain felonies. If his argument is intended to charge error in so instructing the jury, it is answered by People v. Chaves, 122 Cal. 134, 141, 54 P. 596, 598. There, first degree murder was defined in the language of section 189 of the Penal Code. The appellant objected to the instruction as being erroneous because there was no evidence tending to prove that the homicide occurred during the commission of or attempt to commit a felony. This court said: "This criticism has no merit and deserves no particular notice. Obviously it was the right and duty of the court to state the law in regard to the offense, and the degrees into which it is divided as declared by the statute, and such statement did not and could not have prejudiced the defendant."

[6, 7] Referring to the same instructions, Chavez complains of the court's failure to define the word "perpetrate". However, as pointed out by the attorney general, the word has no technical meaning peculiar to the law. It must be assumed that the jurors, being familiar with the English language, understood the term in its usual or ordinary meaning.

[8] Chavez also assigns as error the lack of an instruction "* * * defining 'felony', or enumerating and defining any particular felony or felonies, which would have made the act [of entering] burglary had the defendant entered with such intent". There was no evidence tending to prove that, when Chevez entered the house, he intended to commit any felony other than rape and murder. Both were defined by the court, and an instruction concerning other crimes would have had no evidentiary basis.

The absence of a definition of "felony" as used in the instruction on burglary, says Chavez, was confusing to the jurors and he points to the question addressed to the court by one of them. The record shows that, after deliberating for several hours, the jurors returned to the courtroom and one of them asked if breaking into a house without the intention of taking anything unlawfully constitutes burglary. The court answered the question by reading the statutory definition of burglary as embodied in one of the instructions. The juror then asked: "How about when a murder is committed on this burglary?" The trial judge replied: "Every person who enters any house, room * * * with intent to unlawfully steal, take and carry away the personal property of another of any value or to commit any felony, is guilty of burglary. Murder is a felony. Is that an answer to your question?" The juror said that it was.

[9] Certainly it would have been proper for the court to have stated, when giving the instruction on burglary, that rape and murder are felonies. However, it is not apparent how the failure to do so operated to the prejudice of Chavez, or that the jury was not instructed sufficiently for a proper consideration of the issues of the case.

The following instructions were offered by Chavez and, he contends, should have been given:

"In order to find the defendant guilty of murder in the first degree on the ground that the defendant killed the deceased in the perpetration of rape, you must find that the defendant killed the deceased while committing an act of rape upon the deceased, or that the defendant killed the deceased in pursuance of the act of rape; the killing must have been a part of the rape in an actual and material sense, and have resulted as a natural and probable consequence thereof."

"In order to find the defendant guilty of murder in the first degree on the ground that the defendant killed the deceased in the attempt to perpetrate rape, you must find that the defendant attempted to rape the deceased, and that the defendant killed the deceased while engaged in such attempt, or that the defendant killed the deceased in pursuance of such attempt; the killing must have been a part of the attempted rape in an actual and material sense, and have resulted as a natural and probable consequence thereof."

"In order to find the defendant guilty of murder in the first degree on the ground that the defendant killed the deceased in the perpetration of burglary, you must find that the defendant entered the building with the intent to commit a felony, and that in the prosecution of that purpose, and in pursuance thereof, the defendant killed the deceased; the killing must have been a part of the felony in an actual and material sense, and have resulted as a natural and probable consequence thereof."

[10–12] In his argument, Chavez erroneously assumes that to bring a homicide within the terms of section 189 of the Penal Code, the killing must have occurred "while committing", "while engaged in", or "in pursuance" of the named felonies, and that the killing must have been "a part of" the felony or attempted felony "in an actual and material sense, and have resulted as a natural and probable consequence thereof". The law of this state has never required proof of a strict causal relationship between the felony and the homicide. The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistance of the felony before the homicide was completed.

[13] In People v. Boss, 210 Cal. 245, 252, 253, 290 P. 881, 884, this court said that the felony murder rule "* * * was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any probable consequences of his act by placing a limitation upon the *res gestae* which is unreasonable or unnatural". The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction. People v. Miller, 121 Cal. 343, 53 P. 816. Likewise, the homicide was said to be murder in the first

degree when it occurred during a "continuous integrated attempt to successfully escape after the perpetration of the robberies". People v. Rye, 33 Cal.2d 688, 693, 203 P.2d 748, 751. In that case the robberies took place a considerable time before the fatal beating was administered for the purpose of preventing discovery of the previously committed felony.

[14, 15] There being no requirement that the homicide occurred "while committing" or "while engaged in" the felony, or that the killing be "a part of" the felony, other than that the two acts be parts of one continuous transaction, the trial court did not err in refusing the requested instructions. People v. Covington, 1 Cal.2d 316, 320, 34 P.2d 1019. Furthermore, assuming that, under certain circumstances, the relationship between the felony and the homicide should be explained to the jury more explicitly than in the words of section 189 of the Penal Code, such an instruction was not here necessary. If the testimony of Chavez was believed by the jurors, they were not concerned with the felony murder rule. Only if the jurors rejected his testimony and concluded that he committed a burglary or a rape, was the relationship between the felonies and the homicide an issue for their determination. But once they decided that Chavez committed either of these felonies, the evidence required them to find him guilty of murder in the first degree. For the record shows, as a matter of law, that the homicide which immediately followed was a part of a single continuous transaction.

Finally, Chavez contends that the court erred in refusing to instruct the jury that they must unanimously agree as to the theory supporting a conviction of murder in the first degree. Chiefly, he relies upon the dissenting opinion in People v. Sullivan, 173 N.Y. 122, 137, 65 N.E. 989, 63 L.R.A. 353, which advances a theory rejected by the majority of the court with the following comment: "There was but a single crime charged in the indictment against the defendant,—that of murder in the first degree; and the only issue to be determined by the jury was whether the defendant had been guilty of that crime. Under our statute (section 183, Pen.Code), so far as applicable to the case before us, proof either that the defendant killed the deceased with a deliberate and premeditated design to effect his death, or while the defendant was engaged in the commission of a felony, or an attempt to commit a felony, though without any design to take life, established his guilt of the crime charged. 'It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other.' * * * So, in this case, it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one. It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute."

[16] No authority supporting the position urged by Chavez has been cited by him and the decisions follow the reasoning of the majority in the Sullivan case. See Candy v. State, 8 Neb. 482, 1 N.W. 454; State v. Flathers, 57 S.D. 320, 232 N.W. 51, 72 A.L.R. 150; Wharton on Homicide [3d ed.], § 386; 72 A.L.R. 154. The question has not been passed upon by this court but a similar problem was presented by People v. Caldwell, 55 Cal.App.2d 238, 255, 256, 130 P.2d 495, 504. The defendant was charged with grand theft. Under the evidence, he might have committed larceny, embezzlement, or obtained money by false pretenses. In discussing the court's refusal to charge the jurors that they must agree upon a single theory of guilt, it was said: "* * * [T]he accusation in five counts of the information charged grand theft. Under the evidence, the jury might appropriately have concluded appellant's guilt under any one of the three above mentioned theories of grand theft as defined by section

484 of the Penal Code. * * * It was not necessary to require the jury to agree upon the theory. If, under any one of the theories set forth, they believed appellant had gained possession of and appropriated to his own use the moneys of Pacific, he was guilty of grand theft." The same rule is applicable to the various grounds upon which the jury could have found Chavez guilty of murder in the first degree.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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106 Cal.App.2d 42

CRITTENDEN v. McCLOUD et al.

No. 14730.

District Court of Appeal, First District,
Division 1, California.

Aug. 14, 1951.

Rupert G. Crittenden sued Roy McCloud to quiet title to an undivided half interest in certain real property. Defendant filed a cross-complaint against plaintiff, Rita Alberta Dugger, her husband, and another to quiet title to the entire property and recover damages for forgery of a deed conveying the property to cross-defendant wife. From a judgment of the Superior Court in and for the County of Alameda, S. Victor Wagler, J., quieting title in defendant and cross-complainant, plaintiff appealed. The District Court of Appeal, Bray, J., held that cross-defendant husband was estopped by silence from denying the validity of the forged deed and that plaintiff, as grantee in the husband's subsequent deed to a half interest in the property, was not entitled to half thereof.

Judgment affirmed.

1. Estoppel 🔑110

Estoppel is an affirmative defense, which must be affirmatively averred.

2. Estoppel 🔑110

Estoppel need not be pleaded as defense, where party in whose favor it exists at time of preparing his pleading is without knowledge that his claim must ultimately rest on estoppel.

3. Estoppel 🔑111

In suit to quiet title to half interest in realty purchased by defendant before vendor's husband conveyed such interest to plaintiff, where defendant did not know, at time of filing answer alleging his sole ownership of realty, that deed purporting to convey husband's interest to wife was forged, nor that husband had accepted proceeds of sale, and defendant stated, at beginning of case, that he might have to ask for amendment of answer and cross-complaint to conform to proof and set up estoppel of plaintiff to deny validity of such deed, court properly permitted amendment after court stated that deed was obviously forged.

4. Estoppel 🔑95

An estoppel may arise from silence, but only where there is duty to speak and party owing such duty has opportunity to speak and, knowing that circumstances require him to speak, remains silent.

5. Estoppel 🔑95

A husband, knowing of forgery of deed, signed by another man in husband's name, to his wife, but remaining silent about forgery when one purchasing described realty from wife, asked, about a week after payment of purchase price, when spouses would move therefrom, receiving part of price in cash, and participating in spouses' purchase of other property with proceeds of sale, was estopped from denying validity of deed, and one to whom husband subsequently conveyed half interest in realty stood in no better position than husband and was not entitled to half of property as against purchaser.

6. Equity 🔑65(1)

The maxim that one must come into equity with clean hands means that when party asking to set judicial machinery in motion and obtain some remedy has violated conscience, good faith, or other equitable principle in his prior conduct, court will refuse to interfere in his behalf, acknowledge his right or award him any remedy.

7. Estoppel 🔑101

An owner of real property cannot be divested thereof by forged instrument, but his conduct in reference to such instrument may estop him from denying its validity.

8. Estoppel 🔑101

An innocent purchaser, taking void deed to property purchased, can find protection in doctrine of estoppel, where circumstances established vendor's negligence or other misconduct contributing to purchaser's loss. Civ.Code, § 3543.

9. Frauds, statute of 🔑119(2)

Ratification of forged deed need not be in writing, but may be by acceptance of proceeds of sale of realty conveyed, with full knowledge of forgery, as statute of frauds should not be made a shield for person guilty of fraud. Civ.Code, §§ 2309, 2310.

◆

Gordon K. Williams, Oakland, for plaintiff, cross defendant and appellant.

McKee, Tasheira & Wahrhaftig, Ridley Stone, Jr., and J. D. Cooper, all of Oakland, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment quieting title in favor of defendant and cross-complainant.

Questions Presented.

1. Estoppel. (a) As estoppel was not originally pleaded, did the court err in permitting testimony upon which to base an estoppel? (b) Was the evidence sufficient to establish estoppel?

2. Does the evidence support the court's finding of ratification?

Facts.

As to most of the facts (except the fact of forgery of the deed to Mrs. Dugger) there was a direct conflict in the evidence. The facts and the reasonable inferences therefrom most favorable to the court's findings follow. In January, 1949, plaintiff received from one Taft Dugger a deed to an undivided one-half interest in the property described in the complaint which plaintiff filed to quiet title thereto against defendant McCloud. Plaintiff was Dugger's attorney and it was stipulated that he received the conveyance from Dugger with knowledge of the forged deed hereafter mentioned. His counsel also stated that if plaintiff were called to testify he would raise the privilege between attorney and client. Thus, it was admitted that plaintiff, so far as his rights are concerned, stands merely in the shoes of his grantor Dugger. Defendant McCloud bought the full interest in the property through a real estate agent in July, 1947. He did not know either Mr. or Mrs. Dugger. The purchase price, $5500, was deposited in escrow with the title company. Mrs. Dugger deposited in the same escrow a deed from herself to defendant purporting to convey the entire title to defendant. From the deposit, the title company paid off certain delinquent taxes, encumbrances and expenses, delivering a check for the balance, $2,497.62, to Mrs. Dugger. The title company recorded the deed from Mrs. Dugger to defendant, certifying the title to be in him. This brings us to the deed by which Mrs. Dugger appeared to have title. The title stood in Mr. and Mrs. Dugger as joint tenants. Mr. Dugger was a prisoner in Folsom. Mrs. Dugger went up to see him and talked about selling the property which was their home. He hold her to sell it as he did not want to return upon his release to Oakland where the property is located. He also said that he did not consider the property his. In every letter she got from him he said "Get rid of that place." She had with her a deed from him to her for him to sign. They saw the warden and asked permission for Dugger to sign. The warden denied the permission. Shortly thereafter, on July 21, 1947, Mrs. Dugger appeared at the office of cross-defendant Golden, who was a notary public. (In this action, defendant McCloud cross-complained against plaintiff, also Mr. and Mrs. Dugger, to quiet title to the whole of the property. He also cross-complained against Golden for damages. The court reserved judgment as to Golden. No appeal from this judgment was taken.) She introduced to the notary public, as her husband, a man who signed Mr. Dugger's name to a gift deed to her. The notary notarized it and she recorded it.

It was approximately three months after this that Mrs. Dugger received from the title company the check for $2,497.62. By that time Mr. Dugger was out of Folsom and living with Mrs. Dugger on the property. He went with her when she cashed the check and deposited it in the bank. He spent $200 of the money at Sacramento. The day she sold the property to defendant, she told Dugger about it. She had told him that she cleared a little over $2000 on the place. After that they purchased a place at 1314 Foothill, taking the title in both names. Mr. Dugger joined in the instructions to that effect. Dugger made the first deposit, $50. While Dugger waited for her, Mrs. Dugger went to the bank and drew $2000 out of the moneys deposited from the sale to defendant. Then together they went to the real estate office and paid the $2000 on the purchase price of the Foothill property. About a week after the payment of the purchase price, defendant went to the premises he had purchased. He saw Mr. and Mrs. Dugger in the room. He asked them when they were going to move. Dugger did not say a word, but Mrs. Dugger said she would move as soon as she could. Later, while Dugger was still on the premises, defendant discussed with him his painting the premises, but they could not come to terms. On another occasion Dugger came to see defendant and asked the latter if he had paid for the stove which was on the premises. Dugger did not appear at the trial. However, his deposition was read. He denied signing the Dugger to Dugger deed, although he stated that at Folson, his wife had asked him to turn the property over to her and he told her he could not unless she got the warden to restore his civil rights. He denied that he knew about the sale of the property until October 12th when he came to Oakland from Folsom. He claims some friends told him about it. He then asked his wife and she said she had sold it and admitted having the deed signed by another person. He denied that she gave him any money when she met him at Sacramento. He also denied that he lived with his wife after he got out of Folsom. He stated he asked her what she did with the money she received from the sale but she did not give him an answer.

Findings.

The court found that defendant McCloud is the sole owner of the property and that plaintiff has no interest therein; that the deed from Dugger to Dugger is forged; that Taft Dugger "thereafter, by his conduct and representations and by accepting the proceeds derived by Rita Alberta Dugger as a result of said forged deed, with full knowledge of such forgery and of the source of said proceeds accepted by him, ratified said deed and is estopped to deny the validity thereof;" that plaintiff is not an innocent purchaser for value and likewise is estopped to deny the validity of the forged deed; that cross-defendant Golden, the notary public, was negligent, but that plaintiff had suffered no damage thereby, unless the judgment against plaintiff and in favor of McCloud should be reversed. The court reserved jurisdiction to determine the damage in that event.

1. Estoppel—(a) *Pleading.*

Plaintiff's complaint was in the ordinary form to quiet title to an undivided one-half interest in the property. Defendant answered denying plaintiff's interest and alleging that defendant was the sole owner. Defendant's cross-complaint as against plaintiff was in the usual quiet title form. As against cross-defendants Dugger and Dugger and Golden it set up that defendant McCloud purchased the property relying on the title evidenced by the recorded Dugger to Dugger deed; that plaintiff claimed said deed to be forged one, and that if it is such, defendant McCloud has been damaged by the acts of Mrs. Dugger and the notary. Thus, as the pleadings stood at the beginning of the trial, no estoppel was pleaded. In his opening statement to the court defendant McCloud stated that an issue had been raised as to a *possible* forgery, and that he did not know whether there had been such. "It may be that we will be compelled to ask for an amendment to our complaint to conform to the proof, the reason being that we proceed on the assumption that there was no forgery. We presume the people did the right thing, so we will make that motion if the proof requires that it be made in good faith." At the end of the first day's trial, all parties stated that they had no further witnesses (the action, however, was not submitted). A discussion started between court and counsel in which the court stated that it was obvious that the deed was forged. Defendant then moved for permission to amend the cross-complaint to conform to the proof and set up estoppel and ratification. The court, while not finally ruling on this request, intimated that it would grant permission to amend. (At the end of the trial it granted permission to amend to conform to the proof and to set up estoppel and ratification. Defendant accordingly amended his cross-complaint.) Thereupon plaintiff objected to the court granting permission to amend and to the case being opened for evidence of estoppel or ratification as they had not been originally pleaded. The court overruled the objection to the admission of evidence.

[1, 2] Plaintiff contends that as estoppel was not pleaded originally the court erred in permitting the amendment and particularly in admitting testimony on the subject. "It is a well-settled principle of pleading that estoppel is an affirmative defense which must be affirmatively averred * * *." Edgington v. Security-First Nat. Bank, 78 Cal.App.2d 849, 857, 179 P.2d 640, 645. However, it does not necessarily have to be pleaded where the party in whose favor it exists at the time of preparing his pleading is without knowledge that his claim must ultimately rest on it. First Nat. Finance Corp. v. Five-O Drilling Co., 209 Cal. 569, 289 P. 844; Resetar v. Leonardi, 61 Cal.App. 765, 216 P. 71. In Beckjord v. Traeger, 3 Cal.App.2d 385, it was held at page 387, 39 P.2d 523, 524: "It may be admitted that estoppel must ordinarily be pleaded, but an inspection of the transcript reveals the fact that estoppel was discussed in the opening discussion of the case and in the testimony that followed and was in effect carried into the findings. In such circumstances it became an issue of the case as effectively as though it had been pleaded."

[3] It is apparent that at the time of filing his answer defendant did not know the true facts. He knew, of course, that plaintiff was contending that the Dugger deed was a forged one, but he did not know the truth of the matter, nor did he know the facts which appeared at the trial through the testimony of Mrs. Dugger, that Dugger had accepted the fruits of the transaction. It was the duty of the court when the true situation developed to allow the answer to be amended so that a fraud against defendant would not be permitted through legal technicalities. Moreover, at the very beginning of the case plaintiff was put on notice that such an amendment might be required, for defendant stated that while he was proceeding on the assumption there was no forgery he might be compelled to ask for an amendment to conform to the proof.

1. (b) *Evidence of Estoppel.*

[4–6] Plaintiff's main contention that the evidence did not support a finding of estoppel is based upon the proposition that the sale had actually been made and defendant had parted with the purchase price before the acts occurred upon which the estoppel is based. Thus, contends plaintiff, defendant was not prejudiced by Dugger's acts. Apparently Dugger knew nothing of the sale until he came to Oakland on his release from Folsom at which time defendant had already paid the purchase price (although Mrs. Dugger testified she told him immediately the sale was made). Defendant probably could have salvaged the purchase price had Dugger told him of the forged deed as soon as Dugger learned of it. Defendant could then have proceeded against Mrs. Dugger for a recovery. It was Dugger's duty to speak at this time. "An estoppel may arise from silence, but only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak and, knowing that the circumstances require him to speak, remains silent." People v. Ocean Shore Railroad, 32 Cal.2d 406, 421–422, 196 P.2d 570, 580, 6 A.L.R.2d 1179. After this time defendant improved the premises at a cost of about $600. It is interesting to note that Dugger at no time repudiated the transaction, until he executed the deed to plaintiff approximately sixteen months after he had accepted a portion of the purchase price in cash and had joined in the use of $2000 of it for the purchase of a new home taken in his name as well as his wife's. Dugger wanted the property to be in his wife's name so that she could handle the sale of it, for he tesified that when she came to Folsom and asked him to sign the deed to her he told her to get the warden's consent. The evidence clearly shows that when defendant called at the Dugger house, about a week after payment of the purchase price, Dugger then knew of the transaction and remained silent when defendant asked how soon they would move, received $200 in cash, and participated in the purchase of the new property with the proceeds of the sale. Almost a year and a half later, Dugger attempted to profit from the transaction by purporting to convey a one-half interest in the property to his attorney. It must be remembered that the taxes and liens against the property have now been cleared off. To hold that Dugger's successor, who stands in no better position than Dugger would, is entitled to one-half of the property, would be unconscionable. It is quite apparent that plaintiff seeks, through a technicality, to gain an unfair advantage of defendant. Applicable here is the following statement in 10 Cal.Jur., § 55, pp. 515–516: "A common place maxim of equity, which has also escaped certification, is that which declares that he who comes into equity must come with clean hands. This maxim says 'that whenever a party, who as actor, asks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy.' "

[7, 8] The situation here is somewhat similar to that in Merry v. Garibaldi, 48 Cal.App.2d 397, 119 P.2d 768, where the owner of property, whose name was forged as maker and trustor of a promissory note and deed of trust, learned of the forgeries, but by her silence prevented the lenders of the money paid to the forger from learning of the fraud in time to bring an action which might have permitted the lender to recover. It was there held that the doctrine of equitable estoppel may be invoked by an innocent purchaser, in spite of the fact that ordinarily a forged instrument cannot carry title. "The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity." Blaisdell v. Leach, 101 Cal. 405, 409, 35 P. 1019, 1020. See also Baillarge v. Clark, 145 Cal. 589, 79 P. 268, where the deed was a stolen one. Although the sale had already taken place before Dugger appeared on the scene, his actions contributed to defendant's loss because they prevented defendant from learning the true facts at a time when he might have obtained relief and before he expended further moneys on the property. The following statement from Trout v. Taylor, 220 Cal. 652, applies here at pages 656–657, 32 P.2d 968, 970: "An innocent purchaser taking a void instrument can, however, find protection in the doctrine of estoppel, where circumstances are presented which establish negligence or some other misconduct by the other party, which contributed to the loss. Section 3543 of the Civil Code provides broadly that 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' "

2. Ratification.

[9] The court found that Dugger ratified the transaction by accepting the proceeds with full knowledge of the forgery. The evidence definitely shows this. But, contends plaintiff, sections 2309 and 2310 of the Civil Code require that the ratification must be in writing and there is no writing here. Such a rule would make the statute of frauds a shield for the guilty.

Where the elements of estoppel apply the statute of frauds "would encourage rather than prevent the perpetration of frauds." Wilk v. Vencill, 30 Cal.2d 104, 108, 180 P.2d 351, 354; see also Corporation of America v. Harris, 5 Cal.App.2d 452, 43 P.2d 307.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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106 Cal.App.2d 134

In re CASAD'S GUARDIANSHIP et al.

Civ. 7871.

Sac. 6123.

District Court of Appeal, Third District, California.

Aug. 16, 1951.

Proceeding in the matter of the guardianship of the persons and estates of Brenda Lee Casad and Glenda Eloise Casad, minors. The Superior Court of Merced County, H. S. Shaffer and R. R. Sischo, JJ., entered a judgment appointing the paternal grandfather of the minors as their guardian, and the mother of the minors appealed. The District Court of Appeal, Deirup, J. pro tem., and Van Dyke, J., held that evidence sustained finding that mother of minors was unfit to act as guardian.

Judgment affirmed.

Adams, P. J., dissented.

Guardian and ward 🔑13(4)

In guardianship proceedings involving custody of ten year old and eight year old girls, evidence sustained finding that mother, who had been divorced and had remarried, was unfit to act as guardian and that paternal grandfather, with whom the girls had lived for several years, was entitled to appointment as guardian. Probate Code, §§ 1406, 1407–1409; Welfare and Institutions Code, §§ 700, 701.

David E. Peckinpah and Louis W. Caporale, Jr., Fresno, Cal., for appellant.

C. Ray Robinson, V. G. Preston, Merced, for respondent.

DEIRUP, Justice pro tem.

Brenda Lee Casad and Glenda Eloise Casad are the children of the appellant, Mrs. Eloise Wilson, and Glen R. Casad, who died on July 10, 1949. Upon the death of their father the children became entitled to proceeds from a life insurance policy amounting to approximately $3,000. Their grandfather, the respondent, applied for guardianship of their persons and estates. His application was opposed by the appellant. After a trial an order was entered appointing the respondent guardian, from which this appeal has been taken.

The children were born in 1939 and 1941 and were 10 and 8 years of age at the time of the trial. In 1943 Glen R. Casad entered the armed services of the United States. He left his wife and children with his father, the respondent, and his mother, now deceased. Their home was in the suburbs of Merced and was spacious and comfortable. Appellant, however, preferred to live in town, and moved into an apartment, the rent of which was paid by the respondent. There she entertained service men to a considerable extent. There was no proof that she had improper sexual relations with any of them excepting Charles J. Wilson, to whom she is now married. She and Wilson had an affair, commencing in 1944, in which there were numerous acts of sexual intercourse. Glen R. Casad secured an interlocutory decree of divorce on February 8, 1945. By a property settlement agreement which was incorporated in the decree the custody of the children was awarded to their father for 30 days and then to appellant if she secured a proper home, with an allowance of $75 a month. In July the order was modified to give the father custody. Appellant did not find a home. On the contrary, immediately after the interlocutory decree she went to Kingman, Arizona to join Charles J. Wilson, her lover, and lived with him there and in other parts of the United States as his wife from then on. In June, 1945, she and Wilson had a marriage ceremony performed in Mexico. There was no other marriage until July 19, 1949, after the death of Glen R. Casad. A son was born to them in December, 1945.

There was evidence that appellant neglected the children while she had them. On one or more occasions the children were found playing about in their nightgowns late in the morning, finding their own breakfast. One of them developed eczema, probably due to malnutrition. After she deserted them she sent them a few gifts, but she did not write to them or inquire about them excepting for one letter to the respondent, which he did not answer. In August, 1948, she returned to California and in October Wilson secured a position as a watchmaker in Visalia. Between August and December appellant saw her children briefly a few times, but made no further attempt to do so until after the death of Glen R. Casad in July, 1949. Then she could only look at them, for they were under quarantine. She made no further efforts to see them up to the time of the trial.

Glen R. Casad was married in 1948, but the children lived with the respondent nearly all of the time after the appellant left them, this being more than half their lives. They are well adjusted and happy and want to remain with the respondent. Appellant and her present husband, whom she married on July 18, 1949, have a three room house in Visalia and are planning to build another room. His salary is $300 a month. Friends and neighbors testified that she and her husband are happy together and that she takes excellent care of their little son.

Findings of fact were filed in the guardianship proceedings in which the court found that appellant was unfit to have the custody of the children.

At the trial counsel for appellant objected to the introduction of the greater part of the evidence that we have referred to as being too remote. They call attention to the rule that the question is always one of present fitness, and cite Guardianship of Jones, 86 Cal.App.2d 35, 194 P.2d 141, and Ott v. Ott, 127 Cal.App. 322, 15 P.2d 897, as holding that past misconduct is immaterial unless it bears directly upon present fitness. There is no question at all but that where the issue of fitness is involved it is one of present fitness, In re Green, 192 Cal. 714, 221 P. 903; Munson v. Munson, 27 Cal.2d 659, 166 P.2d 268; Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295, but the cases cited by counsel hold only that the trial court has wide discretion in rejecting or admitting evidence as being or not being too remote to have value as bearing upon the issue of fitness.

The evidence in this case wase admissible as bearing on the present character of the appellant, and warranted the court in finding the appellant to be unfit to have the custody of the children. Appellant has a home, and with the help of the estate of the children is able to support them for a period of time, at least. But more than that is implied in the term "fitness". To be fit to raise children a mother should have character, so that she can train them to be moral and normal persons. She should also have mother love, not as a mere sentiment, but as a compelling force. It is true that moral lapses should not be deemed conclusive. They often occur without seriously interfering with parental care. But it does not occur often that a mother deserts her children to join her lover and stays away from them for years. We use the word "desert" instead of "abandon" because the latter term implies an intent never to have anything to do with a child again, and appellant did no doubt hope that some day, when it became convenient to her, she would get them back. The fact is that her character was such since 1945 that she could desert them and feel very little interest in them for years and that she could live with Wilson and bear and raise another child without the benefit of marriage, and violate all the laws and customs that forbid such a relationship. The trial judge had the opportunity to observe appellant on the witness stand and appraise her character better than we can from a written record, but even in the record there are indications of flippancy and lack of moral stamina. Her testimony indicated that she felt no remorse for what she had done to her children when she deserted them. She said that in 1944 she was 26 years old and could do as she pleased, apparently in justification of her conduct; that her attorney told her after the interlocutory decree was entered that she was as free as the birds; that she thought that the Mexican marriage was valid—also that she had the impression that a final decree of divorce was necessary before she could marry again. She threw her children away once in pursuit of romance; we can have no assurance that she would not do so again. We do not know why she wants the children now. No doubt there is a residuum of mother love. It cannot be very great since it did not prevent her from deserting the children in the first place or cause her to insist upon her legal right of visitation after she came back to California. Perhaps she would like to get the insurance money; and the little girls might be useful to her in taking care of her little boy. And there is such a thing as saving face.

In our opinion the evidence amply sustains the order of the trial court. However, appellant insists that the trial judge, by the remarks he made after the hearing and by his conclusion of law, "That it is for the best interests and welfare of said minors, and each of them, that the said Raleigh Casad be appointed guardian of the persons and estates of said minors, and each of them" indicated that he took into account the welfare of the children and that this is contrary to established law.

The remarks of the trial judge to which exception is taken, are as follows:

"* * * I simply have to look at all the evidence and see what I think is best for these two children.

"If there had been a jury of twelve sitting to my right and heard the evidence, the only conclusion that they could have arrived at is that with Mr. Casad, the grandfather of the children, the children are surely safe; that with their mother they might be safe and again they might go the ways they should not go. That is all that a Judge can do, just take the whole picture and arrive at an unanimous conviction and I am not to take an uncertainty for a certainty."

Insofar as the statements made by the trial judge are concerned we must apply the rule that remarks which are made during or at the end of the trial cannot be used to impeach the findings of the court. Such remarks are made without a full consideration of all of the aspects of the case, and it must be presumed that the judge, in signing the findings, had the law in mind. However, in the present case, what the judge said was that he doubted that the children would be safe in the custody of their mother. If they might be unsafe, the mother was unfit.

The conclusion of law of the trial court was strictly in accord with the first sentence in Section 1406 of the Probate Code.

The Probate Code lays down the following rules for the appointment of guardians:

1406. "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court."

1407. "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

"(1) To a parent;

"(2) To one who was indicated by the wishes of a deceased parent;

"(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

"(4) To a relative;

"(5) If the child has already been declared to be a ward of the juvenile court, to the probation officer of said court."

1408. "As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

1409. "A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child; and a parent or guardian who knowingly permits his child or ward to remain for one year in an orphan asylum where the child is supported by charity, without notifying the managers or officers of the asylum that he is such parent or guardian, abandons and forever forfeits all right to the guardianship of the child. The officers and managers of any orphan asylum having such abandoned child in its care have the preferred right to the guardianship of the child."

These sections were enacted in 1931. Insofar as they are of interest in this case they are based on Sections 1751 of the Code of Civil Procedure and 246 of the Civil Code, which were repealed. There were changes in the wording of the statute which indicated purposeful study by the Legislature and the provision in Section 246 which made it applicable to custody proceedings as well as to guardianship was eliminated. However, a most significant change was made in that the first sentence in Section 1751 was left out. That section, with the eliminated portion emphasized, read as follows: 1751. *"The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person.* The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian."

Appellant insists that it is an established rule in this state that the welfare of a child under the age of fourteen can never be considered at all by the court in a contest between a parent and any other person for guardianship unless the parent is found to be unfit. It is not necessary to discuss this point, for the trial court properly found the parent to be unfit. But the rule as stated in its bald form, applicable in *all* cases where the child is less than 14 years old, is certain to do terrible injury to children in many cases, and therefore the question whether the rule has not been relaxed by the statutory change in 1931 should be discussed.

The rule in its absolute form is laid down in an illuminating and well reasoned opinion in Re Campbell's Estate, 130 Cal. 380, 62 P. 613. We quote from pages 382 and 383 of 130 Cal., page 614 of 62 P.:

"Under the general law, and independently of the provisions of the Codes, the father has a natural right to the care and custody of his child (2 Kent Comm. 205; Schouler, Dom.Rel. §§ 245–248); and this right is recognized by the provisions of our Codes (Civ.Code, § 197; Code Civ.Proc. § 1751), which are to be regarded as but a re-expression of the principles of the common law governing the subject. (Civ.Code § 5). The father's right, at least so far as the services of the child are concerned, is strictly a property right, for the loss of which, as in the case of servants generally, an action could at common law be maintained, and in other respects the right, though not commonly spoken of as such, is of essentially the same nature as the right of property; for, though the subject of the right is not salable, it is valuable, and of all species of property the most valuable to the parent. Hence it is a mistake to suppose that the right of the father is merely fiduciary. It is that; but it is also, like the right of the child in the father, a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property. Beatty, C.J. in Ex parte Miller, 109 Cal. [643], 662, 42 P. 428.

"The father's right is, however, coupled with the obligation to support and educate the child (Civ.Code § 196), and is also qualified and strictly limited by the fact that the child itself is a human being, and as such vested with rights for which it is entitled to protection. Hence it is the clear right and duty of the state, to the extent the protection of the child may require, to control and limit, and under certain circumstances to terminate, the right of the father. Accordingly, independently of numerous statutory enactments, courts of equity have always, by the appointment of guardians and otherwise, exercised a liberal jurisdiction over the persons and estates of minors; and this jurisdiction may be said to be limited only by the principle on which it rests, namely, the necessity of protecting the rights of the child.

"But the question here does not relate to the general right of the state, as exercised by the English court of chancery or courts of equity in this country, but to the special powers conferred by the Codes on the superior court for the appointment of guardians. These do not purport to confer upon the superior court, acting in the special proceeding, all the powers hitherto exercised by courts of equity, but only the power to appoint guardians in certain cases (Code Civ.Proc., § 1747), and under certain conditions [Code Civ.Proc.], § 1751), and the case is therefore to be determined by these provisions. By the former section the power of the court to appoint guardians is limited to the case 'of minors who have no guardian legally appointed by will or deed,' and the same limitation is prescribed by section 243 of the Civil Code, and section 241 therein cited. In the latter section the power of the parent to dispose of the custody of the child by will or deed is expressly recognized, and this must be taken as a recognition of the general right of the parent to dispose of the custody of the child, of which it is but a special example; for it would be unreasonable to suppose that the legislature intended to limit or restrict a right universally recognized in our own and in all systems of law to the single case provided for, which must therefore be regarded simply as an application of the recognized principle.

"Accordingly, by the provisions of section 1751, Code Civ.Proc., it is made the duty of the court to appoint the father or mother of the minor, 'if found by the court competent to discharge the duties of guardianship.' But under this provision, and under the general law, the prima facie presumption is that the parent is competent; and hence the court is not authorized to appoint another as guardian, unless it finds to the contrary. Hence the section is to be construed as if it read that the father or mother is to be appointed 'if not found by the court incompetent,' etc. The fact of the competency or incompetency of the father was therefore the controlling question in this case, and, as there is no finding on the point, the findings must be regarded as insufficient to support the order appealed from."

It will be noted that the rule is based on the part of Section 1751 of the Code of Civil Procedure which was repealed in 1931 and not re-enacted. That decision and that statute were cited in nearly every case prior to 1931 in which a contest for guardianship between a parent and a stranger, such as a grandparent, was involved. In re Campbell's Estate has been cited in opinion since 1931. Yet that decision, insofar as it is founded on a statute which no longer exists, has no authoritative force.

It is pointed out in the decision that at common law the parent owned the child virtually as a chattel; that courts of chancery protected the rights of the child as a human being; but that in this state the superior court was not given the equitable jurisdiction of the chancery courts which courts in other states have. It is interesting to note that, though the common law we adopted included equity, the Legislature chose to abrogate the equitable principle which protected the child when the parent was remiss in the performance of his obligations toward the child.

It happens frequently that a parent leaves a young child with a relative for years. He pays very little attention to it, does virtually nothing toward helping and encouraging it and giving it the feeling of security that a child has to have in order to develop normally. As a rule he does not even contribute toward its support. Then, when it becomes convenient to him, he demands the child as his property. To the child he is a stranger. The foster parent is, to the child, the true parent. In the parent's home there may be a wife with children of her own whom she is bound to favor. The emotional shock to the child is certain to be profound and is likely to be extremely damaging, especially in the complicated society we have today. Yet it has been held that if the parent has a decent home and a fair income and if he is a fairly respectable person, the courts are powerless to prevent him from reclaiming the child. In re Estate of Akers, 184 Cal. 514, 194 P. 706; Guardianship of Snowball, 156 Cal. 240, 104 P. 444; In re Green, 192 Cal. 714, 221 P. 903; Guardianship of Mathews, 169 Cal. 26, 145 P. 503.

In a few cases the appellate courts have said that the child is not a chattel and that its interests are of primary importance. In re Imperatrice's Guardianship, 182 Cal. 355, 188 P. 48; In re Hawkins, 183 Cal. 568, 192 P. 30; In re Johnson's Estate, 101 Cal. App. 110, 281 P. 435; Matter of Lee, 165 Cal. 279, 131 P. 749, 45 L.R.A., N.S., 91. But these are minority cases which follow the rule which prevails in most of the other jurisdictions. 39 C.J.S., Guardian and Ward, § 18, p. 32; 33 Cal.Law Rev. 306.

The equitable rule is illustrated in the decision in Re Bock, 280 N.Y. 349, 21 N.E.2d 186, 187. In that case the order of the Surrogate's Court awarding guardianship to a paternal uncle as against the claim of their mother was affirmed. One of the minors was more than fourteen years old, the other two were under fourteen. It is said in the opinion:

"* * * While it is true that, prima facie, a surviving parent has a right to the guardianship of the children, particularly when they are of tender age, yet under all the circumstances the chief consideration must always be what will promote the best welfare of the children. While the circumstances of a particular case must be strong in order to overcome the so-called paramount right of the parent, yet where the circumstances of a particular case contain such evidence, the best interests of the infants must be the guiding principle. The surroundings and associations of the young have so great an effect upon their outlook and so form the basis of their future development that nothing should prevent the courts from considering the human aspects of the question presented.

"In the case at bar it appears that, owing to the divorce between the parents and the remarriage of the mother, the children have been separated from the mother almost completely for about four years. The oldest child, who testified, exhibited a feeling of antagonism and a distinct aversion to his mother and stepfather. This can be gleaned even from a reading of his printed testimony. The Surrogate examined in private the other two children to learn their wishes. To force these children into an environment to which they are so strongly opposed in any event would be unpleasant and might be attended by very serious results to their development. Then, too, there is the breakup in the continuity of the schooling which they have had in Bronxville. In order to avoid this break their paternal uncle is willing to change his home to Bronxville.

"We reach the conclusion, therefore, that the Surrogate was not without power to appoint the paternal uncle, Hans Breitung, guardian of the person as well as of the property, even through no fault or moral turpitude was shown on the part of the mother."

In Perry v. Perry, 278 Mass. 601, 180 N.E. 512, 513, the father was denied custody of a nine year old son who had lived all his life with a grandmother. It is said that the right of the parent is not absolute, there being "no express or implied requirement that the parents must be found unequivocally to be unfit before the custody of the child can be awarded to some suitable third person."

There are in the United States two conflicting rules that bear upon this subject.

One of them is illustrated by the decisions in this State and in a relatively small number of other states, and may be called the common law rule because it eliminates the chancery rule of the English courts. The other rule may be called the equitable rule, for it includes the rule of the chancery courts that the welfare of the child is of paramount importance, as is pointed out in the quotation from In re Campbell's Estate, supra. This rule is illustrated by the decisions in New York and Massachusetts from which we have quoted.

We derived the rule that has been applied in this State from two sources. A guardianship law was enacted April 19, 1850. Stats. 1850–53, Ch. 115. In Section 5 it is provided that: "The father of the minor, if living, and in case of his decease the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor."

It is provided further that a minor over the age of fourteen years may nominate a guardian and that a minor under that age may nominate a guardian after he reaches the age of fourteen, much as in our present law.

Upon the adoption of the codes in 1872 the old guardianship law was made the basis of the provisions in the Code of Civil Procedure, including Section 1751. Nowhere in that law is the welfare of the child referred to. At the same time the Legislature enacted Section 246 of the Civil Code, the provisions of which will now be found in Sections 1406 and 1407 of the Probate Code. These provisions were based on Field's Draft, N.Y. Civil Code, Sec. 127. 1923 Civil Code, Sec. 246. It will be noted that Section 246 expressed the equitable rule in that it made the welfare of the child the primary consideration. Its terms were inconsistent with the provisions of Section 1751 of the Code of Civil Procedure. The welfare of the child was to be the guide for the court and the child was entitled to express a preference if old enough to form an intelligent one in all cases and regardless of its age. The parent had a preference as against other persons equally entitled, while in Section 1751 he was given a preference as against every other person, if he was competent. This gave him an absolute right instead of merely a preferential right.

Thus until 1931 we had the common law right of the parent under Section 1751 and the equitable right of the child under Section 246. The common law right in Section 1751 was more definite and therefore had the effect of excluding all children under 14 from the rights given by Section 246. That provision in the law has been repealed. Nowhere in the statutes is there any distinction between a child of 13 and one of 14, other than that the one who is 14 years old may nominate a guardian. There is no reference anywhere to the parent being "competent" or "unfit". Incidentally, the latter word never did appear in the statutes.

It appears therefore that since 1931 we have had the equitable rule exclusively and the common law rule has been abolished by statute. The rule that has been followed, on the whole, by the courts never was the common law that we got from England for it included the jurisdiction of the chancery courts, 5 Cal.Jur. 252, which, as pointed out in Re Campbell's Estate, supra, applied the equitable rule. Our rule, insofar as it was what has been called the common law rule, was a statutory rule. The fact that the statute has been repealed indicates that it was the intention of the Legislature to abolish the rule insofar as it was based on the statute. The fact that the Legislature repealed the statute which gave to the parent an exclusive preference leads to the conclusion that the Legislature intended that the parent should *not* have any preference other than that also given by Section 246 of the Civil Code and that the equitable rule should be binding on the courts.

The quotations from In re Bock, supra, and Perry v. Perry, supra, indicate the attitude of the courts that apply the equitable rule, which is now the statutory rule in California. To illustrate the attitude of our courts, following the common law rule, we refer again to In re Estate of Akers, 184 Cal. 514, 194 P. 706. In that case the mother had been away from the children for four years. There were charges of abandonment and immorality but they had not been proven. The child was seven years old and had been cared for by one Mrs. Shreve with whom it had been placed by its father. That case was similar to the one we now have in respect to the fact that the child was of about the age of the Casad children and had been deserted by its mother and was a member of another family. It was dissimilar in that the mother in that case was not found to be unfit upon sufficient evidence while in this case she was. It was similar in that the trial judge was interested in the welfare of the child. For that reason we quote from the opinion at length, 184 Cal. at page 522, 194 P. at page 709, with emphasis added:

"The record reveals that the trial court made the order appealed from largely, if not entirely, upon the theory that—

"'The only purpose in an inquiry of this kind is to determine what is best to be done with the child for its own welfare, and the question as to the character and reputation, fitness, or unfitness, of the mother in a case of this kind, seems to me to be not the most important one.'

"That this was the attitude of the trial court is evidenced by the further statement:

"'I don't know of any higher law than that this child be cared for and that it be in the custody of people who are able and willing to support it, and they have done that and shown that for these 4 years.'

"It is now insisted by counsel for respondent that regardless of the erroneous admission of palpably prejudicial evidence, and apart from the question of the insufficiency of the evidence to support a finding of abandonment, the order appealed from should be affirmed upon the theory indicated and adopted by the trial court. *This we cannot do, because it is the settled rule of law in this state that the care, custody, and control of a minor child under the age of 14 years must be committed to its parents, rather than to strangers, unless it be shown and found that the parent is unfit to perform the duties imposed by the relation, or has, by abandonment of the child, forfeited the natural right to its custody. In short, in a contest for guardianship, as here, between a parent of a child and a stranger to the child, the paramount question is the competency of the parent to act as guardian, and, in the absence of a justifiable finding of the parent's incompetency, the court must appoint the parent as guardian, despite the fact that the material welfare of the child may perchance be enhanced by committing its care and custody to another person.* Code Civ.Proc. § 1751; Civ.Code, § 246, subds. 3, 4; In re Campbell ['s Estate], 130 Cal. 380, 62 P. 613 * * *."

Other cases are cited, but they, too, are based on the repealed sections of the Codes and the decision in Re Campbell's Estate, supra.

As has been pointed out, in a few cases the writers of the decisions have refused to accept the principle that the court may not consider the best interest of the child, but in most of the decisions it is frankly asserted that the court lacks discretion to do so if the parent is fit and has not abandoned the child. Thus in Re Green, supra, though it appeared that the child had been raised by a half sister of the mother from infancy and had been given a happy home as one of her children for 13 years and that the child was fond of her, it was held that the court had no discretion other than to give it to its mother. Probably it was to prevent just such an abuse of the rights of a child that the statute upon which all of the decisions prior to 1931 were based was stricken from the statute books.

The court before 1931 was under mandate not to consider the best interest of a child under the age of fourteen if a parent applied for guardianship or custody as against a stranger unless the parent was found to be incompetent. The court is now under statutory mandate to be guided by "what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare" in every case, without exception.

We have, of course, the statutory preferences in Section 1407 of the Probate Code. This statute applies to children of every age. It has been said that the preference which is given to the parent is equivalent to the exclusive right specified in former Section 1751 of the Code of Civil Procedure. But this interpretation contradicts the terms used. The statute implies that another person may be equally entitled (1) with the parent, or (2) with one who was indicated by the wishes of a deceased parent, or (3) with a trustee, or (4) with a relative or (5) with the probation officer, or may be better entitled. Having in mind the law that the welfare of the child is the primary consideration, it would seem that a stranger who had served as a parent for years might well have a better right than either the parent who had shunted his duty toward the child or any of the other persons who are given priority rights. Clearly the preference that is given to a relative would not be absolute. If the relative were an entire stranger to the child he could not successfully claim a right equal to that of a foster parent who had raised the child. A court could not justly break up the true family of the child solely because of blood relationship.

On the other hand the preferences which are given by Section 1407 of the Probate Code are of importance and cannot arbitrarily be ignored by the trial court without an abuse of discretion. They are natural preferences which should guide the court even if they were not inserted into the statute for its guidance. Especially in the case of the preference in favor of a parent a complex of factors must be considered by the court. One is that the intimate relationship between a parent and a child is of great importance to both. The emotional ties cannot be disrupted without danger of serious psychological damage to both parent and child. The parent has the legal right to custody and to the earnings of the child. The family is important in our system; it is often called the social unit. In the ordinary family the parent has legal and moral rights. But the parent has legal and moral obligations toward the child which are based on considerations of the welfare of the child, and during this century it is the welfare of the child that has received increasing emphasis. For example, the parent is required to send the child to school, though this limits the right to services and earnings. For the protection of the child we have developed the juvenile court system. A parent who is guilty of neglect may be deprived of the custody of the child and a year later he may be deprived completely of all parental rights. Welfare & Institutions Code, Secs. 700, 701. Thus desertion and abandonment may have the same effect in law as they have in fact, insofar as the child is concerned. The writer of this opinion thinks that the repeal of the statute upon which the common law rule was based and the restoration to the courts of the right to ensure the welfare of the child is in line with the purpose of the juvenile court law, so that if a parent has ceased to serve as such long enough to permit the child to become an integral member of another family in which it thrives and is happy, the child does not necessarily have to be given back to the parent and placed in an alien family. After the parent has broken the home of the child once, the court should not be compelled by an ancient law to break its home again against its will, and to its probable detriment.

It has been necessary to argue this point at length because there has been an obvious failure on the part of the appellate courts in their decisions after 1931 to realize the effect of the repeal of the statute upon which our common law rule was based. The first case in which the principle is discussed is Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229. The trial court, in a divorce action, had awarded a child to the parents of one of the parties without any finding as to the unfitness of the parents. The case was decided in 1936, but it is apparent from the opinion that the changes in Section 246 of the Civil Code and Section 1751 of the Code of Civil Procedure in the transfer of their provisions to the Probate Code were not brought to the attention of the court. The court applied the rule that had been laid down in the earlier decisions in guardianship matters, including In re Campbell's Estate, supra, in which the courts had held that they were bound by the terms of Section 1751, and Newby v. Newby, 55 Cal. App. 114, 202 P. 891, in which the guardianship rule was applied to custody cases. The court relied on Guardianship of Mathews, supra. In the opinion in that case, 169 Cal. at page 27, 145 P. at page 503, it is said: "It is well settled that, under the provisions of section 1751 of the Code of Civil Procedure, the father or mother of a minor child under the age of 14 years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed, unless it finds such parent incompetent, notwithstanding the judge is of the opinion that the child's health and welfare may be promoted by giving it to another."

In Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, 1000, the same question arose and Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, and Guardianship of Mathews, supra, are cited with approval. The opinion also quotes with approval from In re White, 54 Cal.App.2d 637, 640, 129 P.2d 706, 708, to the effect that the right of a parent to the custody of a minor child " 'can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody.' " In a dissenting opinion Mr. Justice Schauer suggests that In re Campbell's Estate, supra, the leading case upon the subject, and the cases which rely on it, should be disapproved, in that the child is regarded "somewhat as a chattel and the property interest therein of the parent is made paramount to the best interests of the child." He overlooked the fact that the decision in Re Campbell's Estate, was only that the courts were, by Section 1751 of the Code of Civil Procedure, deprived of jurisdiction to make the equitable rights of the child as a human being superior to the property rights of a parent who had violated his obligations toward the child. It follows that there is no need for disapproving the rule stated in that case. It has been disapproved by the Legislature in the repeal of Section 1751. The opinion is merely an interesting treatise on the subject of an obsolete law. However, the actual decision in that case could have been based on Section 246 of the Civil Code, which gave to the parent a preferential right to custody subject to the welfare of the child. A father was contesting for the custody of a two-year old child as against its maternal grandparents. No question of violation of duty was involved nor of such neglect that the restoration of custody to the father would damage the child psychologically. Without finding that the parent had lost his preferential right because of his conduct, the court could not properly have deprived him of the right of custody. So in Stever v. Stever, supra, and Roche v. Roche, supra, it was not necessary for the Supreme Court to rely on the repealed statute or the cases in which its harsh terms were held binding. The preference given the parent by Sections 1406 and 1407 of the Probate Code should require a finding by the trial court, based upon sufficient evidence, that the parent had, by his conduct, rendered himself relatively unfit to have the custody of the child, in view of obvious consideration of its welfare.

In Roche v. Roche, supra, decisions handed down by the District Courts of Appeal after 1931 are cited with approval. In Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009, involving a contest between a mother and a grandmother, the custody was awarded to the mother. There was no proof or finding of unfitness in the mother or of prejudice to the child. In Re White, supra. again there was no proof that the welfare of the child would be prejudiced by returning it to a parent after a separation of brief duration. In re Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103, the court found for the parent and there is nothing to indicate that the award was not for the best interests of the minor. Juri v. Juri, 61 Cal.App.2d 815, 143 P.2d 708, involved a contest between parents. In Guardianship of De Ruff, 38 Cal.App.2d 529, 101 P.2d 521, the award of guardianship of a child to the maternal grandmother rather than to the mother was reversed, there being no finding that the mother was unfit, or a finding of any other reason why she should not have custody.

In Guardianship of Sloot, 92 Cal.App.2d 296, 206 P.2d 862, there were no facts that indicated that the mother was not entitled to a preference in the appointment of a guardian of an infant child. The necessity of applying the old rule in its extreme form in all cases was denied in Booth v. Booth, 69 Cal.App.2d 496, 159 P.2d 93; and in Robertson v. Robertson, 72 Cal.App.2d 129, 132, 164 P.2d 52, 54, it is said that: "We do not construe said rule to mean that the only cases where the custody of a child may be lodged with a third person are those wherein it has been shown that the parent is unfit to discharge the trust." In Becker v. Becker, 94 Cal.App.2d 830, 211 P.2d 598, 600, the court refused to discuss the effect of the repeal of Section 1751 of the Code of Civil Procedure for the reason that, "since the repeal in 1931, the same rule has been consistently followed". And in Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32, 35, it is said: "* * * The presumption stressed by the courts that the best interests of the child in respect to its temporal, mental and moral welfare always can be subserved by giving its custody to a parent whom the court cannot or does not wish to declare unfit, is a fallacy, but one which, having been defined by the Supreme Court, we, as an intermediate court, are compelled to continue."

In the opinion articles in 33 California Law Review 306 and 19 Southern California Law Review 72 are referred to as stating the "modern" rule that prevails in other jurisdictions.

The term "rule" is somewhat misleading. What we are concerned with is laws. We received as a part of the common law the law that courts of chancery would protect the child as against its parents if they were remiss in the performance of their obligations. It is pointed out in Re Campbell's Estate, supra, that our courts were deprived of that power by the provisions of Section 1751 of the Code of Civil Procedure. What was before the court was the construction of a statute which ensured in the parent ownership of the child regardless of its welfare. Since then the appellate courts usually applied the statute literally, but they did not establish a "rule" which could survive the repeal of the statute. The courts could not by any number of decisions restore the statute which was repealed. It is true that the Supreme Court in Stever v. Stever, supra, and in Roche v. Roche, supra, overlooked the fact that the statute had been repealed and that the decisions in which the statute had been given effect mean no more than any authority does insofar as it construes an obsolete statute. This is an intermediate court and is bound by the Supreme Court decisions insofar as they hold that a child cannot be taken from the immediate custody of a parent without a finding that the parent is unfit. But the Supreme Court did not have before it a factual situation at all similar to the one in the present case. It did not decide that a parent may not become unfit to have the custody of a child because of desertion, if it appears clearly that the child would be better off in the home of a foster parent by whom it has been raised.

In the present case the appellant deserted the children for reasons of which they are no doubt aware. It was necessary for them to become readjusted in the home of their grandparents. They have a comfortable home in which they are happy. They are hostile toward their mother and their stepfather and the little half brother. To force them to go into a crowded little house and live among strangers would involve a terrible psychological shock to them. Breaking the continuity of the emotional life of any child, other than an infant, is a serious thing; it is likely to cause very serious damage. It is so serious that the right kind of parent does not want to do it. If the appellant had been controlled by the real love that children need she would have kept in touch with them while she was away and when she returned she would have tried to make up to them for what she had done to them. She would not have sought to take them back until they wanted to come. The fact that she wished to force them into a damaging psychological environment, if she knew it, or the fact that she did not know it, should be taken as evidence of unfitness.

While we believe that the trial court was fully justified in finding the appellant to be unfit, yet the writer of this opinion feels that it is important that the law or rule which is applicable to cases of this sort be brought up to date. As in the juvenile court, the court should be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare and its emotional and psychological environment. The trial judge knows very well that children should ordinarily be left with their parents. The trial judge sees the parents and the children with their faults and their virtues and can determine what should be done for the greatest good of all concerned. They are not fictional parents and children; they are human beings. Once in a while he will abuse his discretion and be reversed on appeal but on the whole he will be right. And the parent should not be encouraged to believe that he has a legal right to desert his child and serve no purpose in preparing it to meet the world successfully and happily and then, at his convenience, demand its custody against its will.

The judgment is affirmed.

VAN DYKE, Justice.

I concur in the affirmance of the judgment. I do so upon the ground stated in the forepart of the opinion of Justice pro tem. Deirup, that the trial court's finding appellant is unfit to act as guardian is supported by substantial evidence and therefore is binding upon this Court on appeal. That state of the record renders unnecessary that part of the opinion which discusses the soundness of the rule that before custody can be taken from or refused to a parent there must be a finding the parent is unfit to have it. After the statutory change pointed out had occurred, the rule was reaffirmed by the Supreme Court and is binding upon us. Any relaxation of the rule must come from that Court or from the Legislature.

ADAMS, Presiding Justice.

I dissent.

In my opinion the trial court abused its discretion in making the paternal grandfather guardian of the persons of these little girls and refusing such guardianship to their mother.

The evidence shows that this grandfather was, at the time of the hearing in October, 1949, 64 years of age, and these children were 7 and 9 years old respectively. Their own grandmother, the former wife of Raleigh Casad, was dead, and a second wife, 58 years of age, had taken her place. The father of the children was also dead. There was no evidence that the mother of these girls was not as that time living a normal and respectable life with her husband and infant son, or that her home was not a fit place for her girls. The finding of unfitness of the mother was based solely upon alleged improper misconduct with her present husband which had begun some time prior to the divorce action instituted by her former husband, Glen Casad, and prior to the execution by the former spouses of an agreement dated February 8, 1945, which was incorporated into the interlocutory decree when a divorce was granted to Glen Casad on February 8, 1945. In said agreement it was recited that there was no community property and it was agreed that the husband should have the care and custody of the two children for 30 days, and that thereafter the wife should have such care and custody *provided* she had a proper and adequate home properly to care for said children, and that at such times as such home was not provided the husband should have such care and custody and provide such home. No alimony was provided for Mrs. Casad, but the husband agreed to pay to her $75.00 per month for the care of the children when in the wife's custody. Mrs. Casad was given nothing but the proceeds of the sale of certain furniture in the sum of $200.00. The foregoing provisions were incorporated in the divorce decree. Glen Casad was then in the military service, which he had voluntarily joined before being drafted, and his wife and the children had been left by him in the home of the paternal grandparents. Obviously Eloise Casad, who was then in poor health, was without a home of her own into which to take her daughters, and with but $200.00 and the promise of but $75.00 per month for the support of the children was confronted with a condition then impossible of fulfillment. It is or should be understandable that she turned to Mr. Wilson for refuge and understanding, and joined him in Arizona. He was in the military service, and it is undenied that he took her to the home of his parents in Missouri who took her in and cared for her and where a son was born to her. And while she admitted that thereafter she and Wilson lived together as husband and wife, there is no evidence of misconduct other than the fact that their cohabitation was without the sanction of a marriage ceremony. There is no evidence that her conduct was in any sense promiscuous, or that the conduct of that couple was other than that of a legally married couple, or that there was more than a continuation of an intimacy begun some time prior to the agreement between Casad and his wife, and while Casad was absent from his family; and she testified that she told her husband of her love for Wilson and a desire for a divorce before the suit for divorce was filed. Under the law of this State prior to 1895 the conduct of the Wilsons, at least after the divorce became final, would have constituted a common law marriage, recognized as valid; and such marriages are still recognized by law in some states. See Civ. Code, Sec. 55 as originally adopted. Also see Sharon v. Sharon, 75 Cal. 1, 16 P. 345; White v. White, 82 Cal. 427, 23 P. 276, 7 L.R.A. 799; Estate of Richards, 133 Cal. 524, 527, 65 P. 1034; 16 Cal.Jur. 914–917, Sec. 11; 55 C.J.S. Marriage, § 6, p. 816 et seq.

Shortly after the death of Glen Casad in July, 1949, Wilson and Mrs. Casad were married under the auspices of the Catholic Church of which they are members. They had already established a modest home in Visalia, California, where Wilson was employed at a salary of $300.00 per month. On July 20, 1949, Raleigh Casad filed his petition for guardianship of the persons and estate of the two children, the estate consisting of $3,000.00, the proceeds of a life insurance policy left by Glen Casad. Mrs. Wilson then filed a similar petition seeking guardianship. On the hearing of the two petitions no showing whatever was made as to any present unfitness of Mrs. Wilson to have the custody of her daughters. On the contrary there was testimony by three persons who knew her and Mr. Wilson in Visalia, one of whom was a next door neighbor, to the effect that they had known Mrs. Wilson for over a year, had visited her home frequently, had had opportunities to observe her fitness to keep a home and her third child; that she was an excellent housekeeper and a good and kind mother; and that she had overcome any mistakes she may have made in her past life.

It is well established that as between a parent and a grandparent the latter is a stranger to an action involving custody, Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999; Robertson v. Robertson, 72 Cal. App.2d 129, 133, 164 P.2d 52; Becker v. Becker, 94 Cal.App.2d 830, 833, 211 P.2d 598, and as between him and the mother of these children her rights are paramount. In re White, 54 Cal.App.2d 637, 129 P.2d 706; Roche v. Roche, supra; Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229; Newby v. Newby, 55 Cal.App. 114, 202 P. 891; Robertson v. Robertson, supra, 72 Cal. App.2d at page 132, 164 P.2d 52. Even as between husband and wife in actions for divorce, while neither is of right entitled to the custody of minor children, as provided by Civil Code Section 138 other things being equal, if a child is of tender years it should be given to the mother. This has often been held to be of special importance if the child is a girl. Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96; Juri v. Juri, 69 Cal.App.2d 773, 779, 160 P.2d 73; Estate of Lindner, 13 Cal.App. 208, 212, 109 P. 101; Bemis v. Bemis, 89 Cal.App.2d 80, 83, 200 P.2d 84; Noon v. Noon, 84 Cal.App.2d 374, 379, 191 P.2d 35.

It is undenied that nothing has been shown in this proceeding which reflects unfavorably upon the recent conduct of Mrs. Wilson, or is incompatible with a conclusion that if she once erred, she has rehabilitated herself. In Prouty v. Prouty, 16 Cal.2d 190, 194, 105 P.2d 295, 297, the court said: "The question as to whether a parent is a fit or proper person to have the custody of a minor child refers, however, to his or her fitness *at the time of the hearing* and is not necessarily controlled by conduct many years prior thereto.

Ott v. Ott, 127 Cal.App. 322, 15 P.2d 896; In re Green, 192 Cal. 714, 221 P. 903. Evidence of prior acts of misconduct may be admissible if it can be said to have a direct bearing upon the issue of present unfitness, but such evidence should be limited to this issue alone." (Italics added.)

The rule that present fitness and not former misconduct should control in custody cases as stated in 67 Corpus Juris Secundum, Parent and Child, § 12, p. 662, is: "A parent who is, at the time when the question arises, a suitable and competent person to have the custody of the child will not be refused such custody because at some time in the past his conduct, habits, health, or circumstances were such that he would not then have been a proper custodian." Also it is said, 67 C.J.S., Parent and Child, § 12, at page 661: "A parent may be denied the custody of a child because of bad moral character or reputation. The immorality, however, must be of so gross a character that the morals of the child would be seriously endangered, and proof of a lapse from moral standards or of one immoral act does not conclude the parent's right." Other California cases holding that fitness of a parent at the time of the hearing is the proper test to apply in cases such as this are In re Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; In re Guardianship of Jones, 86 Cal.App.2d 35, 37, 194 P.2d 141; In re Green, 192 Cal. 714, 721, 221 P. 903.

Cases from other jurisdictions follow the same rule. In Cooke v. Cooke, 67 Utah 371, 248 P. 83, at page 102, the court said: "In this country the general rule is that a spouse, though found or adjudged guilty of adultery, will not, for such reason, necessarily be deprived of the care and custody of his or her children (Haskell v. Haskell, 152 Mass. 16, 24 N.E. 859; Ex parte Lincoln, 128 La. 278, 54 So. 818; Brogna v. Brogna, 67 Wash. 687, 122 P. 1; Richardson v. Richardson, 36 Wash. 272, 78 P. 920), and especially where it is shown *that the adulterous relation had ceased, or would not be repeated, or the morals of the child or children not affected thereby.* And such is the effect of our statute, under which, different from the laws of Canada, the mother, in case of separation of husband and wife, instead of the father, is given the paramount right to the care, custody, and control of minor children." (Italics by that court.) In Vanover v. Johnson, 201 Ky. 302, 256 S.W. 422, it was held that the mother of a girl child, who had been divorced and remarried, should not be denied custody as against its paternal grandparents, because she had committed adultery during the first marriage, where her conduct showed complete reformation. In People ex rel. Woolston v. Woolston, 135 Misc. 320, 239 N.Y.S. 185, it was held that the conduct of a mother in living with another as his wife after separating from the husband was not sufficient ground to deny her custody of children after the death of their father. And in People ex rel. Geismar v. Geismar, Sup., 54 N.Y.S.2d 747, infidelities of a mother, which were said not to be notorious or in the presence of the children, were held insufficient to justify her deprivation of the custody of her children. Also see Com. ex rel. Martocello v. Martocello, 148 Pa.Super. 562, 25 A.2d 855, 856; Com. ex rel. Bock v. Bock, 159 Pa.Super. 159, 48 A.2d 133. In the latter case the trial court refused to make a finding that the mother was guilty of adultery, saying that it did not seem proper in the interests of the child whose custody was in controversy. But it said that a conviction of adultery would not, of itself, render her unfit to have custody of her child.

While the grandfather may be able to give to these infants greater material advantages, this court said in Re White, supra, 54 Cal.App.2d at page 640, 129 P.2d at page 708, that: "The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody." That language was quoted and approved in Roche v. Roche, supra, 25 Cal.2d at page 144, 152 P.2d 999. Also see Robertson v. Robertson, supra, 72 Cal.App.2d at page 133, 164 P.2d 52.

While in the proceeding before us the court did find that Mrs. Wilson is not a fit and proper person to have custody and control of her little daughters, that conclusion was based upon testimony of past events most of which dealt with events prior to the interlocutory divorce decree and the agreement of the parties in February, 1945, which were known to the husband and were, doubtless, made known to the court at that time. The evidence relied upon by petitioner Raleigh Casad shows that intimacies between the Wilsons began in 1944; and, as to the finding that when Mrs. Wilson had the children with her in 1944 she failed to care for them properly, this is based solely upon the testimony of Mr. Casad that when he called at her home one morning he found the children around in their night clothes, and their mother still in bed; and his further testimony that one of the children had eczema, which he attributed to lack of proper diet, though there was no medical testimony to support it. But be that as it may, it did not deter either Glen Casad in his agreement or the court in the divorce decree, from awarding the children to Mrs. Casad, under the conditions hereinbefore stated. There being no evidence of *present unfitness* of Mrs .Wilson except such as may have been inferred from her conduct in living with Wilson while unmarried to him, the trial court must have based its finding of unfitness upon conduct some five years prior thereto. In my opinion such evidence should not have been admitted, particularly that of conduct prior to the interlocutory divorce decree. Nor do I consider that it is or can be for the best interests of these little girls that they be deprived of the love and companionship of their young mother and that the character of their mother forever be stamped as immoral. The puritanical notion that a young woman whose conduct does not conform with the mandates of the "double standard" of morals should forever after bear the scarlet letter is outmoded. And to paraphrase the language used in People v. Mangum, 31 Cal.App.2d 374, 382, 88 P.2d 207, it must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that, in many respects, its application would be a grotesque anachronism. A more generous attitude toward the children as well as their mother would be to forget the past, and restore, as far as possible, the normal relationship between parent and children. It is unnatural that these little girls be raised by and dependent upon an aging grandfather, particularly since, with unexorability of time, he will become less and less capable of fulfilling the duties of mother and father to them; and in the event of his demise before these children reach their majority they will be left strangers to and alienated from their mother and dependent upon the support and care of strangers.

As for the assertions in the opinion of Judge Deirup that Mrs. Wilson "deserted" her children (he concedes that she did not abandon them) and that "she threw her children away once in pursuit of romance", in my opinion they are unjustified by the evidence in the case, as is the statement that "Perhaps she would like to get the insurance money; and that the little girls might be useful to her in taking care of her little boy." The evidence shows without contradiction that at the time Mrs. Wilson left California and went to Arizona, these children were, by the order of the divorce court, in the custody of their father, and that she was obviously unable to secure a home for herself into which to take them; that the attitude of the Casads toward her was unfriendly; and that shortly thereafter the legal custody of the little girls were given to their father by another decree of the divorce court. Under these circumstances she cannot be said to have deserted them because she did not remain in California, and any assertion that she did not thereafter evince interest in them is contradicted by evidence that from time to time in 1945, 1946, 1947, 1948 and 1949 she sent them gifts and remembrances, some of which their custodians refused to accept and did not acknowledge. She was in no condition, either physically or financially, to do much in that respect, and under no legal obligation to contribute to their support. And when she returned to California in 1948, for the asserted purpose of seeing her children, she was met with objections from their father, and, after his death, from their grandfather. And regarding the aforesaid reference to Mrs. Wilson's desire to "get the insurance money", she stated that she would prefer that the court should appoint a bank or trust company to act as guardian of the children's estate and that she was interested in the children alone. But even if she were guardian of same, the children's money would not be hers to expend, but would be subject to the court's supervision. And, furthermore, she did not seek guardianship until after Raleigh Casad had filed his petition asking for appointment. And any assertion that perhaps Mrs. Wilson wanted her girls to take care of her little boy is purely fanciful and gratuitous.

Finally, as was said by the court in Geismar v. Geismar, supra, 54 N.Y.S. at pages 755–756:

"Above all, the question here, as already observed, is not one of abstract morals, but rather whether the mother's indiscretions have been such as to affect her right to custody; whether the welfare of the children has been or will be harmed thereby. The law is not so vengeful as to punish the children through their mother.

"Since we are dealing with humans and not angels, we must take human frailties into account. Granted that the mother is not perfect, still, imperfection is not unfitness. And if we rejected anything short of flawlessness, our quest would have to go beyond and higher than this earth. * * *

"* * * This is not a divorce action, calling for a branding with the scarlet letter. For the Court to assume a sanctimonious or puritanical attitude would not be realistic; it would not meet the practicalities here presented. A system of justice not seasoned with compassion and understanding would be unjust. A blind and merciless casting of the first stone is not the mission of the law."

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106 Cal.App.2d 226

LANCE v. FORSBERG.

Civ. 18024.

District Court of Appeal, Second District, Division 3, California.

Aug. 21, 1951.

Walter D. Lance sued Fred A. Forsberg for money had and received and return of the par value of plaintiff's shares of stock in a corporation to which the parties agreed to transfer all the assets of a partnership between them. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., for defendant on an order sustaining a demurrer to plaintiff's amended complaint without leave to amend, plaintiff appealed. The District Court of Appeal, Wood, J., held that the amended complaint stated a cause of action in plaintiff, not the corporation.

Judgment reversed with direction to overrule the demurrer.

1. Corporations ⚷436

Mere incorporation of existing partnership does not, ipso facto, transfer to corporation title to partnership's property, but there must be conveyance thereof as in other cases.

2. Licenses ⚷39.9

A security issued without permit from Commissioner of Corporations is void.

3. Licenses ⚷39.23

An amended complaint, alleging that defendant fraudulently failed to include various assets of partnership between parties in defendant's petition to corporation commissioner for permit to issue 1000 shares of stock in corporation, to which parties agreed to transfer all partnership assets in exchange for such shares, of which plaintiff was to receive 400 and defendant 600, that defendant disposed of most of partnership assets and applied proceeds thereof to his own use, and that defendant delivered purported stock certificate to plaintiff after expiration of permit to issue stock, stated cause of action in plaintiff, not corporation, for return of par value of plaintiff's shares of stock.

Joseph K. Coady, Bellflower, for appellant.

Jesse A. Hamilton, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendant which was based upon an order sustaining, without leave to amend, a demurrer to the amended complaint.

In the first cause of action of the amended complaint it was alleged that defendant was indebted to plaintiff in the sum of $4,000 for money had and received, and that no part of said sum had been repaid. In the second cause of action it was alleged, in substance, as follows: About November 1, 1944, defendant was engaged in the fumigating business; about that date said defendant, by oral agreement, employed plaintiff to work for him in said fumigating business for an indefinite period of time and, as compensation therefor, defendant agreed to pay plaintiff a sum equal to 25 per cent of the gross income of the business, payable $50 a week, and the remainder in a lump sum at the end of each year; plaintiff thereafter entered into such employment upon said terms and conditions; during the year 1945 said business had a gross income of $26,660; during said year plaintiff drew from his 25 per cent share thereof the sum of $3,950, leaving a balance due plaintiff at the end of said year of $2,715; about December 31, 1945, plaintiff and defendant entered into an agreement whereby both parties agreed that the said sum of $2,715 should not be withdrawn by plaintiff but "left to accumulate for the purpose of buying an interest in said business"; during the year 1946 the "business" had a gross income of $18,777.49; during said year plaintiff drew from his 25 per cent share thereof the sum of $3,120, leaving a balance due plaintiff at the end of said year from defendant the sum of $1,574.37; said sum was not paid to plaintiff but by mutual agreement was allowed to remain in the business and accumulate to plaintiff's credit for the purpose of buying an interest in said business; from January 1, 1947, to June 3, 1947, the said business had a gross income the exact amount of which was unknown to plaintiff; about June 3, 1947, plaintiff and defendant filed a certificate with the county clerk "for transacting business" under a fictitious name; said certificate "certifies" that plaintiff and defendant were conducting a fumigating business under the fictitious firm name of Commercial Fumigation and Extermination Co.; about June 3, 1947, the sums which had been left to accumulate by plaintiff were transferred to the general funds of said company; said business was thereafter conducted and operated by both plaintiff and defendant; in December, 1948, plaintiff and defendant entered into an oral agreement whereby it was mutually agreed to dissolve their partnership business "and transfer all of the assets of the partnership to a corporation to be immediately formed"; it was further agreed "that all of said assets were to be exchanged for stock in said corporation in the amount of one thousand (1,000) shares, each share to have an agreed par value of Ten ($10.00) Dollars a share"; it was further mutually agreed that plaintiff's interest in the partnership assets was 40 per cent "of the total" and plaintiff was to receive 400 shares of said stock, and that defendant's interest in said partnership assets was 60 per cent "of the total" and defendant was to receive 600 shares of said stock; in accordance with said agreement, articles of incorporation were prepared and filed with the Secretary of the State of California; about January 1, 1949, an inventory of the assets of the partnership, which plaintiff and defendant agreed should be turned over to the corporation, was taken; said assets "consisted of equipment, machinery and materials to the value of $10,319.66, accounts receivable in the sum of $1895.59, and cash on hand in the sum of $2,503.13, subject to liabilities of accounts payable" in an amount unknown to plaintiff at that time; among the items included in said inventory were certain assets (specifically set forth in paragraph X) of certain values (specifically set forth in said paragraph) of the total value of $3,398; thereafter a petition was filed by defendant with the corporation commissioner for a permit to issue 1,000 shares of stock "of the said corporation in exchange for the assets of the said partnership," and without the knowledge or permission of plaintiff the assets (above referred to) of the total value of $3,398 were not included by defendant in said petition; that the failure on the part of defendant to include said assets was deliberate and with the intent to defraud the plaintiff; a permit to issue 1,000 shares of stock to plaintiff, defendant and one Stene, or any of them, in consideration for the transfer to the corporation of the "assets described in its application" was issued by the corporation commissioner upon the condition that all authority to sell said stock "shall terminate and expire on the 29th day of December, 1949"; about January 1, 1950, plaintiff discovered that defendant had disposed of the greater portion of the assets set forth in paragraph X of the complaint, and had applied the proceeds thereof to his own use; defendant refused to account to plaintiff for such proceeds; thereafter plaintiff discovered for the first time that the petition to the corporation commissioner had not included all of the assets of the partnership and that the permit issued by said commissioner expired December 29, 1949; plaintiff demanded the return of the sum of $4,000 from the defendant some time after January 1, 1950, and before January 30, 1950, and defendant refused to pay said sum; on January 30, 1950, defendant delivered to plaintiff a purported certificate for 400 shares of stock in said corporation "with par value of $10.00 a share, which certificate was dated January 30, 1950"; the permit to issue stock had not been renewed as of said date and the "permit" was null and void; about February 13, 1950, plaintiff rescinded his agreement to purchase 400 shares of stock in the corporation, tendered the aforesaid purported certificate of stock to the defendant, and demanded the return of $4,000; defendant has refused to pay the same or any part thereof.

[1, 2] Respondent (defendant) contends that if the amended complaint "indicates a cause of action, it is owned by the corporation, not the plaintiff here." He argues that the plaintiff's remedy was a stockholder's suit against defendant. The minute order of the court sustaining a demurrer recites as follows: "Demurrer is sustained without leave to amend, but without prejudice to an action by the corporation." That order indicates that the trial court was also of the opinion that the plaintiff did not have the right to maintain the action but that the corporation had that right. It was alleged in the amended complaint, as above shown, that the plaintiff and defendant were partners; that plaintiff's interest in the partnership was 40 per cent and the defendant's interest was 60 per cent; that the partners agreed to dissolve the partnership and to transfer all of its assets to a corporation to be formed, and that all the assets were to be exchanged for 1,000 shares of stock in the corporation, and that plaintiff was to receive 40 per cent or 400 shares and defendant was to receive 60 per cent or 600 shares. It was alleged further that the petition filed by the defendant for a permit to issue the 1,000 shares in exchange for the assets of the partnership did not include various assets of the partnership of the value of $3,398; that said failure to include said assets was without the knowledge or consent of plaintiff and was with the intent to defraud plaintiff. It was also alleged that permission was granted by the corporation commissioner to issue 1,000 shares to plaintiff, defendant and one Stene, or any of them, in consideration of the transfer to the corporation "of the assets described in its application," and that such permission should terminate on December 29, 1949. Since the assets described in the application did not include the said assets of the value of $3,398, and since those said assets were not a part of the property to be received by the corporation under the provisions of the permit or any agreement between the corporation and the partners, it does not appear that the corporation was entitled to receive the said assets of the partnership which were not described in the application. The mere incorporation of an existing partnership

does not *ipso facto* operate to transfer to the corporation the title to the property of the partnership, but there must be a conveyance as in other cases. 18 C.J.S., Corporations, § 143, p. 543. There was no conveyance of the said assets of the value of $3,398 and, as above stated, it does not appear that there was any agreement between the corporation and the partners requiring the conveyance of such assets. The permit to issue certificates of stock expired prior to the date the certificate of stock was issued to plaintiff. A security "issued without a permit from the Commissioner of Corporations is void." Austin v. Hallmark Oil Co., 21 Cal.2d 718, 726, 134 P.2d 777, 782. It therefore appears that plaintiff did not receive anything from the corporation. Thereafter plaintiff rescinded his agreement to purchase 400 shares of stock and tendered his certificate of stock to the defendant.

In Morris v. Whittier Amusement Co., 123 Cal.App. 121, 10 P.2d 1017, certain persons became associates for the purpose of purchasing a building and transferring it to a corporation to be formed. The building was purchased and transferred to the corporation which was formed. The action, which was commenced by some of the associates, was to recover secret profits made by one of the associates who, in behalf of the others, negotiated the purchase. A demurrer to the complaint was sustained without leave to amend. The question therein was whether plaintiffs or the corporation had the right to maintain the action. It was held in that case that plaintiffs had the right to maintain the action, and the court stated, 123 Cal.App. at page 124, 10 P.2d at page 1018, that the solution of the question as to who may maintain the action "depends upon the answer to the question, 'Who was injured by the fraud of Harris [the associate who negotiated the purchase]?'" It further stated that the "injury was not suffered by the corporation but by the associates, who paid their cash for the property, and who were defrauded by their own agent." It further stated therein, 123 Cal.App. at page 123, 10 P.2d at page 1018, "The rights and liabilities of the parties who thus associate themselves for the purpose of acquiring the property, and afterward forming the corporation, are governed by the same principles as those applying to joint adventures. * * * 'Promoters, like other joint adventurers, and like parties generally, occupy a relation of trust and confidence, so that they must act toward each other with the utmost good faith, and if one or more are guilty of any fraud or breach of trust against the others, by taking a secret profit, misappropriating funds, or otherwise, they will be compelled to account in equity as in other like cases.' [Citation.] The foregoing authorities clearly establish the rights and liabilities of these associates, *per se*. It would appear that the transaction here detailed was a matter entirely between themselves."

[3] In the present case it appears that all the transactions, from the formation of the partnership to the formation of the corporation, were between plaintiff and defendant. They were the only members of the partnership and the only parties to the agreement to form a corporation and transfer the partnership assets to it. (It does not appear that Stene, who was mentioned in the permit, had any interest in the assets.) The corporation was not a party to the agreement, relative to the transfer of the assets, and it does not appear that it acquired any right to the assets which the defendant allegedly misappropriated. The amended complaint stated a cause of action.

The judgment is reversed, and the trial court is directed to overrule the demurrer.

SHINN, P. J., and VALLÉE, J., concur.

106 Cal.App.2d 80

JONES v. MALONEY, Insurance Commissioner.

Civ. 14657.

District Court of Appeal, First District, Division 1, California.

Aug. 15, 1951.

James Moore Jones brought a mandamus proceeding to vacate orders of John R. Malone, as insurance commissioner of the State of California, revoking petitioner's licenses as an insurance agent and an interinsurance agent. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered an order denying the petition, and the petitioner appealed. The District Court of Appeal, Bray, J., held that the Commissioner's findings were not sufficient to support his conclusion that the petitioner had obtained his licenses by concealment and misrepresentation.

Reversed with directions.

1. Mandamus 🔑174, 187(9)

In mandamus proceeding brought to vacate insurance commissioner's order revoking petitioner's licenses as insurance agent and interinsurance agent, Superior Court was authorized to exercise its independent judgment on evidence, but province of District Court of Appeals, in reviewing Superior Court's order denying petition, would be to determine whether there was any substantial evidence, contradicted or uncontradicted, which would support findings of Superior Court to effect that charges against petitioner had been supported by weight of evidence. Insurance Code, § 1731.

2. Mandamus 🔑168(4)

In mandamus proceeding to vacate insurance commissioner's order revoking petitioner's licenses as insurance agent and interinsurance agent, evidence sustained finding that petitioner had knowingly made misstatement in his application for licenses notwithstanding psychiatrist's testimony that agent was so confused that he couldn't recall facts to which misstatement related. Insurance Code, § 1731.

3. Criminal law 🔑982, 1001

Power of court to grant probation may be exercised in either of two ways: (1) by suspending imposition of sentence, in which case there is no judgment of conviction, or (2) by imposing sentence and thereafter suspending its execution.

4. Insurance 🔑12

Where applicant for insurance agent's license has knowingly or wilfully made misstatement in his application, it is not necessary to revocation of license that such misstatement have been of matter which, if known to commissioner, would have caused denial of application. Insurance Code, § 1731(b).

5. Insurance 🔑4, 12

Statute requiring applicant for insurance agent's license to answer truthfully whether he has been convicted of a misdemeanor is neither arbitrary nor unsound, and whether particular misdemeanor is one which will affect applicant's right to license is for commissioner to determine rather than for applicant. Insurance Code, § 1731(b).

6. Insurance 🔑12

Under Insurance Code section authorizing commissioner to revoke agent's license if license holder has obtained his license by concealment or knowing misrepresentation, two things are required: (1) concealment or knowing misrepresentation; (2) showing that such concealment or misrepresentation was of such nature as was cause of obtaining of license which otherwise would have been denied. Insurance Code, § 1731.

7. Administrative law and procedure 🔑486

Administrative findings must conform to statute governing agency, but they need not be stated with formality required in judicial proceedings. Insurance Code, § 1731(b).

8. Administrative law and procedure 🔑749

In connection with action of administrative board, fact that certain action is taken or recommendation made may raise presumption that existence of necessary facts was ascertained and found. Government Code, § 11518.

9. Administrative law and procedure 🔑486

In Administrative Procedure Act section requiring that findings be made in addition to determination of issues presented, provision to effect that findings may be stated in language of pleadings or by reference thereto indicates that there must be findings sufficient to enable court to determine that commissioner actually found necessary facts to support his determination of issues, and that mere conclusion, particularly where there are no facts in evidence to support it, is not sufficient. Government Code, § 11518; Insurance Code, § 1731.

10. Mandamus ⚷168(4)

In mandamus proceeding brought to vacate insurance commissioner's order revoking insurance agent's license, where it appeared that commissioner had found as fact that agent had made wilfull misstatement in his license application, but that commissioner had made no finding as to whether license would have been withheld if questions had been answered truthfully, and there had been no facts in evidence to support such finding, commissioner's conclusion that license had been obtained by concealment and misrepresentation could not be sustained. Government Code, § 11518; Insurance Code, § 1731.

11. Mandamus ⚷187(9)

Where, on review of Superior Court's order denying writ of mandate to vacate insurance commissioner's orders revoking insurance agent's licenses because agent had wilfully made misstatements in his application and because agent had obtained his license by concealment and misrepresentation, District Court of Appeal found that commissioner's findings were not sufficient to support his conclusion that license had been obtained by concealment and misrepresentation, judgment would have to be reversed and sent back to commissioner for reconsideration of penalty, since there would be no way of knowing what penalty commissioner would have imposed for misstatements alone. Insurance Code, § 1731.

◆

Lloyd E. McMurray and Gladstein, Andersen & Leonard, all of San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., T. A. Westphal, Jr., Deputy Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for respondent.

BRAY, Justice.

A hearing conducted by the respondent insurance commissioner under the provisions of section 1731 of the Insurance Code culminated in the revocation of petitioner's licenses as an insurance agent and an interinsurance agent. Petitioner applied to the superior court for a writ of mandate to vacate the orders making such revocation. Exercising its independent judgment on a consideration of the proceedings before the commissioner (no additional evidence was offered) the trial court found that the commissioner's decision is supported by the findings and the findings by the evidence. It also found that petitioner wilfully inserted false statements in his applications for the licenses. The court by order denied the petition. Petitioner appeals.

Questions Presented.

1. Sufficiency of evidence to support findings that petitioner wilfully made misstatements in his application.

2. Sufficiency of the evidence and the findings that he obtained his license by concealment and misrepresentation.

Record.

On March 4, 1948, petitioner applied for a license as an interinsurance agent and it was granted June 14. On July 22 he applied for a license as an insurance agent. This license was granted September 10. December 10, respondent filed an accusation against petitioner alleging that petitioner had obtained said licenses by wilfully answering "No" to question 14 in each application and that he obtained the licenses "by concealment and/or knowing misrepresentation." Question 14, in each application, reads:

"Have you ever been convicted of a misdemeanor other than a traffic offense?

"You should answer the above questions in the affirmative if any conviction ever took place irrespective of Executive pardon, or any withdrawal of pleas of guilty, or vacations of a verdict of conviction based on the right of a discharged probationer that may have been allowed since that conviction. If your answer to either of the above questions is in the affirmative please write a supplementary statement giving the court in which you were convicted, the date of your conviction and a statement of the acts which gave rise to the conviction; also include a certified copy of the judgment of conviction. If there is any pardon or order of dismissal based on withdrawal of a plea or vacation of a verdict certified copy of documents evidencing these acts should likewise be included herewith."

After the hearing, the commissioner adopted the proposed decision of the hearing officer, revoking the licenses. The commissioner later denied a petition for reconsideration. The decision finds that in each application petitioner (1) knowingly made a misstatement, and (2) obtained each license by concealment and misrepresentation; that both matters constitute grounds for disciplinary action under section 1731 (b) of the Insurance Code.

Evidence As To Wilful Misstatements.

[1, 2] In reviewing the evidence before the commissioner the trial court was authorized by law to exercise its independent judgment on the evidence. Our province, however, is to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of the trial court to the effect that the charges against petitioner were supported by the weight of the evidence. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20. While there is evidence which would have supported a finding by the board or the trial court to the contrary, there is ample substantial evidence to support the findings made. On November 23, 1928, in the police court of Palo Alto, petitioner was tried on a misdemeanor charge—violation of section 224 of the ordinances of that city, "to wit, disturbing a public assemblage." He was found guilty, and waived time for pronouncement of sentence. The court "ordered and adjudged that as a punishment * * * [he] be committed to the County Jail for Six months * * * which sentence is suspended on condition * * * [he] leave Palo Alto and remain away." According to a statement signed by petitioner and introduced in evidence this charge arose out of the fact that when the newly elected President Hoover was leaving Palo Alto for Washington, petitioner and others paraded with banners asking that the Marines be withdrawn from Nicaragua. According to the statement, petitioner was then a college student. He was held in the Palo Alto jail for a night and a day.

On November 4, 1939, petitioner was convicted in the municipal court of San Francisco of a misdemeanor, to wit, disturbing the peace and resisting an officer. He was sentenced to two days in the county jail. His sentence was suspended. The above-mentioned statement sets forth that this charge arose out of the fact that a policeman called him a name whereupon petitioner "swung" on the policeman. Apparently petitioner got the worst of the "swinging." He testified that he was taken to the emergency hospital and received medical attention and that when he was taken to court the judge said, "'Well, I guess you have suffered enough,' and he let me go."

Petitioner testified that in answering "No" to question 14 he did not realize that he had been convicted of the two misdemeanors or sentenced on them, as, in each case, he had been immediately released by the court. However, the testimony of one Wade, an investigator for respondent, completely contradicts petitioner and affords ample foundation for the finding that petitioner wilfully and knowingly misrepresented the situation. Wade testified that prior to the filing of the accusation he interviewed petitioner; that he went over with petitioner his applications and the questions and answers thereon; that he asked petitioner several times if he had ever been convicted of a misdemeanor and also several times if he had ever been arrested. Petitioner stated that he had not. It was not until Wade showed petitioner the records of these convictions that he finally admitted that he had been arrested. He told Wade that as to the San Francisco case he did not know what, if any, sentence was imposed. Petitioner signed and swore to a statement which Wade wrote out during the discussion and which he claims contains what petitioner told him. It states: "I * * * received a 6 months suspended sentence, as I recall it." The statement then goes on: "I did not mention these incidents on my applications for insurance licenses because I considered them very much in the past and immaterial." Wade testified that petitioner also stated that he answered "No" to the questions for the reason "that if the record was known it would hurt him in the business and he felt the cards would be stacked against him if he had admitted these arrests. Mr. Samuel [deputy insurance commissioner]: Q. Now, when you speak of arrests do you mean arrests and convictions? A. Yes, the arrests and the convictions—in fact, his whole record, because he had denied the whole record, arrests and convictions, and he felt that the whole thing would work against him and he didn't want it to be known." On the witness stand petitioner was somewhat evasive.

At a later hearing Dr. Tuchler, a psychiatrist, testified that he was appearing at the hearing on his own initiative; that he had seen petitioner as a private patient in the years 1944, 1945 and 1946; that in January, 1949, petitioner was referred to him by the State Bureau of Vocational Rehabilitation; that petitioner has a neurotic difficulty; also that he has a marital problem which affects his anxiety neurosis; that in his opinion, petitioner is so concerned, confused and disturbed that he could not remember what had happened at the time of his arrests and that petitioner could not wilfully defraud anyone.

Petitioner claimed that he had not told the investigator Wade that he had ever been convicted nor had he denied being arrested. He did admit, however, that it was not until after Wade showed him the pictures attached taken by the police that he said he had been arrested. While there was evidence upon which the commissioner and the court could have found that petitioner did not realize that he had been convicted and hence made the statements on the application in good faith, such evidence does not compel that result. Taking the evidence as a whole it clearly appears that the trial court was justified in finding that the weight of the evidence supported the commissioner's conclusions.

[3] Petitioner contends that the actions of the criminal courts did not constitute convictions. In the Palo Alto case the docket shows that the defendant was found guilty and the court "ordered and adjudged that as a punishment for the offense * * [he] be committed to the County Jail for Six months * * * which sentence is suspended * * *" In the San Francisco case the record reads: "the said defendant having been duly convicted in this Court of the crime of Misdemeanor, to-wit: Dis[turbing] the Peace and Resisting an Officer. It is ordered and adjudged as a punishment therefor, that the said defendant be imprisoned in the County Jail * * * for the period of 2 days. Sentence suspended." In In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, cited by petitioner, the same contention was made as is made here, namely, that there was no conviction. The exact order there was that defendant be imprisoned in the county jail for 180 days, "execution suspended for 2 years and respondent placed on probation on condition he serves 175 days in City Jail." The opinion states that the power of the court to grant probation may be exercised in either of two ways: (1) It may suspend the imposition of sentence, in which case there is no judgment of conviction, or (2) it may impose the sentence and thereafter suspend its execution. It then pointed out that it was clear from the language of the order that the court rendered its judgment of conviction and then suspended its execution. Applying the test of the Phillips case to the judgments in our case it is equally clear that in each instance the court rendered its judgment of conviction and then suspended its execution.

[4] Petitioner argues that the matters concealed were such that had they been known to the commissioner and not concealed, they would not have caused a denial of the licenses. As far as the charge of misstatement is concerned, this is immaterial. Section 1731 of the Insurance Code provides: "The commissioner may suspend or revoke any license * * * if, after a hearing * * * he determines * * *

"(b) Such person has knowingly or wilfully made a misstatement in an application to the commissioner for a license * *." There is nothing in the act which limits the misstatement to one concerning a matter which, if known, would cause a denial of the license. It is the *fact* of wilful concealment that is important, rather than the matter concealed.

Petitioner relies for his contention that the concealment of a fact which, if revealed would not justify the refusal of a license, will not support a revocation of the license, on certain cases in California and outside the state. The California cases are in connection with disbarment proceedings. In re Jung, 13 Cal.2d 199, 88 P.2d 679, does not support this proposition. There the referee appointed to investigate the charge that in his application to take the bar examination respondent had made false answers to certain statements, found that respondent did not knowingly or wilfully conceal any material facts or make any false answers. There is no discussion of whether the answers, if false, would or would not have barred his being permitted to take the bar examination. In State Bar v. Rollinson, 213 Cal. 36, 1 P.2d 428, the decision was based upon the refusal of the District Court of Appeal to admit evidence to show that respondent's misstatements did not constitute a wilful fraud, and upon a holding that the evidence that was introduced showed an absence of bad faith and intentional fraud on his part. Just why appellant cites State Bar v. Turner, 31 Cal. 2d 842, 192 P.2d 897, is not clear, as there the court revoked an order admitting respondent to the bar on the ground of concealment of certain misdemeanor convictions. He requested permission to show that at the time he applied to take the bar examination he was suffering from a nervous and mental illness which made him incapable of remembering the convictions or of formulating a wilful and fraudulent intent. In refusing to admit such evidence the court said that it was immaterial that because of mental condition, respondent may not have been guilty of intentional concealment. This holding is interesting in view of the fact that in our case the psychiatrist testified that petitioner because of his nervous condition had no memory and was incapable of wilful concealment. Petitioner cites three out of state cases. Louisiana State Board of Dentistry v. Hodge, 160 La. 743, 107 So. 511, dealt with a situation where the board claimed that the defendant in obtaining his license to practice dentistry had falsely represented that he was a graduate of a certain dental college. Defendant denied that he had made such representation. The Supreme Court held that he did not make it and that it was clear that the board out of sympathy for defendant because he was a war veteran, had waived its requirement that he be a dental school graduate. Again, in Mississippi State Bd. of Dental Examiners v. Mandell, 198 Miss. 49, 21 So.2d 405, the decision setting aside an order of the board revoking defendant's license to practice dentistry was based upon the court's determination that there was no proof that defendant in obtaining his license had knowingly or wilfully misrepresented. Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810, is a case in which the board's finding that defendant obtained his medical license by fraudulent means was upheld. There is some language, however, to the effect that the fraud must be causal before a license may be revoked. However, the charge there was that defendant had obtained his license *by* fraudulent means. As we point out later in connection with the second charge in our case, under such a charge the materiality of the misstatement or fraud becomes important. None of the cited cases support the proposition that where the statute provides, as does section 1731 of the Insurance Code, that a license may be revoked where a person has "knowingly or wilfully made a misstatement" in his application, such misstatement must be of a matter which if known to the commissioner would cause a denial of the application.

[5] Petitioner has cited a number of cases which held certain statutes and ordinances regulating insurance agents unconstitutional because arbitrary or unsound. It is not necessary to discuss them as there is no resemblance between them and section 1731 of the Insurance Code. It cannot be said that a statute requiring an applicant for an insurance agent's license to answer truthfully whether he has ever been convicted of a misdemeanor is either arbitrary or unsound. Whether the particular misdemeanor is one which will affect the applicant's right to a license is for the commissioner to determine rather than for the applicant.

Second Charge.

[6–10] However, on the charge of having obtained his license by concealment or misrepresentation, the materiality of the matter concealed or misrepresented becomes important. Section 1731 provides that the commissioner may suspend or revoke a license if the license holder "has obtained his license by concealment or knowing misrepresentation". In determining this question it becomes important to ascertain whether the matter was such as, if known, would have caused a denial of the license. If it was not, then the license was not obtained by suppressing the truth on this subject. Under this portion of the section, two things are required: (1) the concealment or knowing misrepresentation (as pointed out above there is substantial evidence of this): (2) a showing that this concealment or misrepresentation was of such a nature that it was the cause of the obtaining of a license which otherwise would have been denied. (There is no evidence of this fact.) So far as the record goes there is nothing in the circumstances of the two convictions, one almost twenty years, the other almost nine years, prior to the applications, which would have justified the commissioner in denying the license to petitioner. Nor is there any finding to support the conclusion that petitioner did obtain his license by concealment and misrepresentation of the two convictions.

The hearings on the accusation necessarily were under the provisions of the Administrative Procedure Act, § 11500 et seq., Gov.Code. Section 11517 relates to "Method of Decision in Contested Cases" and provides that if the case is heard by a hearing officer alone (the situation here) he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. The agency (in this case, the commissioner) may adopt the proposed decision in its entirety (the commissioner did) or may reduce the proposed penalty and adopt the balance of the proposed decision. Section 11518 provides: "The decision shall contain findings of fact, a determination of the issues presented and the penalty, if any." This language suggests an analogy to a decision of the superior court comprised of "findings of fact" and "conclusions of law." The "penalty" feature appears somewhat comparable to the "decree" or "judgment" of the superior court. The decision here is prefaced with the statement that the "Hearing Officer makes the following findings of fact." It then finds true certain matters set forth in paragraphs I to V inclusive of the accusation, and that "Except as hereinabove found, the other allegations contained in Paragraphs I to V inclusive, of said Accusation are untrue." The matters set forth in paragraphs I to V found to be true are the matters of wilfully and with knowledge misstating the answers to question 14 in each application. There is no finding of fact that had the answers to that question been truthfully given the licenses would have been withheld. Then, in the decision the hearing officer "makes the following determination of the issues presented" (comparable to a court's "conclusions of law"). As it relates to the matter before us it states "That respondent has obtained each of his said licenses by concealment and knowing misrepresentation, which constitutes grounds for disciplinary action * * * under the provisions of subdivision (b) of Section

1731 of said Insurance Code." Insofar as this is a finding of more than that there was concealment and knowing misrepresentation, it is not a finding but a conclusion. There is, then, no finding that as a fact, the licenses were obtained by this concealment or representation. To put it another way, there is no finding that the concealment and misrepresentation was of a material fact which would have influenced the commissioner in his issuance of the licenses. The rules as to findings by an administrative agency have been set forth succinctly in Swars v. Council of City of Vellejo, 33 Cal.2d 867, 872, 206 P.2d 355, 358: "Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings [citations]. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found, [citations]". In our case we have a statutory requirement that findings be made in addition to "a determination of the issues presented" Gov.Code, § 11518. While as above set forth the findings need not be stated with the formality required in judicial proceedings the statement in section 11518, "The findings may be stated in the language of the pleadings or by reference thereto", indicates that there must be findings sufficient to enable this court to determine that the commissioner actually found the necessary facts to support his determination of the issues. A mere conclusion, particularly where there are no facts in the evidence to support it, is not sufficient. Section 1731 states that licenses may be suspended or revoked if, after a hearing, the commissioner "determines that any of the following *facts* exist"—he "has *obtained* his license *by* concealment or knowing misrepresentation". (Emphasis added.) The missing finding in our case is the fact that the licenses were obtained *by* the concealment. The findings say nothing about the licenses having been "obtained" either by "concealment" or by "knowing misrepresentation" and the evidence in the case is not sufficient to have supported such a finding had one been made. The misdemeanor convictions were of ancient date. The offenses themselves bear no peculiar or apt relation to petitioner's qualifications for a license as an insurance agent. As there is no sufficient finding of fact to support it, the second charge must fall.

[11] The commissioner made a single order of revocation based on his conclusions that both charges had been substantiated. Inasmuch as we hold that the findings are not sufficient as to the second charge, and we have no way of knowing what penalty the commissioner would have imposed on the first charge alone, the judgment must be reversed and the matter sent back to the commissioner for reconsideration of the penalty. Garfield v. Board of Medical Examiners, 99 Cal.App.2d 219, 221 P.2d 705.

As there has to be a reconsideration by the commissioner of the penalty it becomes unnecessary for us to consider or determine the question raised by us at oral argument, namely, whether this court has power to annul the order of the commissioner on the sole ground, if it should so find, that the penalty imposed is too drastic for the violations found.

The judgment is reversed and the trial court is directed to enter judgment commanding respondent commissioner to set aside his order of revocation and further directing him to redetermine his order in the light of this court's opinion and judgment.

PETERS, P. J., and FRED B. WOOD, J., concur.

106 Cal.App.2d 126

In re McKANNA'S ESTATE.

FATHER FLANAGAN'S BOYS TOWN v. McKANNA.

Civ. 18348.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1951.

Proceeding in the matter of the estate of Edwin A. McKanna by Nancy M. McKanna for payment of a family allowance to her as the common-law wife of the decedent and Father Flanagan's Boys Town objected. The Superior Court, Los Angeles County, Roy L. Herndon, J., entered orders directing such payment and the objector appealed. The District Court of Appeal, Hanson, J. pro tem., held that a valid common-law marriage had existed between the petitioner and the decedent.

Orders affirmed.

1. Marriage 🔑50(1)

In proceeding by alleged widow for order directing payment of family allowance to her as common-law wife of decedent, evidence sustained finding that couple became husband and wife in Texas in accordance with its common law.

2. Marriage 🔑13

Texas views common-law marriage not as mere contract but as status to which mutual consent is essential, implemented and not attained until parties publicly assume such relation by holding themselves out as husband and wife.

3. Marriage 🔑20(1)

Mutual consent or agreement required in Texas for valid common-law marriage need not be expressed or evidenced by any particular form of words.

4. Marriage 🔑13

One essential element of valid common-law marriage in Texas is that parties cohabit together as man and wife.

5. Marriage 🔑13

One essential element of valid common-law marriage in Texas is that parties publicly hold themselves out as man and wife.

6. Marriage 🔑22

Where couple in Texas agreed to be husband and wife, signed hotel registers as such using their correct name, stated to landlord they were going to be married and presented themselves to landlord as man and wife, though woman later worked for period under own name, there was within Texas sufficient public holding out by couple of fact that they were husband and wife for establishment of common-law marriage.

7. Marriage 🔑13

That parties be domiciled in Texas at time of alleged agreement to marry, or that at time there was intention to acquire domicile in Texas, is not essential to validity of common-law marriage in Texas.

8. Executor and administrator 🔑194(7)

In proceeding by alleged widow for order directing payment of family allowance to her as common-law wife of decedent, it was for trial court to weigh evidence and determine credibility of witnesses.

9. Witnesses 🔑139(14)

In proceeding by alleged widow for order directing payment of family allowance to her as common-law wife of decedent, law of California, domicile of parties and site of action was applicable to determine admission of widow's testimony as to transactions and conversations with alleged common-law husband.

◆

Carl C. Katleman and George Appell, Los Angeles and Monsky, Grodinsky, Good & Cohen, Omaha, Neb., for appellant.

John M. Sherman and Robert M. Fisk, Pasadena, for respondent.

HANSON, Justice pro tem.

In the court below the respondent sought and obtained an order directing the executor to pay her a family allowance as the common-law wife of the decedent Edwin A. McKanna. The case here on appeal turns upon the question whether or not at the time of the death of McKanna on April 25, 1950, the respondent was in fact his common-law wife. The alleged common-law marriage was claimed by respondent to have taken place in Austin, Texas, on September 3, 1946.

Appellant's challenge is based primarily upon the ground that the evidence was insufficient to sustain the essentials of a common-law marriage in Texas which it contends requires evidence (1) of an agreement to be husband and wife as a life-long relationship; (2) that it be followed by cohabitation; (3) that it be followed by publicly holding themselves out as man and wife, and (4) that such holding out must occur while the parties are domiciled within the state of Texas or while residing in Texas they were possessed of an intention to acquire a domicile in that state.

As respondent agrees with appellant that evidence of the first three named essentials are requisites under Texas law we shall assume for the purposes of the opinion that appellant is correct. But see 25 Texas Law Review 681. Respondent, however, sharply challenges the assertion that domicile is a factor as contended by appellant.

We turn first to a statement of the facts leading up to the alleged common-law marriage as they could have been found by the trial court on the evidence.

In June, 1946, the decedent Edwin, being at the time domiciled in California, went to San Antonio, Texas, on a business and vacation trip. At San Antonio he took lodgings at a lodge where respondent Nancy Davis likewise had lodgings. She was a Texas girl and at the time employed as a cashier at a nearby coffee shop where she first met Edwin. She at once began having dates with him.

In July, 1946, she changed her employment to that of secretary to an official of a department store and thereupon moved to a room in a rooming house run by a Mr. and Mrs. Temple. About three weeks later Edwin engaged a room for himself in the same rooming house. The testimony of Mrs. Temple is that on the morning of September 3, 1946, Edwin and Nancy came downstairs with traveling bags and Nancy announced to Mrs. Temple, in the presence of Edwin, that they were driving to Austin, Texas, to be married; he added that he was giving up his room and that on the couple's return they would occupy Nancy's room. On their return the next day Nancy testified that Edwin announced to Mrs. Temple that "she is mine now; she is my wife." Mrs. Temple testified she recalled the first part of the statement, but could not positively recall the second. She did testify she and her husband congratulated the couple, who proceeded to occupy Nancy's room until some four days later when the couple drove to St. Louis. A day or two after the couple had returned from Austin Mrs. Temple introduced them to a neighbor as Mr. and Mrs. McKanna.

The respondent Nancy testified that previous to the trip to Austin, Edwin had not only proposed marriage to her but had also asked that she accompany him to St. Louis where he wished to undergo a facial operation; that she thereupon suggested he should go alone and that they marry upon his return; that after further discussions both agreed they would shortly proceed to Austin to be married. Her testimony is that on their arrival in Austin they decided to dispense with the formality of a marriage ceremony. In her own words: "Mr. McKanna asked me if I would live with him as his wife and assume the duties as wife to him, and I said I would; and he said he would live with me as my husband." At Austin the couple registered in a hotel as Edwin A. McKanna and wife—the registration signature, however, was in the hand of respondent, who testified she signed at the direction of Edwin. Whether Edwin was inebriated or not at the time is not disclosed, but that he was an alcoholic before and after he met Nancy and until his death is the record in this case. Except in this one instance, hotel registers thereafter were always signed by Edwin, never under fictitious names, but always as "Edwin A. McKanna and wife." That Edwin desired to marry Nancy before the couple went to Austin is corroborated by Mrs. Temple, who stated the subject of marriage was many times discussed in her presence in her home and moreover that Edwin also sought Mrs.

Temple's help in getting Nancy to marry him.

The couple returned from St. Louis to Texas, registering first at a hotel in Fort Worth and later at another in San Antonio as Edwin A. McKanna and wife. Then they went to California. In California, Edwin always introduced respondent as "my wife" or as Mrs. McKanna. He bought a house in which they resided until his death. He told his lawyer when he drew his will that Nancy was his wife and made the same statement to a trust officer of a bank which handled the trust from which McKanna derived his income. Except during two periods when Edwin was confined for alcoholism, Nancy always lived with him.

[1–3] Upon the facts stated it seems to us abundantly clear that the evidence completely sustains the trial court's finding that the couple became husband and wife in Texas in accordance with its common law. Under the law of Texas, as we view it, there are at most three essentials to a valid common-law marriage. Texas, unlike most of the states, views a common-law marriage not as a mere contract but as a status to which mutual consent is essential, implemented and not attained until the parties publicly assume such relation by holding themselves out as husband and wife. Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124, L.R.A. 1915E, 1; 35 Am.Jur., p. 200. The mutual consent or agreement need not be expressed or evidenced by any particular form of words, Consolidated Underwriters v. Kelly, Tex.Com.App., 15 S.W.2d 229; Associated Indemnity Corporation v. Billberg, Tex.Civ.App., 172 S.W.2d 157. The meaning of the words of consent, testified to by respondent, means matrimony to us in our view of the law of Texas, abetted and interpreted, as the words are, by the prior intent of the parties as testified to not only by the respondent but also by the witness Mrs. Temple.

[4] The second essential to a valid common-law marriage is that the parties cohabit together as man and wife. Grigsby v. Reib, supra. As appellant does not question that there is adequate evidence as to this essential, we discuss it no further.

[5, 6] The third essential to a valid common-law marriage under the laws of Texas is that the parties publicly hold themselves out as man and wife, Grigsby v. Reib, supra; McChesney v. Johnson, Tex.Civ.App., 79 S.W.2d 658. On this point appellant contends that there was no public holding out in Texas, and this it contends was required regardless of any subsequent public holding out in states other than Texas. We think it may be conceded, as appellant argues, that a registration by a man and woman on a hotel register is sometimes equivocal. This is particularly true where a fictitious name is used. But here no fictitious name was used when the couple registered in the hotel at Austin or when they registered at hotels in Fort Worth or in San Antonio on their return from St. Louis. In fact, at not time from September 3, 1946, until Edwin's death in April, 1950, was any fictitious name used by either Edwin or Nancy, except in one instance when Nancy, to aid the family budget, was employed under the name Nancy Davis, using her security card number which had been issued to her under that name prior to September 3, 1946. The argument that this implied Nancy was single is entirely pointless, as tens of thousands of married women use their maiden names when employed. In addition to the hotel registrations there is the testimony of Mrs. Temple that Edwin sought her assistance in getting Nancy to consent to marry him; the statements of the couple to Mrs. Temple on September 3, 1946, that they were going to Austin to get married; the statements by Edwin made to her on the return of the couple next day; the congratulations offered by the Temples. There was then, within the state of Texas, a sufficient public holding out by the couple of the fact that they were husband and wife, and the trial judge was fully justified in so finding.

There appears to be no square holding by the courts of Texas as to whether or not there must be a public holding out within the state of Texas. However, it is of some note to observe that the Attorney General's Department of Texas in 1946 ruled there is no such requirement. In an opinion by that office (0–7529(1946). Judge Speer, in defining the term "cohabitation" requisite to a common-law marriage, said: "It merely means the living together of a man and woman under agreement for marriage in the matrimonial sense—* * * such as * * * the holding out of each other as husband and wife, the adopting by the woman of the husband's name, and the use thereof, the execution of deeds or other instruments in a manner indicating their status to be husband and wife * * *. Any one or more of the acts * * * will have probative force sufficient to consummate the marriage having its inception in the previous contract * * *. *It can make no difference where such act or acts of assumption or holding-out take place.* * * * The publicizing of such a marriage by a proxy ceremony, * * * the statements of the parties that they were married, * * * the exchange of letters addressed by the one to the other of such a character as to recognize the status, * * * or any other act recognizing the relation as marriage, would in law be sufficient to show the consummation that would make the union true marriage." (Emphasis supplied.)

That a single act of publicly holding forth as husband and wife within the state of Texas, followed by a like holding forth in other states, is sufficient is the holding in Bobbitt v. Bobbitt, Tex.Civ.App., 223 S.W. 478, 480. In that case it was said:

"A large part of appellant's brief is in support of his claim that the finding of the jury that a common-law marriage between the plaintiff and the defendant was entered into and consummated in Texas is manifestly wrong and should be set aside. * * *

"It is not disputed that during practically all the time from May, 1886, to March, 1916, the plaintiff and defendant lived and cohabited together. The plaintiff maintains that this relation was preceded by an agreement to live together as husband and wife, and this agreement was immediately followed and consummated by the said parties living together in such status and continuing in such relation throughout said period of time, so as to constitute the relation a common-law marriage within the decision of the Supreme Court in the case of Grigsby v. Reib, 105 Tex. [597] 608, 153 S.W. 1124, L.R.A. 1915E, 1, Ann.Cas. 1915C, 1011.

"The defendant, on the other hand, contends that the relation in its inception was meretricious and continued so at all times while the parties were together in Texas; that, while there is sufficient evidence to justify the conclusion that the plaintiff and defendant did live together as husband and wife in other states, Louisiana, Mississippi, and Arkansas, a common-law marriage is not valid in such states, and the acts of the parties in such states cannot be taken as a consummation of an agreement of marriage without ceremony in Texas. * * *

"* * * The appellant (husband) is supported by the testimony of a great number of witnesses, and the plaintiff (appellee) is corroborated as to the status in Texas by the direct testimony of only one witness. However, she is corroborated and the plaintiff's evidence to some extent discredited by the production of the time books and payrolls. The long continuance of the status shown to have existed in the other states affords some evidence that it was a continuance of a status previously established in Texas, and that the relation from its beginning was lawful, and not meretricious. It is natural that the longer the status was continued the stronger would be the proof of its existence."

[7] Notwithstanding what has so far been said, appellant contends that there is a further essential to the validity of a common-law marriage in Texas, i. e., that the parties be domiciled in the state at the time of the alleged agreement to marry, or that at the time there was an intention to acquire a domicile in the state. In view of the fact that there is no such requirement to a ceremonial marriage in Texas and the constant reiteration by its courts that there are at most only three essentials to a common-law marriage in Texas, of which essentials domicile is never referred to, we see no merit in the contention. The

case of Kelly v. Consolidated Underwriters, Tex.Civ.App., 300 S.W. 981, affirmed by the Commission of Appeals, in 15 S.W. 2d 229, upon which appellant relies, we do not regard as an authority for the proposition. In that case it was shown that the parties, "citizens of Louisiana, * * * began living together and cohabiting as husband and wife, under an agreement that they would be husband and wife, on conditions that in Texas would have constituted a common-law marriage." They thus lived from the year 1902 to the year 1920. "* * * during all these years they maintained their home at Amelia, La., recognizing that their absence from their home was only of a temporary nature, for the purpose of securing employment, and Louisa's visits to Joe were purely in the nature of visits, and without any intention whatever of acquiring a residence in any of those states.

"Under the statement as made, the law of Louisiana declared the relations between Joe and appellant illegal and meretricious, and their temporary sojourn in the states recognizing common-law marriages did not convert their illegal relations into a lawful marriage."

The court goes on to say that in 1920 Joe deserted Louisa, who, believing him dead, married one Brown, residing with the latter in her home in Louisiana until 1925, when, upon learning that Joe was not dead but was residing in Beaumont, Texas, she immediately left Brown and went to Texas to live with Joe, and "lived with him continuously from that date as his wife until his death on the 19th of January, 1926. They resumed their relations with the intention of living together as husband and wife until their death. Joe Kelly introduced her to his Beaumont friends as his wife, and she acknowledged him openly as her husband. They lived and cohabited as husband and wife, and received their friends in their home as such, and their friends recognized them as husband and wife. The relations between Joe and appellant were such that, except for the fact that Louisa had a living husband, the law would have declared their status to be that of a common-law marriage. * * * The death of George Brown (in November, 1925) made no change in their relations. They made no new contract in relation thereto, but from October, 1925, when they reunited their lives in the city of Beaumont, Tex., there was no change in their relations until Joe's death in January, 1926."

Upon these facts the court held that the law would infer that consent had been given by the parties to the marriage as soon as the impediment to it was removed, although they did not know that the impediment had been removed, i. e., by the death of Brown. The court goes on to say: "As they desired marriage, and intended their relations to be that of husband and wife, this continuing intent must be recognized during all the time they cohabited as such, and therefore the agreement upon which they renewed their relations made them husband and wife from the moment the bar to their lawful marriage was removed."

From the quotations of the foregoing case it appears to be the view of the court that where the contract of marriage is invalid under the law in the state in which it is made, the status of the parties thereafter will be regarded as being meretricious and that that status will follow them during any stay in Texas, unless there is a new agreement of marriage made in Texas, followed by cohabitation and a public holding-out, or unless they become domiciled in Texas. If the parties become domiciled in Texas, then and in that event there is no necessity to prove a new agreement of marriage in Texas, but instead consent to a new marriage within that state will be inferred by reason of the original intent to marry if there be cohabitation in Texas and a public holding-out by the parties that they are husband and wife. In short, domicile is an aid but not a prerequisite to sustain the claim of a common-law marriage in Texas where the original contract of marriage was invalid. We have no such case here.

[8] In this case it is true, as appellant contends, that certain statements were made by Edwin in his lifetime which

tended to put in question the validity of the marriage. These statements, however, we regard as being equivocal. At all events, it was for the trial court to weigh the evidence and determine the credibility of the witnesses.

[9] The contention that the trial court erred in admitting Nancy's testimony as to transactions and conversations with Edwin is without merit. The law of California in that aspect was applicable and not that of Texas. In re Estate of McCausland, 52 Cal. 568.

As we are satisfied that the law of Texas is as we have stated it, we see no point in discussing or differentiating the numerous additional cases cited to us.

The orders are affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

SAFEWAY STORES Inc. v. RETAIL CLERKS INTERNATIONAL ASS'N et al.

Civ. 14679.

District Court of Appeal, First District,
Division 2, California.

Aug. 14, 1951.

Hearing Granted Oct. 11. 1951.*

Safeway Stores Incorporated, a corporation, sued Retail Clerks International Association and others to enjoin defendants from engaging in picketing or striking to compel plaintiff to bargain collectively with defendants for the working conditions of plaintiff's location store managers. The Superior Court, Alameda County, Ralph E. Hoyt, J., granted a preliminary injunction, and defendant appealed. The District Court of Appeal, Dooling, J., held that it was a legislative question rather than one for the court as to whether, because of their duty of undivided loyalty to their employer, supervisory employees should be forbidden to attempt to enforce their demands against their employer through a rank and file union.

Order modified and affirmed.

Nourse, P. J., dissented.

1. Labor relations 🔑176, 206, 291, 295

In enacting the Taft-Hartley Act section excluding supervisors from employee class for collective bargaining purposes, Congress intended to exclude supervisory employees from all benefits of Wagner Act as modified by Taft-Hartley Act and from like benefits of any state act which placed compulsion or restraint upon employers in collective bargaining with their employees, but Congress did not, by that enactment, place any restrictions on common-law or nonstatutory rights of supervisory employees to organize for purpose of bargaining with their employers and to use any of recognizedly legal methods of pressure, such as striking and picketing, which common or nonstatutory law accorded them as employees. National Labor Relations Act, §§ 1 et seq., 2(3), 14(a), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 151 et seq., 152(3), 164(a).

2. Labor relations 🔑831

Court should not overlook history and experience when they are asked to hold that practice, which in some instances goes back for over 60 years, is contrary to public policy, nor should court close its eyes to practicalities, and therefore, in employer's action to enjoin union from picketing or striking, in order to compel employer to bargain collectively for working conditions of supervisory employees, consideration would be given to proven effectiveness of industry-wide or vertical union, and to fact that if supervisory employees were denied assistance of rank and file who work with them they would be denied assistance of only ally which they were apt to find, and to fact that their undivided loyalty to management would not better their bargaining power when management opposed their demands. National Labor Relations Act, §§ 1 et seq., 2(3), 14(a), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 151 et seq., 152(3), 164(a).

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* Subsequent opinion 261 P.2d 721.

3. Constitutional law ⟹70(3)

Courts, in shadowed areas of conflicting interests with only limited factual information available within narrow confines of particular case, and without opportunity to see picture as a whole either in its broad and sweeping outlines or in infinite detail of all complexes of human relations, should not attempt dogmatic and sweeping declarations of public policy for which facts of particular case are too apt to furnish incomplete and fragmentary data, and repercussions of which, in other situations not clearly or at all envisioned by court, may be extremely mischievous and unfortunate.

4. Principal and agent ⟹69(3)

Even under the rule giving a principal right to demand undivided loyalty from his agent, law permits agent to deal with principal to his own advantage if he makes full disclosure of facts, since it is only secret, undisclosed, surreptitious placing of his own interests above those of his principal upon which law frowns.

5. Labor relations ⟹2

The relations between government and its employees stand on different plane from those between labor and private industry, and therefore cases drawn from field of public employment are not helpful in determining issues in case arising under private employment.

6. Labor relations ⟹206, 837

In employer's suit to enjoin union from picketing or striking to compel employer to bargain collectively with union for working conditions of supervisory employees, it would be immaterial that less than half of total number of supervisors sought to bargain through unions, since supervisors are expressly removed from coverage of Taft-Hartley Act and provisions of that act requiring collective bargaining exclusively with union representing majority of employees affected is therefore not applicable to supervisors. National Labor Relations Act, §§ 1 et seq., 2(3), 14(a), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 151 et seq., 152(3), 164(a).

7. Constitutional law ⟹208(1)

Classifications, if they have substantial basis, are not unreasonably discriminatory.

8. Labor relations ⟹122

Denial by unions to supervisors of right to hold office is grounded on sound basis of classification, and therefore is not unreasonable and does not deprive supervisors of substantial equality within union Labor Code, §§ 921–923.

9. Constitutional law ⟹70(3)

The question of whether sound public policy dictates that supervisory employees should not, because of duty of undivided loyalty, be permitted to attempt to enforce their demands against employer through rank and file union is legislative question rather than one for court, since courts cannot undertake piecemeal and detailed regulation of complicated relations between labor and management. National Labor Relations Act, §§ 1 et seq., 2(3), 14(a), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 151 et seq., 152(3), 164(a).

10. Labor relations ⟹825

Extreme or studied acts of violence and lawlessness in conduct of strike may justify an injunction prohibiting all picketing.

11. Labor relations ⟹829

Employer would not be entitled to enjoin unions from engaging in picketing or striking for purposes of compelling employer to bargain collectively with unions for working conditions of supervisory employees. National Labor Relations Act, §§ 1 et seq., 2(3), 14(a) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 151 et seq., 152(3), 164(a); Labor Code, §§ 921–923.

◆

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Roland C. Davis, J. D. Burdick, Carroll Davis & Freidenrich, San Francisco, for San Francisco Labor Council of the American Federation of Labor, amicus curiae in support of appellant's position.

DOOLING, Justice.

This is an appeal from the issuance of a preliminary injunction prohibiting defendants from further picketing or striking to compel plaintiff to bargain collectively with defendants for the working conditions of plaintiff's location store managers.

Plaintiff is in the retail food business, and operates 11 retail food stores in Contra Costa County and 65 in Alameda County. Defendants are unincorporated labor unions and the individuals named are officers of these unions.

There are employed in each store in the two counties from 4 to 23 clerks, in addition to the store manager, who are members of one of the defendant unions. There are also employed in the stores butchers who are members of another union. All of these employees are under the direction and supervision of the store manager.

All clerks in the stores involved have been members of the Clerks Unions, including the store managers, and these unions have since 1937 bargained collectively with Safeway for the wages, working conditions, etc., of these store managers. The unions were the exclusive bargaining agents, and a "union shop" prevailed, i. e., employment was conditioned upon membership in the union.

In the summer of 1949 the parties negotiated for a new contract to replace the then existent contract which would expire on September 19, 1949. Plaintiff from the outset of these negotiations refused to bargain with the defendant unions for the conditions of employment of its store managers, although all other employers, who were represented in the negotiations along with plaintiff by a bargaining agent known as Retail Food Labor Relations Council, consented to bargain with defendants for like managers, and labor agreements between all such other employers and defendant unions, in which were included the terms of employment of their store managers, were in fact entered into.

All store managers of plaintiff were informed by plaintiff during the negotiations, through the medium of a prepared statement, that plaintiff would under no circumstances bargain with defendants for the terms of its store managers' employment and the store managers were thereby confronted with the thinly veiled threat that if they persisted in their attempt to bargain through defendant unions plaintiff would discharge them, as the following quotation from that statement makes clear:

"It has been established that supervisory employees may be excluded from the bargaining unit of the rank-and-file and the employer may insist that supervisory employees chose either the union or their employer. The law does not compel a supervisor to give up membership in his union. However, if a supervisor insists upon retaining his union membership, or having the union bargain for him, the Company will be within its right in discharging him for such action * * *

"Whether we reach an agreement with the Clerk's Union or continue operations otherwise, Location Managers no longer will be covered by the Clerks' contract * * The above program is not one which will be abandoned."

With the lines so drawn the defendant unions went out on strike and forty of the store managers joined them. At the time of the hearing thirty-six of these store managers still stood with the defendant unions and testified that they wished to be represented by the defendants in bargaining with plaintiff, two had swung to the employer's side and two were unaccounted for.

It is undisputed that plaintiff's business sufficiently impinges on interstate commerce to make its labor relations subject to Federal statutory regulations and the present battle was precipitated by the adoption by Congress of the Labor Management Relations Act commonly known as the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq. Under the National Labor Relations Act or Wagner Act, 29 U.S.C.A. § 151 et seq., although the National Labor Relations Board had vacillated back and forth on the question, it was finally established that supervisory employees were within the coverage of the act and entitled as employees to bargain collectively with their employers under the act's provisions. Packard Motor Car Co. v. National Labor Relations Bd., 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040. The earlier vacillations of the N.L.R.B. are noted in footnote 3 of that decision, 330 U.S. at page 492, 67 S.Ct. 789, 91 L.Ed. 1040. Despite these vacillations of the N.L.R.B. and the fact that during much of the period after 1937 (when plaintiff first bargained with the defendant unions for its store managers) the N.L.R.B. ruling was that supervisory employees were not covered by the Wagner Act, plaintiff continued to so bargain during the entire period. Against this background its statement now that it did so only under the compulsion of that act cannot escape the evocation of a shade of skepticism.

Be that as it may with the adoption of the Taft-Hartley Act supervisory employees were expressly removed from the coverage of the act. By section 2(3) of that act "any individual employed as a supervisor" is expressly excluded from the definition of "employee" and section 14(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Supervisory employees in businesses subject to the act's provisions were thereby thrown back into the jungle of tooth-and-claw labor warfare which had characterized labor-management relations before the adoption of statutory procedures to regulate and ameliorate the strife. As a result of this new legislation the Court of Appeals, Sixth Circuit, held in National Labor Relations Bd. v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579: "We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities."

[1] It is clear that by the adoption of sec. 14(a) the Congress intended to exclude supervisory employees from all the benefits of the Wagner Act as modified by the Taft-Hartley Act and from the like benefits of any state ("local") act which placed any compulsion or restraint upon employers in collective bargaining with their employees. It is equally clear that the Congress by this enactment did not place any restriction on the common-law or non-statutory rights of supervisory employees to organize for the purpose of bargaining with their employers and to use any of the recognizedly legal methods of pressure (striking, picketing etc.) which the common or non-statutory law accorded them as employees. Indeed the Congress went a step further and made explicit, what otherwise would only have been implicit, by expressly enacting in sec. 14(a): "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization * * *."

The Congress thus expressly recognized a constitutional right of supervisory employees which both the majority and minority of the United States Supreme Court in the Packard case had plainly declared (although sharply divided on the question as to whether supervisory employees were included in the coverage of the Wagner Act), the right as employees to organize or join a union of their choice for the purpose of bargaining for better terms of employment with their employers. Justice Douglas speaking for the minority in that case said on this question: "What I have said does not mean that foreman have no right to organize for collective bargaining. The general law recognizes their right to do so. (Citing cases.)" 330 U.S. at page 500, 67 S.Ct. at page 797, 91 L.Ed. 1040.

The same view is implicit in Mr. Justice Jackson's opinion, written for the majority of the court, although since the majority held supervisory employees to be employees within the meaning of the Wagner Act they were under no necessity of spelling out their common law or constitutional rights as employees apart from the act. The implication is clear from the following language found in Mr. Justice Jackson's opinion in the Packard case: "Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others." 330 U.S. at pages 489–490, 67 S.Ct. at page 792, 91 L.Ed. 1040.

Indeed the plaintiff in this case does not dispute that supervisory employees are none the less employees for having supervisory powers. Its position, and that of the trial court, is basically that because a supervisory employee exercises as such employee some of the functions of management a sound public policy dictates that supervisory employees should not be permitted to attempt to enforce their demands through a rank-and-file union, even though it be the union of their voluntary choice, because standing between management and the rank and file they should give undivided allegiance to management and not be subject to the pressures and influence of membership in a rank-and-file union. This argument is buttressed by a copious citation of authorities, none of them from the field of private labor-management relations, wherein the duty of loyalty of an agent to his principal is expounded, never more simply or forcefully than in the language of Matthew VI, 24: "No man can serve two masters."

Nothing, however, can be more subtly misleading than the appearance of logic in applying a settled principle of law in one field to a different field of the law in which other opposing principles may exert an overbearing weight. The syylogism is simple and carries the superficial persuasiveness of simplicity: "No man can serve two masters. If a supervisory employee seeks to enforce his labor demands through a rank-and-file union he is attempting to serve two masters, the union and his employer. Therefore a supervisory employee may not enforce his labor demands through a rank-and-file union."

Some of the opposing factors, undisclosed in this simple syllogism, are forcefully expressed by Mr. Justice Jackson speaking for the majority of the Supreme Court of the United States in the Packard case. We recognize that the court was dealing in that case with a union made up exclusively of supervisory employees and that it was considering only the question whether supervisory employees were within the coverage of the Wagner Act but the broader application to the question of public policy presented by this case seems to us to be readily apparent. Accordingly we quote: "The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work." 330 U.S. at page 490, 67 S.Ct. at page 792, 91 L.Ed. 1040.

Membership of supervisory employees in rank-and-file unions is nothing new in the history of labor-management relations in this country. In the newspaper and job-printing field foremen have been members of rank-and-file unions since 1889. 55 Yale Law Journal, 772; How Collective Bargaining Works, Twentieth Century Fund, 67; Collective Bargaining By Foremen, 12 Labor Relations Reporter 421, May 1943, Bureau of National Affairs.

"Nearly all the building trades unions require foremen to be union members. * *

"While the practice is less uniform in the metal trades * * * the tradition * * * is to require foremen to be union members and to establish wage rates for them * * *

"General practice in the maritime industry is for the unlicensed seamen to make up one unit and for officers to be separately organized. * * * Practice is not uniform, however, and there are cases where agreements of the above officers' organizations cover unlicensed personnel * * *

"There is extensive organization of supervisory personnel in the railroad industry * * * Some foremen and supervisors are organized into unions of their own; in some crafts they belong to the same unions as the men they supervise." (Collective Bargaining by Foremen, supra; cf. Daykin, Status of Supervisory Employees, 29 Ia.Law Rev. pp. 314–315.

[2] Courts should not overlook history and experience when they are asked to hold that a practice which in some instances goes back for over 60 years is contrary to public policy. Nor can we close our eyes to practicalities. The industry-wide or vertical union has proved its effectiveness, particularly since the organization of the C.I.O. In the struggle for better working conditions if supervisory employees are denied the assistance of the rank-and-file who work with them they are denied the assistance of the only ally which they are apt to find. Their undivided loyalty to management will not better their bargaining power when management opposes their demands, and if they are divorced from their fellow workers at the same time that they are struggling with their employer they may well find themselves in the unfortunate position of Poland at the outset of the last war, beset and overrun from both sides by forces which under the normal circumstances of labor disputes would be more likely to be arrayed against one another.

Justice Holmes in his historic dissenting opinion in Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077, 1079, 35 L.R.A. 722 (an opinion which like many another of Justice Holmes' dissents has made a greater impress upon the development of the law than the opinion of the majority with which he disagreed; see 1 Teller, Labor Disputes and Collective Bargaining, p. 192, notes 57 and 59) has emphasized the difficulty facing courts which attempt to declare sharp rules of public policy with insufficient data in those areas where the complicated interplay of competing interests is difficult to discover and define: "Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them." Vegelahn v. Guntner, supra, 44 N.E. at page 1080.

Over twenty years ago Justice Frankfurter and Nathan Greene pointed out that questions of policy in this field are primarily for the legislature to determine and only within narrow limits should this function be exercised by the courts: "Once we recognize that the right of combination by workers is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power, the consequences of making the power of union effective will be seen in truer perspective. Undoubtedly, hardships and even cruelties are involved in this phase, as in other aspects, of our competitive system. Wise statesmanship here enters to determine at precisely what points the cost of competition is too great. Primarily this is the task of legislatures. Only within very narrow limits is it the function of courts to apply their own notions of policy. And it is immaterial whether this is done by judges with the frank avowel that they also are organs of policy or under the subtler guise of enforcing constitutional coercions. To count the cost of union weapons is to count the cost of free competition in industrial controversy. Without breeding other ills and, above all, without hurting the prestige of law, that cost is not to be diminished by curtailing in the name of law the most effective union tactics." Frankfurter & Greene, The Labor Injunction, p. 205.

This has become the declared policy of our own Supreme Court. Mr. Justice Edmonds, speaking for the court in C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414, quoted from the dissenting opinion of Justice Brandeis in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 448, 41 S.Ct. 172, 65 L.Ed. 349: "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 404, 106 P.2d 414, 422.

Mr. Justice Traynor speaking similarly for his court in a later case restated the same principle in his own language: "Injunctions in labor disputes have not generally proved to be an effective means of settling them; frequently they have aggravated rather than allayed a conflict. They have the deceptive appeal of the quick and easy and therein lies their danger, for disputes between workers and employers, now often complicated by internecine disputes among workers themselves, are not always of a comparable simplicity. There are many currents of conflict in the mainstream of labor relations, variable, unpredictable, subsiding at times as quickly as they arise. For the most part they can best be controlled, not by the courts but by the Legislature, whenever the necessity arises and to whatever degree the public interest requires." Park & Tilford Import Corp. v. Int. Bro. of Teamsters, 27 Cal.2d 599, 608–609, 165 P.2d 891, 897, 162 A.L.R. 1426.

[3] The lessons of experience crystallized in the above quotations dictate that courts in shadowed areas of conflicting interests, with only the limited factual information available within the narrow confines of a particular case, and without the opportunity to see the picture as a whole either in its broad and sweeping outlines or in the infinite detail of all the complexes of human relations, should not attempt dogmatic and sweeping declarations of public policy for which the facts of the particular case are too apt to furnish incomplete and fragmentary data, and the repercussions of which in other situations not clearly or at all envisioned by the court may be extremely mischievous and unfortunate.

[4] The injunction rests primarily, as previously stated, upon the right of a principal to demand undivided loyalty from his agent. This principle in the areas in which it has been applied embodies the wisdom of judicial experience. Even in those areas, as pointed out by amicus curiae, the law permits an agent to deal with a principal for his own advantage *if he makes a full disclosure of the facts.* It is the secret, the undisclosed, the surreptitious placing of his own interests above those of his principal upon which the law frowns. See 2 Restatement of Agency, sec. 390, p. 877 and comment a; 1 Mechem on Agency, 2d Ed., sec. 1206, p. 881; sec. 1221, p. 892; 1 Cal.Jur., Agency, sec. 81, p. 793; sec. 85, pp. 798–799. Here the fact that the 36 store managers are members of defendant unions and desire to bargain with plaintiff through those unions is no secret but is the very basis of plaintiff's complaint and the temporary injunction appealed from herein.

To extend the principle of the right to undivided loyalty to cover a court-made doctrine of public policy that no supervisory employee may openly bargain with his employer through a rank-and-file union of his choice is to disregard the caution of Justice Holmes quoted with approval in C. S. Smith Met. Market Co. v. Lyons, supra, 16 Cal.2d at page 403, 106 P.2d at page 422: "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified."

[5] Plaintiff's citation of certain cases drawn from the field of public employment is not helpful. The relations between government and its employees stand on a different plane from those between labor and private industry. The distinction is clearly made in Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 297–298, 168 P.2d 741, 745: "'The distinction between private employment and public service is an important one. Private employers if not restrained by law, are free to adopt any policy toward their employes which they believe calculated to promote the success of their enterprises, without regard to its effect upon the welfare of the employes * * *.

"'In the field of public employment, on the other hand, altogether different conditions prevail. Public officers do not have the same incentive to oppress the worker; and fair treatment sought to be coerced by collective bargaining in the field of private employment, is in the public field, to a large extent, compelled by law.'"

More tersely the court said in Perez v. Board of Police Com'rs, 78 Cal.App.2d 638, 647, 178 P.2d 537, 543: "Nothing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison."

[6] We attach no importance in this case to the fact that the 36 store managers who sought to bargain through defendant unions, after the effect of the competing pressures of the parties had crystallized, are slightly less than 50% of the total number of store managers involved. By sec. 14(a) of the Taft-Hartley Act supervisors are removed from the coverage of the act. The provisions of that act requiring collective bargaining exclusively with the union representing a majority of the employees affected is therefore no longer applicable to these store managers. The unions of their choice were thereby freed in acting on their behalf from the statutory restraint which otherwise might have made such conduct illegal. Park & T. I. Corp. v. Int. Bro. of Teamsters, supra, 27 Cal.2d 599, 603, 165 P.2d 891, 162 A.L.R. 1426. In the absence of such statutory prohibition there is nothing in the public policy of our state to prevent strikes or picketing by a minority for a union-shop contract. Park & T. I. Corp. v. Int. Bro. of Teamsters, supra, 27 Cal.2d page 604, 165 P.2d 891, 162 A.L.R. 1426; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 387–388, 106 P.2d 403; McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 327, 106 P.2d 373.

The argument grounded on sections 921, 922, 923, Labor Code, that those sections clearly set management's representatives on the side of management is not convincing. In bargaining for terms of employment supervisory employees are opposed to management, not its representatives. This dual position was clearly stated by Justice Jackson in the Packard case in the passages above quoted. As employees they are entitled to exercise the rights of employees, and sec. 923, Labor Code is clear in its declaration: "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees." The Shafer case spells out that the prohibition of secs. 921–922 do not prevent picketing to compel an employee to join an independent, as distinguished from a company, union. Shafer v. Registered Pharmacists Union, supra, 16 Cal.2d 379, 386–388, 106 P.2d 403.

Under the by-laws of defendant unions members of those unions who in their employment have the right "to hire or fire" are not eligible to hold office in the unions. It is disputed between the parties whether the store managers of plaintiff have the right to hire and fire. Taking the position that they do have this right plaintiff argues that the injunction is supportable under the principle of James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, and Riviello v. Journeymen Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400, prohibiting a closed union and a closed shop. The principle was thus announced in James v. Marinship Corp., supra, 25 Cal.2d at pages 736–737, 155 P.2d at page 338, 160 A.L.R. 900: "But if the union imposes *unreasonable* and discriminatory restrictions upon Negroes not placed upon members of Local No. 6, and if the auxiliary does not afford its members privileges and protection *substantially equal* to that afforded to the members of Local No. 6, then to compel the Negroes to join the auxiliary, upon penalty of discharge, is the equivalent of a complete denial of union membership." (Emphasis ours.)

[7, 8] It is to be observed that the opinion emphasizes *unreasonable* restrictions and *substantial* equality of treatment, not *complete* or *absolute* equality. In both the James and Riviello cases the courts were dealing with situations wherein one class of members were denied the right to any voice or vote in any union matter. In the case before us it is not contended that union members who have the right to hire or fire are denied full freedom of expression in union meetings or the equal right to vote on any matter before the union. It needs no citation of authorities from the field of constitutional law to establish the principle that classifications, if they have a substantial basis, are not *unreasonably* discriminatory. The denial by the unions of the right to hold office to members with the right to hire or fire is grounded on a sound basis of classification. Officers of the union, whose duties might be to insist on the hiring or retention of employees by employers would be put in the extreme position of divided loyalty, so emphasized by plaintiff in its main argument, if they had the right to hire or fire in the very cases under dispute between the union and their employer. The unions by this by-law have shown a wise restraint in making such extreme situations impossible. Under the circumstances, we cannot hold that the denial of the right to hold office to such members is not reasonable or that it deprives those members of *substantial* equality within the unions. It is true that in the Riviello case the court *arguendo* referred to the fact that the plaintiff was denied the right to hold office in the union, Riviello v. Journeymen Barbers etc. Union, supra, 88 Cal.App.2d page 506, 199 P.2d 400, but the true basis of that decision was, as in the Marinship case, the denial of "the right to participate in the determination of union policies." Id., 88 Cal. App.2d at page 507, 199 P.2d at page 405. Here the store managers, assuming they cannot hold office in the defendant unions (a point which the unions dispute), have otherwise full and equal rights with all other members of the union "in the determination of union policies."

[9] Plaintiff emphasizes certain instances in which their store managers were put under pressures by defendant unions in their dealings with plaintiff. If we are right in our conclusion that this is a legislative question rather than one for the courts no purpose will be served by discussing these incidents. Courts cannot undertake the piecemeal and detailed regulation of the complicated relations between labor and management. We will remark that the few instances cited are impressive that on the whole the evils that plaintiff envisions as arising from the membership in defendant unions of its store managers have in practice been kept to the minimum.

Certain instances of illegal threats and violence at the outset of the strike were proved. The trial judge said of these, in oral findings made at the close of the extended hearing:

"I am inclined to believe, based solely upon the fact that most of the affidavits filed related to either acts prior to the strike or during October and November and that, as I recall, none of them related to recent instances, that as time has gone on the acts have diminished and that a realization that the restraining order was in force probably had something to do with that.

"I am inclined to believe that the restraining order—that there should be a restraining order restraining violence, intimidation and coercion. Certainly it deprives no one of any lawful right when it is issued and there may be, if it is not issued, on the basis of the evidence * * * a flare-up of these things if it is not continued in force."

[10] While extreme or studied acts of violence and lawlessness in the conduct of a strike may justify an injunction prohibiting all picketing, Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20; Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.

Ct. 552, 85 L.Ed. 836, it is clear that this is not such a case, nor did the trial court so consider it.

[11] The injunction insofar as it enjoins unlawful acts in the conduct of the strike was proper and should be continued. Insofar as it enjoins defendants from attempting to bargain, by strike and picketing, for the terms of employment of its store-manager members it should be modified.

The order granting the temporary injunction is accordingly modified by striking from the preliminary injunction the paragraphs numbered a, b, c and i (all of which enjoin defendants' activities on behalf of plaintiff's store managers) and as so modified the order is affirmed, defendants to have their costs on appeal.

GOODELL, J., concurs.

NOURSE, Presiding Justice.

I dissent.

I cannot concur with the opinion of the majority as it nullifies the provisions of section 14(a) of the Taft-Hartley Act which provides that no employer shall be compelled to treat a supervisor as an employee "for the purpose of any law, either national or local, relating to collective bargaining." This was one of the most controversial provisions of the Taft-Hartley Act, and has been uniformly upheld by the federal courts and National Labor Relations Board. These rulings are binding on us. Assuming that the employer went too far in notifying the supervisors to withdraw from the union, the strike was not called in relation to such membership. It is conceded that the union demanded that the employer grant the supervisors the right of collective bargaining contrary to section 14(a).

If an employer is not required by the terms of the act to treat a supervisor as an employee for the purpose of collective bargaining as to the supervisors' working conditions, a strike called to compel him to do so is called for an illegal purpose. That an injunction to prevent a strike under such circumstances is proper is supported by uniformity of decisions.

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106 Cal.App.2d 221

CLIFFORD et al. v. EPSTEN et al.

Civ. 4260.

District Court of Appeal, Fourth District, California.

Aug. 20, 1951.

Rehearing Denied Sept. 5, 1951.

Hearing Denied Oct. 18, 1951.

Action by William E. Clifford and Dorothy T. Clifford against Harry Epsten and Eleanor Epsten for rescission of contracts for declaratory judgment as to rights of parties under agreement to sell trailer court, and for damages for unlawful removal of a trailer. The defendants cross complained for damages for breach of contract. The Superior Court, San Diego County, Dean Sherry, J., entered interlocutory decree in favor of plaintiff and the defendants appealed. The District Court of Appeal, Mussell, J., held that where evidence showed that trailer was mobile unit, that it was used as temporary office and home for manager, and defendant testified that it was his intention to sell trailer and convert bungalow on premises into an office, trailer could not be construed as party of realty so as to pass with purchase of trailer court.

Judgment affirmed in part and reversed in part.

1. Vendor and purchaser ⚷44

In action for rescission, for declaratory judgment as to rights of parties under agreement to sell trailer court, and for damages for unlawful removal of a trailer therefrom, evidence sustained finding that sellers had not represented to plaintiffs that office of said property was in form of a trailer and part of said property, that there was no misrepresentation or mistake by which purchasers were induced to enter into such contracts, and that the facts did not warrant the rescission or cancellation of the contract or the return of any purchase money paid by purchasers.

2. Fixtures ⚷21

In action for rescission, for declaratory judgment as to rights of parties under agreement to sell trailer court, and for damages for unlawful removal of a trailer therefrom, where evidence showed that trailer was mobile unit, that it was used as temporary office and home for manager, and seller testified that it was his intention to sell trailer and convert bungalow on premises into an office, trailer could not be construed to be part of the realty so as to pass with the purchase of the trailer court. Civ.Code, § 660.

3. Fixtures ⚿**1, 35(3)**

Whether an article is a fixture is ordinarily a question of fact to be determined upon the evidence of the particular case, and the question is determined not only by the manner in which the article is annexed to the realty but also by the relationship between the parties.

4. Vendor and purchaser ⚿**322**

In action for rescission, for declaratory judgment as to rights of parties under agreement to sell trailer court, and for damages for unlawful removal of trailer therefrom, wherein sellers cross complained and answered and denied that purchasers rescinded the contract or had any right to rescind, and trial court found that purchasers had paid into court monthly payments due on the contract and had not repudiated agreement of their purchase, and rendered judgment against sellers on their claim of forfeiture of contract, defendants could not claim damages for breach of contract.

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H. G. Sloane and H. M. Fisher, San Diego, for appellants.

R. M. Switzler, San Diego, for respondents.

MUSSELL, Justice.

Action for rescission and declaratory relief.

Defendants appeal from an interlocutory judgment and final decree in an action for declaratory relief to determine the rights of the parties under the terms of an agreement to sell a trailer court situated in San Diego.

The real property, operated as a motor trailer court, was owned by the defendants and contained accommodations for approximately 40 tenant trailers, including one which was used temporarily by the defendants as an office and living quarters for the manager of the court. The principal controversy herein is whether the trailer used as an office was sold with and as a part of the real property involved.

Defendants listed the trailer court for sale with a real estate broker and on March 26, 1950, the property was advertised in a San Diego newspaper. The listing contained no reference to the trailer in question and the advertisement described the property to be sold as a trailer court—43 trailer spaces—very modern owners bungalow and office—2 car garage—bath house—toilets—wash room—very best equipment—lot 200 x 300, completely fenced.

Plaintiffs, who were living in their own trailer on the premises, read the advertisement, contacted the broker, and on April 3rd executed and submitted a written offer to purchase "the following described real property: Juan Street Trailer Court. 3036 Juan Street. Ground size approximately 200 x 300 feet. Room for 41 trailers, plus house and garage, purchase price $37,500." This offer was accepted by the defendants and on April 4, 1950, an escrow agreement was signed by the parties and $5,000 deposited with Balboa Escrow Company. The property to be sold was described in the escrow instructions as "lots 1 and 2 and the Northerly 50 feet of lots 3 and 4 of block 379 of Old San Diego."

A few days before the escrow closing date, defendants removed the trailer in question from the premises. On May 3, 1950, the plaintiffs served notice of rescission on the defendants, the escrow holder and the broker, demanded a return of their deposit, and on May 8, 1950, filed an action for rescission and declaratory relief by which they sought a determination of their rights of rescission, if any, under the purchase contract and the escrow agreement.

It was alleged in the complaint, among other things, that "as an inducement to the plaintiffs to enter into said purchase contracts and as a part of the consideration therefor and without which plaintiffs would not have entered into said contracts, said Epstens orally represented to the plaintiffs that said trailer court was a going concern with a very modern owner's bungalow and an office and with the very best equipment; that the office on said property was in the form of a trailer * * * and was a part of the equipment of said auto court's going business." It was also alleged that shortly before May 5th, the plaintiffs were informed by the defendants that the "office trailer" did not go with the property, whereupon the plaintiffs immediately rescinded said contract to purchase and demanded a return of their money. The prayer of the complaint was that the written contract be canceled and surrendered and that the plaintiffs recover the money deposited in escrow.

The Epstens, on May 18, filed an answer and cross-complaint asking for damages for breach of contract. On July 26th, at the conclusion of the trial on the rescission issue, the court announced its findings against the charge of fraud and mistake and denied rescission, suggesting to counsel for the plaintiffs that he amend his complaint to conform to proof by inserting therein a cause of action for the trailer or its value. Plaintiffs then filed an amendment alleging that the trailer in question was on and a part of the property sold by the defendant and that the defendants unlawfully and without the consent of the plaintiffs removed the trailer from the property. The prayer of the complaint was amended so as to include a request for judgment against the defendants for $1,600 damages.

On December 15, 1950, an interlocutory decree was entered awarding the plaintiffs judgment for return of the trailer, or in the alternative, the sum of $1,600; denying rescission or cancelation of the contract and return of any purchase money; denying recovery to the defendants on the cross-complaint; and quieting title to the real property against them, and ordering delivery of possession. The action was then continued for the purpose of an accounting of the rents and interest and on February 6, 1951, a decree was entered awarding possession of the real property (not including the trailer) to respondents, declaring the note and deed of trust to be in full force and effect and fixing the credits to be applied thereon.

[1] The trial court found, as to the issue of rescission "* * * that it is not true that any defendant represented to plaintiffs that the office on said property was in the form of a trailer and was a part of said property * * *; that it is true that there was no misrepresentation nor mistake by which plaintiffs were induced to enter into such purchase contracts;" and "that it is not true that the facts warrant the rescission or cancelation of the contract, nor the return to the plaintiffs of any of the purchase money paid by them." These quoted findings are supported by ample evidence and are not attacked by the appellants. In this connection the evidence adduced by the plaintiffs was that the trailer was not mentioned in any of the conversations resulting in the execution of the written contract to purchase. The defendants introduced evidence to the effect that the trailer in question was discussed in the negotiations but that the plaintiffs were informed that it did not go with the property. The trailer was not specifically mentioned in the contract of purchase, in the escrow agreement, in the newspaper advertisement or in any writing executed by the parties. The trial court found that the defendants removed the "office trailer" from the premises without the consent of the plaintiffs and converted it to their own use; that the trailer was used as an office at the time the contract was entered into and that the said office trailer was a part of the realty at all times subsequent to February, 1950, and gave judgment for its return or its value, found to be $1,600.

[2, 3] The finding that the trailer was a part of the real property is not supported by substantial evidence. The evidence shows that the trailer in question was a mobile unit similar to the 40 others situated on the premises; that it was not attached to the realty; that water and electricity connections, consisting of hose and tubing, were detachable in two minutes; that there was no permanent plumbing; that a sign reading "office" was attached to a post in the ground near the trailer; that the trailer was used temporarily as an office and home for the manager; that a permanent building regularly used for an office up to September, 1949, had been moved away, leaving an adjacent permanent building adaptable

for the same use; that the trailer in question was for sale at all times.

The defendant, Harry Epsten, testified that it was his intention to convert the bungalow on the property into an office; that the building was so constructed as to be available as a manager's office and living quarters. Under these circumstances, it is apparent that the trailer was not a part of the realty nor considered so by its owner.

Whether an article is a fixture is ordinarily a question of fact to be determined upon the evidence in the particular case, and the question is determined not only by the manner in which the article is annexed to the realty but also by the relationship between the parties. Taylor v. Heydenreich, 92 Cal.App.2d 684, 688, 207 P.2d 599. As was said by this court in Estus v. Weber, 76 Cal.App.2d 724, 725, 726, 173 P.2d 870, 871:

"It is well settled that the question whether a building has been affixed to and has become a part of real property is one of fact and is one dependent upon the peculiar circumstances of each case. Alderman v. Baggett, 134 Cal.App. 501, 25 P.2d 532, 533. In that case it is said: 'Among the things that should be taken into consideration in deciding such a question are the following: The character of the building and the manner of its construction; the presence or absence of customary methods of attaching to or embedding in the soil; the use to which the building is adapted and to which it has been put; and any expressed intent with regard to its permanence.'

"The intent of the parties is usually the controlling factor, and various matters may and should be taken into consideration for the purpose of ascertaining that intent. Gosliner v. Briones, 187 Cal. 557, 204 P. 19."

In the instant case it cannot be said that the trailer involved was affixed to the land or permanently resting upon it within the meaning of section 660 of the Civil Code and where, as here, the uncontradicted evidence is that the defendants had no intention to regard it as a part of the realty, the trial court's finding that it constituted part of the land is entirely unsupported by substantial evidence.

[4] Appellants' contention that they are entitled to damages on the cross-complaint is without merit. In their answer they deny that plaintiffs rescinded or had any right to rescind the contract to purchase, and deny that plaintiffs are entitled to the return of the money paid by them on the contract. The court found that plaintiffs had paid into court the monthly payments due on the contract for the months of June, July, August, September and October, 1950, and that they had not repudiated their agreement of purchase. Judgment was rendered against defendants on their claim for forfeiture of the contract. In view of the circumstances presented by the record and the judgment enforcing the terms of the contract to purchase the real property involved, defendants are not in a position to claim damages for breach of the contract.

The portion of the interlocutory decree which provides that plaintiffs have judgment against the defendants for the return of the office trailer, or in the alternative, for its value and interest, and the provisions of the decree allowing plaintiffs credit for the sum of $1,691.66 by reason of the failure of defendants to deliver the trailer to plaintiffs are reversed. The remaining provisions of the judgment are affirmed. Each party to pay their own costs.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

106 Cal.App.2d 181

PEOPLE v. SHAW.

Cr. 834.

District Court of Appeal, Fourth District, California.

Aug. 17, 1951.

Tess W. Shaw was convicted in the Superior Court of Fresno County, Arthur C. Shepard, J., of burglary in the first degree and from the judgment and an order denying a new trial, defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Burglary ⚷41(1)

Evidence sustained conviction of burglary in the first degree.

2. Criminal law ⚷338(7), 1169(1)

Cross-examination of defendant on trial for burglary of cafe operator's home as to whether defendant had not been barred from cafe for fighting was objectionable, but it was not sufficiently prejudicial to justify a reversal of conviction, particularly in view of the convincing evidence in the case.

3. Criminal law ⚷1169(12)

Arresting officer's statement to defendant en route to police station that he would like to catch more fellows red-handed as he had defendant was accusatory in nature and would naturally call for a denial from defendant, and any error in admitting testimony of officer as to such statement and defendant's failure to reply thereto was not reversible error under the circumstances of the case, where the evidence of guilt was strong, complete and convincing.

◆

James N. Hays, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

A jury found the defendant guilty of burglary in the first degree, and he appeals from the judgment and from an order denying his motion for a new trial. Although ably represented by counsel appointed by the court, he has personally filed a reply brief.

In the early morning of January 22, 1951, some one entered the home of Mr. and Mrs. Faretta in Fresno, and took a box of raisins. Mrs. Faretta had retired at 12:30 a. m., after hooking the screen door to the back porch and leaving a light in one room for her husband. Mr. Faretta returned about 1:00 a. m., turned off the light and went to bed.

Mr. Narvais, who lived in a house the back yard of which abutted that of the Farettas, returned home about 2:00 a. m. Hearing a noise like somebody cutting a screen, he walked to the rear fence and saw a man in a long dark coat standing by the door of the screen porch of the Faretta house. He went to a near-by police station and reported the matter. Three officers, who left the police station at 2:10 a. m., went back with him and spread out, looking for the intruder. At 2:15 a. m. one of the officers arrested the defendant as he entered the alley from the back yard of the house between the Faretta home and the alley. The defendant had on a dark overcoat, and was carrying a box of raisins. Mrs. Faretta identified this box of raisins as belonging to her, and as having been on the back porch when she went to bed. The screen in the back porch door had been cut, and the lights in the Faretta house had been turned off by moving a switch in the meter box at the rear, stopping an electric clock at 2:06. A knife was found in the defendant's pocket. Mr. Narvais identified the defendant as the man he had seen by the back door of the Faretta home. The defendant told the officers that a man had given the raisins to him, and later told them that a man named "J. W." had given them to him.

The defendant testified that he left the "Five and Ten" cafe, which was about a block from the Faretta home, after 2:00 a. m.; that he met a man whom he knew as "J. W.", who sold him these raisins for 15¢; that he went past the Faretta home and entered the alley on his way to his home farther down this alley; and that when he had gone a short distance a police officer entered the alley and ran to him. A waitress in the Five and Ten Cafe testified that the defendant left the cafe shortly after 2:00 a. m., when it closed.

The appellant first contends that the evidence is insufficient in that it was not proved beyond a reasonable doubt that he is the person who entered this house and took these raisins. It is argued that the testimony of Narvais, who was the only one who saw the man at the time the screen was probably cut, was inherently improbable for three reasons: (1) Narvais did not see the man's face; (2) he testified that the fence between the two yards was eight or ten feet from the back door of the Faretta home, whereas one of the officers testified that he thought the distance was about 35 or 40 feet; (3) that at the preliminary hearing Narvais said he saw the man in the porch while at the trial he said he saw the man by the door of the porch. It is further argued that the appellant had no motive to commit burglary since he had $5.43 in his pocket when he was arrested. Also, that 15 minutes elapsed between the time Narvais saw the man and the time appellant was arrested, and it would be unreasonable to believe that he would remain on the porch for 15 minutes when all he found was a box of raisins.

[1] There is nothing unreasonable about Narvais' testimony or the other matters referred to, and nothing appears beyond a slight conflict in the evidence. Neither Narvais nor the officer claimed to know the exact distance from the house to the fence, and each was giving his general estimate. The man seen by Narvais had on a long coat, and the appellant had on an overcoat when he was arrested a few minutes later. The electric clock had stopped at 2:06, and when the appellant was arrested nine minutes later he had these raisins and was coming from the back yard of the adjoining home. He made no attempt to explain his presence in that back yard. He gave two explanations of how he came in possession of the raisins, neither of which appears plausible either by itself or in the light of the other evidence. The evidence supporting the verdict and judgment is both sufficient and convincing.

[2] It is next contended that the court erred in permitting the improper cross-examination of the appellant in one respect. The appellant was asked if he had ever gone into the "Half Moon" cafe, which was operated by Mr. Faretta. He replied that he had, and was then asked when he was last there. An objectoin on the ground that this was not proper cross-examination was overruled, the court remarking that he did not see the materiality but that it might develop. The appellant was then asked if he had not been barred by Mr. Faretta from this cafe for fighting, to which he replied that he had. It is argued that this question concerned a matter about which the appellant had not been examined in chief; that it did not tend to prove any issue in the case; that it was not admissible as impeachment; and that it could have been asked only for the purpose of prejudicing the appellant in the minds of the jurors. The question was not objected to, no motion to strike was made, and the appellant did not ask the court to instruct the jury to disregard the matter. We agree that the question was objectionable but it cannot be held to have been sufficiently prejudicial to justify a reversal, especially in view of the convincing evidence in this case.

[3] Finally, it is contended that the court improperly admitted evidence of a conversation between an officer and the appellant on the way to the police station that night. When the officer was asked what was said in this conversation an objection on the ground that it was hearsay was overruled. When asked what the conversation was, the officer testified that he then said to the appellant "I would like to catch more fellows like him, red-handed like that, with his pants down. It would make our job a lot easier," and that the appellant made no reply to this. It is argued that this statement of the officer does not come within the exception permitted by section 1870 of the Code of Civil

Procedure, since the statement and the circumstances were not such as to call for any reply on the part of the appellant. This statement was accusatory in nature and would naturally call for a denial from the appellant, if he was innocent or felt that he had not been caught red-handed. If error be assumed in this connection, it is not sufficient to warrant a reversal under the circumstances of this case, where the evidence of the appellant's guilt is strong, complete and convincing.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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106 Cal.App.2d 160

SHERROD v. SAUNDERS et al.

Civ. 18145.

District Court of Appeal, Second District, Division 1, California.

Aug. 17, 1951.

Action by Murel Sherrod against Daniel L. Saunders and others for personal injuries resulting from being struck by the named defendant's automobile. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain finding that defendant was not negligent.

Judgment affirmed.

1. Automobiles 🔑244(8)

In action by highway patrolman against automobile driver for personal injuries resulting from being hit by defendant's automobile while plaintiff was standing on or near double traffic line of highway as he wrote report of previous accident, evidence was sufficient to sustain finding that defendant was not guilty of negligence.

2. Automobiles 🔑11
Highways 🔑172

Double traffic line painted on highway is not safety zone.

3. Officers 🔑91

Public officials, in any branch of government, are entitled to no special privileges.

4. Automobiles 🔑219

Where highway patrolman was standing in highway on or near double traffic line writing out report of previous accident, it was his duty to exercise ordinary care.

Arthur C. Miller and Lee A. Solomon, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly and Roger Kelly, Los Angeles, for respondents.

DORAN, Justice.

In this action for damages for personal injuries the jury returned a verdict for defendants and plaintiff appeals from the judgment that followed.

It is contended on appeal that the verdict was contrary to the facts and the law. It is also urged that certain instructions were "contrary to law, contradictory in fact, and misleading to the jury."

The statements of facts in the respective briefs reflects the controversy. Appellant's brief recites: "The following facts are undisputed: On the evening in question, the plaintiff while acting as a State Highway Patrol Officer, was called to the scene of an accident which had occurred at the above mentioned intersection. Imperial runs east and west and St. Andrews, north and south, the latter intersecting Imperial Highway only on the north, and not being cut through on the south side of Imperial. The center of Imperial was distinctly marked with a painted double white line.

"The plaintiff went to the center of the intersection from the south side of Imperial and made observations for the purpose of his report, and was standing on the double center line, or had started to walk from the center line of Imperial in a southerly direction along a line that coincided with the westerly curb line of St. Andrews, when defendant, westbound, ran into plaintiff. Defendant admitted that he never saw the plaintiff at any time before the accident, although his headlights were burning. The plaintiff was at the time of the accident looking to his right, to the west, the direction from which traffic might be anticipated, in crossing the southerly half of Imperial Highway. His flashlight was burning and held in his hand, or under his arm, at all times."

Respondent on the other hand recites the facts as follows: "Taking the evidence in the light most favorable to defendant, defendant was at all times on the north side of the double white line, i. e., on the right side of the highway as he drove west. Defendant was driving at a moderate rate of speed, and had his headlights on. Defendant did not see plaintiff until just before the impact, from which it may be inferred that plaintiff stepped over the white line into the path of defendant's oncoming vehicle, or else was at all times north of the double line. Plaintiff had been standing in the middle of the road with his back toward west bound traffic. Plaintiff, a highway patrolman, had been investigating a prior accident and was writing on a sheet of paper. He used no care or diligence to observe cars coming from defendant's direction. Plaintiff had previously put red flares upon the highway but had carelessly allowed them to die out and had carelessly failed to replace them.

"Plaintiff was carrying a flashlight, but negligently did not have it pointed in defendant's direction, which was the direction from which danger was most likely. The automobiles involved in the first accident had been removed from the highway, and plaintiff had already concluded such investigation of skidmarks, etc., as his duties required. The record reveals no excuse or reason for plaintiff's writing of his report while standing in the middle of the highway, nor for his facing away from the direction of danger."

[1-4] There was no evidence that defendant crossed the double line. The jury determined that the defendant was not guilty of negligence and in all probability believed that plaintiff's conduct in the circumstances was negligent. And there is substantial evidence to support such a conclusion. It should be noted in this connection that the double traffic line has never been regarded as a safety zone. Moreover, if the double line at the point where the accident occurred is similar to the highway lines throughout the state, it is only 10 or 12 inches wide overall. There is no evidence in the record on this fact. It should also be noted that public officials, in any branch of the government, whether executive, legislative or judicial, are entitled to no special privileges and it is as much the duty of a peace officer, in such circumstances, to use ordinary care as any other citizen.

An examination of the instructions reveals no prejudicial error in connection therewith.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

106 Cal.App.2d 92

ADAMS et al. v. HERMAN et al.

Civ. 14674.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1951.

Action by Ephraim Adams and Emma Adams against Corabelle Herman, administratrix of the estate of Albert E. Alldis, deceased, and Mrs. A. E. Alldis, for damages for the alleged breach of a fiduciary relationship. The Superior Court, San Mateo County, Hon. A. R. Cotton, J., gave judgment of nonsuit and the plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that an agency was established and the fact that deceased agent, without the knowledge of the principal, sold plaintiffs' property to defendant widow, established a prima facie case of breach of the fiduciary relationship.

Judgment reversed.

1. Trial 🔑165

Motion for nonsuit at close of plaintiff's case has legal effect of demurrer to evidence, assumes that all admissible evidence in favor of plaintiff is true, and is predicated on theory that there is no admissible evidence or reasonable inferences therefrom that would support a judgment for plaintiff.

2. Principal and agent 🔑48, 69(2)

The relationship of principal and agent is a fiduciary one, and in any transaction on behalf of his principal the agent is bound to exercise utmost good faith and honesty, and if agent makes a secret profit from the agency, principal may recover such profit.

3. Principal and agent 🔑69(4)

Sale by agent of his principal's property to agent's wife is the same as a sale to agent himself, and same rules are applicable.

4. Principal and agent 🔑69(4), 78(4, 6)

All sales by an agent to himself of his principal's property are not prohibited, but proof of sale to agent by himself establishes prima facie case against agent, and raises presumption that agent obtained unfair advantage over principal, and burden is then on agent to rebut presumption, which he may do by showing that he acted in good faith and revealed all material facts to principal.

5. Executors and administrators 🔑450
Principal and agent 🔑78(6)

Where agency was established, and it was proved independently of testimony of principal regarding transaction with deceased agent that agent without knowledge of principal, sold principal's property to agent's wife, principal established prima facie case against both administratrix of deceased agent and his widow, for damages for breach of fiduciary relationship.

6. Witnesses 🔑133

Statute providing that parties to an action against an administratrix upon a claim against estate of deceased person cannot testify as to any matter or fact occurring before death of deceased person, did not apply in favor of deceased agent's widow in action for breach of fiduciary relationship against her and deceased's administratrix by principal. Code Civ.Proc. § 1880, subd. 3.

7. Witnesses 🔑133

Statute providing that parties to an action against an administratrix upon a claim against estate of deceased person cannot testify as to any matter or fact occurring before death of deceased person does not apply to action to establish a trust. Code Civ.Proc. § 1880, subd. 3.

8. Witnesses 🔑133

Where statute providing that parties to an action against an administratrix upon a claim against estate of deceased person cannot testify as to any matter or fact occurring before death of deceased person, made no exception in action where deceased was charged with fraud, court could not make such exception. Code Civ.Proc. § 1880, subd. 3.

9. Witnesses 🔑178(3)

Cross-examination outside scope of direct examination may constitute waiver of dead man's statute. Code Civ.Proc. § 1880, subd. 3.

10. Witnesses 🔑178(3)

Where principal testified as to transaction with deceased agent in action by principal against agent's administratrix, and administratrix objected on ground that such testimony violated dead man's statute, but trial court admitted testimony subject to motion to strike, administratrix was required to cross-examine until court ruled, and did not waive objection. Code Civ.Proc. § 1880, subd. 3.

11. Witnesses ⚿133

Under dead man's statute, vendor suing broker's estate and broker's widow for damages for breach of fiduciary relationship was incompetent as a witness so far as deceased's estate was concerned. Code Civ.Proc. § 1880, subd. 3.

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Louis J. Glicksberg, San Francisco, James A. Ersted, San Jose, for appellant.

Joseph P. Lacey, Cyrus J. McMillan, Burlingame, for respondents.

PETERS, Presiding Justice.

This action was brought by Mr. and Mrs. Ephraim Adams against Mr. and Mrs. A. E. Alldis. Before trial Mr. Alldis died and his administratrix was substituted as one of the parties defendant. The complaint is in two counts. The first count charges a breach of a fiduciary relationship between A. E. Alldis and plaintiffs, in that it is averred that Alldis, a real estate broker, while acting as agent for plaintiffs in selling their property, without disclosing to plaintiffs that Mrs. Alldis was the purchaser, bought the property for $10,500, and several months later sold it to third persons for $11,500. Money damages for the alleged breach of this fiduciary relationship are requested. The second cause of action is on an open book account. At the conclusion of plaintiffs' case a motion for a nonsuit was granted as to both defendants on the ground that plaintiffs had failed to prove their case. From the judgment of nonsuit plaintiffs appeal.

[1] A motion for a nonsuit at the close of a plaintiff's case has the legal effect of a demurrer to the evidence. Such a motion assumes that all admissible evidence in favor of plaintiff is true, and is predicated on the theory that there is no admissible evidence or reasonable inferences therefrom that would support a judgment for the plaintiff. Henderson v. Progressive Optical System, 57 Cal.App.2d 180, 134 P.2d 807; Connors v. Southern Pacific Co., 91 Cal.App.2d 872, 206 P.2d 31; Mastro v. Kennedy, 57 Cal.App.2d 499, 134 P.2d 865.

Tested by these standards, we think that plaintiffs established a prima facie case against both defendants, and that the nonsuit must be reversed.

The record shows the following: Mr. Adams, who is an attorney, testified that in 1944 and until 1947 he was in the army; that in 1944 he was stationed in Oklahoma; that in that year he and his wife owned a parcel of real property in Redwood City; that it had been their former residence; that this property was vacant, and they wanted to dispose of it; that in the first part of June, 1944, he visited California and orally told several real estate firms, including A. E. Alldis, that he wanted to sell the house for $10,500 net; that he then returned to Oklahoma; that on July 16, 1944, he received a telegram from Alldis reading: "Sold house at 1010 Katherine Street Redwood City Sold Place for Cash $10,500 Wire Instructions"; that on the same day Adams telegraphed to Alldis: "Sale Ten Ten Katherine Street for Ten Thousand Five Hundred Confirmed. Forwarding Instructions Air Mail Special to California Pacific Title Redwood City"; that on the same day he sent, by letter, instructions to the title company. The letter contains this statement: "Please prepare deed to party to be designated by A. E. Alldis, Realtor and forward to me for execution."

Several days later Adams received a deed from the title company naming the California Pacific Title Co. as grantee. This deed he executed and returned to the title company. That company, on instructions from A. E. Alldis, and apparently purporting to act pursuant to the instructions in Adams' letter to it, erased the name of the title company and inserted the name of Alice G. Alldis, as grantee. Subsequently, Adams received the balance of the purchase price of $10,500, less the usual deductions, including a $525 commission to Alldis.

In 1945 Adams received information that Alldis had resold the property for $11,500. He wrote to Alldis and demanded an accounting of the extra $1,000. Under date of May 18, 1945, Alldis replied, stating that he had sold the house to a party by the name of Osborne for $10,500, but two weeks later, because Mrs. Osborne became ill "I agreed to take property off his hands"; that he made certain repairs to the premises and "about 2½ months later I resold the place." He protested that he had acted in good faith.

Adams did not return to California until August of 1947, and filed this complaint in December, 1947.

Mrs. Alldis knew very little about the transaction. She testified that her husband was a real estate broker, but that she was not, nor did she work in her husband's office. She remembered purchasing the property, but could not remember what was paid for it or to whom it was paid. She did not remember ever seeing the Adams-Alice G. Alldis deed, and had no recollection as to who received delivery of it, but thought that it must have been delivered to the office of her husband, because all business transactions were handled there. She recalled that the property was sold to the Burrs, and testified that this sale was negotiated through her husband's office. She admitted signing a deed to the Burrs, and remembered that the sale price was $11,500. The Alice G. Alldis-Burrs deed is dated September 11, 1944. She testified, in reference to the payment of the $11,500, that "It would be paid to me, of course; that is a long time ago." She could not recall whether her husband or the title company paid the money to her, or where the money was deposited. She claimed that in that period she had some personal bank accounts, but could not remember in what banks they were, and that, at the time of trial, she had no personal accounts. The money was spent, she stated, for "Expenses and sickness." Alldis died in August of 1949.

The manager of the title company testified from the records of the company. He stated that such records showed that Alldis instructed the company to prepare a deed naming the title company as grantee, and that such deed was prepared and sent to Adams; that when the duly executed deed was received back from Adams the title company was still named grantee; that two days later Alldis instructed the title company to change the grantee to Alice G. Alldis. The escrow officer who handled the transaction made the following notation, dated July 28, 1944, on the title company's work sheet: "Note—in accordance with authority from Captain Adams to Deed Property to anyone designated by Alldis (see instructions of July 16) the Deed was changed to read to Alice G. Alldis. This was done because Alldis said he promised Capt. Adams he would have the money by today and since the buyers do not know yet how they wish to take title Alice G. Alldis is to hold the same until they know. He did not want Calif. Pac. to hold title as I told him we would charge another title fee when we deeded out."

In the corner of the work sheet is another notation also dated July 28, 1944. It reads: "Hold open resold to Edward K. Osborne and Dora Osborne per Mr. Alldis." The work sheet is signed by the escrow officer and by Alldis.

The propriety of the title company thus erasing the name of a grantee to an executed deed and inserting the name of another grantee, and the question as to whether such act was authorized by Adams' letter of July 16, 1944, is not here involved. No question is here raised as to the validity of the deed to Alice G. Alldis. This evidence is important, however, because it demonstrates that Adams had no knowledge that Mrs. Alldis was the purchaser of the property when he executed the deed.

The records of the title company show the instructions given by Mrs. Alldis when she conveyed the property to the Burrs. The property was sold to the Burrs for $11,500. The money did not go through the title company because the instructions of

Mrs. Alldis state that she already had received the amount due her. Mrs. Alldis paid the title charges. Mrs. Alldis' memory as to who prepared and who typed her instructions, whether Mr. Alldis was present when they were prepared, and whether she or Mr. Alldis delivered them to the title company was very vague. She admitted, however, that the transaction was handled through the office of her husband acting as broker.

On this evidence several questions are presented:

1. Assuming that all of the evidence was admissible against either or both respondents, does that evidence establish a prima facie case of breach of a fiduciary relationship by A. E. Alldis?

2. Assuming a prima facie case of breach of a fiduciary relationship by A. E. Alldis, would that evidence also justify a holding that Mrs. Alldis is legally responsible for such breach of duty?

3. Was Adams' testimony admissible against the estate of A. E. Alldis in view of section 1880, subd. 3, of the Code of Civil Procedure? If not, is the admissible evidence in the case sufficient to establish a prima facie case against the estate of A. E. Alldis?

One of the important questions presented here is whether Adams, over objection, could properly testify as to transactions had with a man now deceased, in view of the provisions of section 1880, subd. 3, of the Code of Civil Procedure. But whatever the answer to that problem may be, it is perfectly clear that Adams' testimony was admissible against Mrs. Alldis, and no contention is made to the contrary. Moreover, even without the oral testimony of Adams, in our opinion, the remaining testimony establishes a prima facie case of a breach of a fiduciary relationship by A. E. Alldis. The telegrams between Alldis and Adams, which were admitted without objection, as well as the title company records, establish that Alldis was the agent for Adams for the sale of the property. The records of the title company show that Alldis instructed the company to prepare a deed and to send it to Adams, naming the title company as grantee. The same records show that Alldis, after the deed was executed, induced the title company to change the grantee to his wife. Mrs. Alldis, in this fashion, purchased the property for $10,500, and Adams paid a commission to A. E. Alldis. All this was done without notifying Adams that Alldis was selling the property to his wife. Then, about two months later, Mrs. Alldis sold the property for $11,500 to the Burrs, thus realizing a quick $1,000 profit. Both sales and the details of both transactions were handled through the office of A. E. Alldis. The money was used for "sickness and expenses."

The above evidence, independent of the testimony of Adams, established a prima facie case against both defendants, and threw upon them the burden of showing that the transaction was not subject to attack.

[2] The relationship of principal and agent is, of course, a fiduciary one. In any transaction on behalf of his principal the agent is bound to exercise utmost good faith and honesty. Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830; Kinert v. Wright, 81 Cal.App.2d 919, 185 P.2d 364; Webb v. Saunders, 89 Cal.App.2d 732, 201 P.2d 816; Bell v. Scudder, 78 Cal.App.2d 448, 177 P.2d 796. This elementary rule is stated as follows in Schwarting v. Artel, 40 Cal.App.2d 433, 441, 105 P.2d 380, 384: "When the acts of an agent have been questioned by his principal and the fiduciary relationship has been established, the burden is cast upon the agent to prove that he acted with the utmost good faith toward his principal [citing cases] and that he make a full disclosure prior to the transaction of all the facts relating to the transactions under attack. [Citing cases.]"

It is an integral part of that rule that, if the agent makes a secret profit from the agency, the principal may recover such profit. The fact that the agent may have paid a fair price for the property, or that the property could not then have been sold for a greater price, are false factors if a full disclosure, prior to sale, is not made. See, Robertson v. Chapman, 152 U.S. 673, 14 S.Ct. 741, 38 L.Ed. 592; see, also, many cases collected and commented on in 2 Am. Jur. p. 207, § 256.

Respondents admit that these rules apply to any secret profit made by an agent, but contend that there is no evidence here that the agent, A. E. Alldis, made any secret profit. Mrs. Alldis was, of course, not the agent of the Adams. They urge that the sale to her, in effect, was the same as a sale to a stranger; that there is no evidence that A. E. Alldis had any interest in the property or received any of the proceeds therefrom; that there is no evidence that title was taken in Mrs. Alldis' name for any purpose of her husband; that there is no evidence that the funds used by Mrs. Alldis to purchase the property were furnished by her husband, or that he had any interest therein; and that there is no evidence that A. E. Alldis sold the property to the Burrs as his own property, or that he was not acting as the agent for his wife in that sale.

These arguments are all predicated on the erroneous premise that an agent may sell his principal's property to his wife, without disclosing that fact to the principal, and that she may then resell at a profit, and that the principal cannot recover the profit unless he can prove that the husband retained or secured some interest in the property. That is not and should not be the law. If that were the law an agent could, with practical impunity, defraud his principal by selling his principal's property to his wife, as long as the agent is careful enough to give the appearance that he retains no interest in the property. The proper rule, supported by authorities from many states, is stated as follows in 2 Am. Jur. p. 208, § 257: "The general principle which denies the agent the right, without the knowledge and consent of the principal, to become the purchaser of property which he is employed to sell for the principal is aimed at an indirect or collusive sale or transfer, as well as a direct sale or transfer to the agent. *It precludes the agent from selling or conveying to the agent's spouse*, to a corporation in which the agent has a large concealed interest, indirectly to himself in the name of a third person, and even to a clerk of the agent who is engaged in the affairs of the vendor relating to the sale of the land." Italics added; see, generally, Kimball v. Ranney, 122 Mich. 160, 80 N.W. 992, 80 Am.St.Rep. 555; Tatsuno v. Yoshihiko Kasai, 70 Utah 203, 259 P. 318, 62 A.L.R. 63, 68.

A case where the factual situation was quite similar to the instant one is Tyler v. Sanborn, 128 Ill. 136, 21 N.E. 193, 4 L.R.A. 218. In that case the Tylers employed Sanborn to sell some lots in Illinois. The Tylers lived out of the state. One Beard orally offered to pay $1,000 for the lots. That was a fair price. The Tylers accepted, and executed deeds to Beard, delivering them to Sanborn. Beard changed his mind and refused to go through with the sale. Sanborn mentioned this fact to his wife, who, over her husband's objections, agreed to buy the lots for $1,000. Sanborn explained this to Beard and he executed deeds to Mrs. Sanborn. Mrs. Sanborn used her own funds in making the purchase. The Tylers were not informed of the fact that Mrs. Sanborn had thus become the purchaser. When the Tylers discovered the facts they sought to set the deeds aside. It was held that, as a matter of law, the sale to Mrs. Sanborn was, in legal effect, a sale to the agent. 21 N.E. at page 194, col. 2, the court stated: "The evidence quoted (*supra*) can leave no doubt on the mind as to the real character of the transaction. It was, in effect, a sale and conveyance to Frances C. Sanborn, by her husband, O. D. Sanborn, as the agent of the Tylers, without their knowledge. The sale to Beard was not consummated. He refused to take the property, but became an agent in fact for Frances C. Sanborn, whereby she was enabled to obtain the legal title. In equity the execution of the deed by Beard to her, and the delivery thereafter of both deeds to her, was but the execution and delivery of a deed to her by the Tylers without their knowledge. Admitting that the price paid for the property was not grossly inadequate, and that it was one with which, if it had in good faith come from Beard, the Tylers would have been satisfied, the question is still left whether the fact that the purchase was made by the wife of their agent, without their knowledge, of itself alone renders the deeds voidable at their election. The doctrine is familiar, and has been often recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal, which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. [Citing cases.] It is of no consequence in such case that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent. [Citing cases.] The rule is not merely remedial of wrong actually committed. It is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the chief justice, in Staats v. Bergen, 17 N.J.Eq. 554, that 'a trustee may not put himself in a position, in which to be honest must be a strain on him.' An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal, but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent, which might affect the principal, and that, having such knowledge, he freely consented to the transaction. [Citing cases.]"

After pointing out that a sale by an agent to his wife cannot be considered as a sale to a stranger, and after pointing out that Mr. Sanborn might have a pecuniary interest in the purchased property because of his dower rights, the court stated, 21 N.E. at page 195, col. 2:

"There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction, but unless his marital relations be perverted he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife.

"In our opinion the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency, without the knowledge and express consent of the principal."

The same rule, supported by authorities from many states, is summarized as follows in 26 Am.Jur. p. 752 at p. 753, § 127: "Generally, however, where one spouse is disqualified by reason of some fiduciary relationship from securing a title, he or she cannot convey such title to the other. It has been said that if such a rule rests only upon a supposed privity of estate between husband and wife, it might well be argued that statutes relating to married women have destroyed its foundation. The rule, however, is founded upon considerations of public policy, and conclusively imputes to the one spouse, as derived from the other, knowledge of facts the existence of which precludes the other spouse from action. The opportunities that would be afforded for fraudulent practices would be so numerous and the difficulty of exposing them so great that courts apply the doctrine of estoppel to both, and thus close the door that offers the temptation. Thus, one spouse acting as trustee or employed as an agent to sell property cannot sell it to the other spouse, and the other spouse cannot purchase it, without the knowledge and consent of the cestui que trust, or, in the case of agency, of the principal. Where a trustee sells the trust estate to one who by previous agreement purchases for the wife of the trustee, the sale will be set aside on the application of the cestui que trust, and evidence that the sale was fair and for the best price obtainable is not admissible."

[3] In other words, in legal effect, a sale by an agent of his principal's property to his, the agent's wife, is the same as a sale to himself, and the same rules are applicable as if the agent sold to himself.

[4, 5] Of course, all sales by an agent to himself of his principal's property are not prohibited. Proof of a sale to the agent by himself establishes a prima facie case against the agent. Such a sale raises a presumption that the agent obtained an unfair advantage over his principal. The burden is then on the agent to rebut the presumption, which he may do by a showing that he acted in utmost good faith and revealed all material facts to his principal. Helbing v. Helbing, 89 Cal.App.2d 224, 200 P.2d 560. This, however, is a matter of defense. Once the agency has been established and the fact proved that the agent, without the knowledge of the principal, sold the principal's property to himself or to his wife, the plaintiff principal has established a prima facie case sufficient to prohibit a nonsuit. These facts were proved here, and, as already pointed out, were proved independently of the oral testimony of Adams. It is clear, therefore, that it was error to have granted the nonsuit as to either defendant.

In view of the impending retrial, something must be said about the admissibility of the testimony of Adams. Section 1880 of the Code of Civil Procedure lists certain persons who "cannot be witnesses". Subd. 3 provides: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

[6] When Adams was called as a witness, the attorney for respondents objected, citing the code section as the basis for his objection. The trial judge let Adams testify, subject to a motion to strike. Counsel for respondents cross-examined Adams. At the conclusion of appellants' case the motion to strike was granted. It is not clear from the record whether the motion to strike was granted in favor of both respondents, or was limited to the estate of Alldis. There is no doubt that Adams was perfectly competent to testify as against Mrs. Alldis. The inhibitions of section 1880(3) do not apply in her favor. Chapman v. Associated Transit Term. Corp., 123 Cal.App. 157, 10 P.2d 1023.

[7] As to the estate of Adams, appellants urge that the section does not apply because the cause of action is not to establish a claim against the estate, but to establish a trust. Actions to establish a trust do not fall within the section. Alvarez v. Ritter, 67 Cal.App.2d 574, 155 P.2d 83; Humes v. Humes, 56 Cal.App.2d 126, 133 P.2d 39; Porter v. Van Denburgh, 15 Cal.2d 173, 99 P.2d 265. The difficulty with this argument is that this is not an action to impose a trust, but an action for damages for fraud. The complaint is entitled "Complaint for Damages." The first cause of action is to recover damages for fraud, the second is on an open book account. The prayer is for money damages for fraud. The allegations necessary to establish a trust are not contained in the pleading. Thus, there is no allegation, and no proof, that the remedy at law was inadequate, nor in the pleading or proof was any attempt made to trace the trust *res*. It is quite clear that this trust argument is an afterthought intended by appellants to circumvent the section. As was said in Holland v. Bank of Italy Nat. T. & S. Ass'n, 115 Cal.App. 472, 485, 1 P.2d 1031, 1037, in discussing a similar problem: "While it is settled that section 1880 of the Code of Civil Procedure has no application where a trust is sought to be established, and while equity may give relief in a proper case, the claim of a trust fund should not be allowed merely for the purpose of circumventing the provisions of section 1880, nor unless a case is presented which clearly comes within the established rules."

[8] Appellants, without citation of authority, also urge that section 1880(3) has no application where the deceased is charged with fraud. They cite some out-of-state cases that do not involve statutes similar to section 1880(3). No California case is cited on the point. The section makes no such exception. The courts should not make exceptions where the Legislature has not seen fit to do so.

[9–11] Appellants next argue that respondents cross-examined Adams outside the scope of direct examination, and contend that this necessarily waived the provisions of the section. Of course, cross-examination outside the scope of the direct examination, under certain circumstances, can constitute a waiver, Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371; see, also, Lucy v. Lucy, 22 Cal.App.2d 629, 71 P.2d 949; Davis v. Mitchell, 108 Cal.App. 43, 290 P. 887; Stankey v. Palmer, 6 Cal.App.2d 215, 44 P.2d 382, but here the cross-examination was entirely within the scope of the direct examination. Certainly, under the circumstances here existing, mere cross-examination cannot be held to be a waiver. The respondents objected to the testimony. The trial court decided to admit it, subject to a motion to strike. Until the court ruled, the respondents were required to cross-examine. They cannot be held to have waived their objection by cross-examining while such objection was still under consideration. For these reasons, Adams was incompetent as a witness so far as the estate of A. E. Alldis is concerned.

The judgment of nonsuit is reversed.

BRAY and FRED B. WOOD, JJ., concur.

106 Cal.App.2d 176

PEOPLE v. GAINES.

Cr. 755.

District Court of Appeal, Fourth District, California.

Aug. 17, 1951.

C. J. Gaines was convicted in the Superior Court, San Diego County, John A. Hewicker, J., of issuing a check drawn on a bank in Texas, knowing, at the time, that he did not have sufficient funds or credit with bank to meet it on presentation. The District Court of Appeal, Griffin, J., held that the refusal to permit defendant to testify as to his intent was prejudicial error.

Judgment reversed and new trial ordered.

1. Criminal law 🔑1170(1)

Exclusion of testimony as to fact about which there was no question in criminal prosecution, was not prejudicial error.

2. False pretenses 🔑5

Intent of person to pass check in violation of statute penalizing issuance of check without sufficient funds with intent to defraud does not depend on failure or success of entire enterprise involved. Pen. Code, § 476a.

3. Criminal law 🔑1170(2)

Exclusion of testimony of a witness involving subject fully covered by defendant's testimony in criminal prosecution was not prejudicial error.

4. False pretenses 🔑5

Intent to defraud is an essential element of crime of issuing check without sufficient funds with intent to defraud. Pen. Code, § 476a.

5. Fraud 🔑68

Where intent to defraud is essential element of crime, it is subject of evidence in same manner and to same extent, and depends on same general rules of procedure, as any other necessary fact in case.

6. Criminal law 🔑390

Witness may be examined as to intent with which he did act, when that intent is material, even where defendant is witness and his intent is element of crime charged.

7. Criminal law 🔑742(1)

In prosecution for issuance of check without sufficient funds with intent to defraud, credibility of defendant's testimony as to his intent was question for jury. Pen.Code, § 476a.

8. Criminal law 🔑1170(1)
False pretenses 🔑42

Where defendant was being prosecuted for issuing check without sufficient funds with intent to defraud, refusal to permit defendant to testify as to alleged arrangement made with third party on day before issuance of check to deposit money in bank next day to defendant's credit was prejudicial error. Pen.Code, § 476a.

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Crittenden, Holley & Gibbs and Phillip Crittenden, all of San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of the crime of issuing a check drawn on a bank in Texas in the sum of $85, knowing, at the time, that he did not have sufficient funds or credit with the bank to meet it on presentation. He admitted a prior conviction of a felony.

On September 12, 1950, defendant purchased a 1941 Hudson automobile from a dealer in El Monte, California, and gave a check for $268.80, drawn on the Texas bank to cover the purchase price. On September 18th that bank refused payment. On September 19th defendant's car broke down near La Jolla. It was towed to the Bowman & Vader garage in San Diego. Defendant was given an estimate of $65 for the cost of repairing it. He stated he wanted to pay for the repairs in advance but needed some extra cash so he could return to Los Angeles. He showed a bill of sale for the car. He then made out a check for $85 on the Texas bank covering these amounts. He told the complaining witness he had just sold a restaurant and had put the money in that bank. The complaintiff witness took the check and gave defendant $20. Two weeks later defendant phoned Bowman and inquired if the check had cleared. (The check had been returned from the Texas bank with payment refused because defendant had no account with that bank). However, Bowman told defendant he had not heard from the bank and asked defendant to come to the garage because the repairs had been completed on his car. Defendant later went to the garage. He appeared quite nervous and frightened and asked Vader if he would not like to buy the car. Vader told him to return in an hour and see his partner Bowman. The defendant never returned and they did not see him again until the time of trial.

The president of the Texas bank testified that he had examined the books of the bank for the period from 1940 to 1951, and defendant had no account with that bank or credit arrangements with it during that period. The check was written on a form of "countercheck", a supply of which was kept by the bank in the lobby. The officer also testified that seven other checks were returned in September and October, 1950, which were drawn on that bank by "C. J. Gaines".

Defendant testified that when he purchased the car he told the seller that the check would be good by the time it got to the bank. He testified that the complaining witness told him they would like for him to leave the car there until the check cleared; that he had an account in that bank in 1949, and that the last deposit he made there was in the early part of 1950; that when he wrote the check he believed he still had an account open in the bank.

The only contention on this appeal arises from the rulings of the trial court on the question of the admissibility of certain evidence. Defendant first claims that the court erred in sustaining the prosecution's objection, during the cross-examination of the witness Bowman, involving the conversation with defendant over the phone as to whether or not the check cleared, and about the car. Counsel for defendant asked the witness if defendant said anything about *taking the car away from the garage,* and the court sustained the objection as immaterial. In his offer of proof he stated that he wanted this evidence admitted to show defendant had no intention of cheating or defrauding the complaining witness at the time.

[1,2] While the court might well have overruled the objection defendant cannot claim prejudicial error as there was no question about this fact. Defendant himself testified he said nothing to them about taking the car except when they asked him if he wanted it and he refused because they said it would not hold up very long, and that defendant then told them he would

try to sell it. This had little, if any, bearing on defendant's intention to cheat and defraud the complaining witness by reason of the lack of funds in the Texas bank. The intent of a person to pass a check in violation of section 476a of the Penal Code cannot be made to depend on the failure or success of the entire enterprise. People v. Porter, 99 Cal.App.2d 506, 222 P.2d 151; People v. Sherman, 100 Cal.App. 587, 280 P. 708. Under the circumstances no prejudicial error resulted.

[3] A similar objection was made to the court's ruling in sustaining an objection to a question asked the witness Vader on cross-examination in respect to whether or not Vader said anything to the defendant as to how long the car would hold up after it was repaired. This question appears to be immaterial. However, since the subject was fully covered by the testimony of the defendant himself no prejudicial error appears.

The final contention requires more consideration. The claim is that the court erred in refusing to let the defendant testify that on the day before the check was drawn he had made some arrangements with some named person in Big Springs, Texas, who owed defendant $500, to put it, on the morning of the following day, to defendant's credit in the bank at Seminole, Texas, upon which bank the check was drawn. The court limited defendant's testimony to any arrangements he may have made with the bank, but would not allow any testimony pertaining to any claimed arrangements made with third parties. An offer of proof to this effect was made and denied.

In support of the admissibility of this proffered testimony of defendant, he cites People v. Becker, 137 Cal.App. 349, 30 P.2d 562, which is a case where defendant had no account in the bank but testified he had made arrangements with a Mrs. Zoll to open the account the next business day after the check was issued. In corroboration of his own testimony to this effect he offered the testimony of Mrs. Zoll that she agreed to furnish the money for that purpose. The court sustained an objection to her testimony. A reversal of the judgment of conviction resulted.

People v. King, 63 Cal.App. 674, 219 P. 753, upon which the prosecution relies, was there analyzed. In the King case the defendant drew a check on a bank where he had no account. He testified that there was money due him which he intended to deposit in the bank the day following but suffered a nervous breakdown and did not make the deposit as planned. On appeal the court stated that such a claimed defense would be no defense to the crime charged and his testimony as to that matter "was wholly irrelevant and immaterial to the issue".

The holding in the Becker case is criticized in Fricke on California Criminal Law, 4th Ed. [1951] p. 280–281, where it is said: "* * * The decision, reversing the conviction because the defendant was not allowed to testify to his intent to open such account, overlooks the fact that defendant obtained a watch by giving for it a check on the bank in which he had no account or credit whereby the seller of the watch was defrauded and the fact that the defendant intended to make the check good by thereafter opening an account is no more a defense than if he intended in some other manner to reimburse the vendor. * * *"

Defendant points out that in the King case no brief was filed by the appellant. The statement that the facts constituted no defense and that defendant's testimony in this respect was "irrelevant and immaterial" was dicta and unnecessary to the decision in that case because the evidence was admitted and the jury rejected the defendant's story. No hearing in the Supreme Court was asked. In the King case defendant had no account in the bank. Here, the defendant testified he had an account with the bank notwithstanding the testimony of the banker to the contrary.

The Becker case holds that these comments were "obiter", and directly holds such evidence as here offered to be admissible to show intent of "reasonable expectation of payment", [137 Cal.App. 349, 30 P.2d 564] citing 35 A.L.R. p. 384, and, in effect, the Supreme Court refused to adopt the "obiter" as a correct interpretation of the law. A petition for hearing in the Supreme Court was denied. See also People v. Kauffman, 48 Cal.App.2d. 393, 119 P.2d 998.

[4–8] It thus appears that the "intent to defraud" is an essential element of the crime. It is the "gist of the offense". People v. Bullock, 123 Cal.App. 299, 11 P.2d 441, 443; People v. Wilkins, 67 Cal.App. 758, 228 P. 367, 368. It must be and is the subject of evidence in the same manner and to the same extent, depending on the same general rules of procedure, as is any other necessary fact in the case. People v. Landman, 103 Cal. 577, 580, 37 P. 518; 5 Cal.Jur. p. 25, et seq. Sec. 144; 10 Cal.Jur. 832, et seq. Sec. 117. A witness may be examined as to the intent with which he did an act, when that intent is material. People v. Morley, 89 Cal.App. 451, 457, 265 P. 276. This is true even where the defendant is the witness and his intent is an element of the crime charged. People v. Sheasbey, 82 Cal.App. 459, 464, 255 P. 836. It plainly appears that the refusal to allow defendant to testify on this subject was error, even though the court might well have believed, from the evidence here produced, that defendant was testifying falsely. Fanning v. Green, 156 Cal. 279, 104 P. 308. This was a question for the jury to determine. People v. Wepplo, 78 Cal.App.2d Supp. 959, 965, 178 P.2d 853; People v. Rose, 9 Cal. App.2d 174, 48 P.2d 1009.

The only question is whether such error was prejudicial. In determining this question, had defendant been given the right to fully testify on this subject and bring in evidence supporting his offer of proof, the jury might well have disagreed on the question or could have returned a verdict in defendant's favor. This conclusion is supported by defendant's argument in his closing brief reciting that defendant did go to trial on the same issue before another judge who allowed him to testify to the facts set forth in his offer of proof and a disagreement of the jury resulted. Upon a retrial he was denied this right. We conclude that the ruling of the trial court was therefore prejudicially erroneous. People v. Geibel, 93 Cal.App.2d 147, 179, 208 P.2d 743.

Judgment reversed and a new trial ordered.

BARNARD, P. J., and MUSSELL, J., concur.

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106 Cal.App.2d 1

MEAD v. SMITH et ux.

Civ. 18209.

District Court of Appeal, Second District,
Division 1, California.

Aug. 9, 1951.

Action by Charles Mead, as executor of the estate of William Joseph Hayman, deceased, against Perry Smith and Kathleen Smith, his wife, to set aside a certain deed to real estate executed by decedent to defendants. The Superior Court, Los Angeles County, C. A. Paulsen, J., rendered judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Durand, J., held that evidence was sufficient to support finding that no confidential relation existed, that no fraud or undue influence was practiced and that deed in question was decedent's voluntary act.

Judgment affirmed.

1. Appeal and error ⇨989

Power of a reviewing court, where sufficiency of evidence is attacked, begins and ends with inquiry whether there is any substantial evidence in support of findings and judgment.

2. Contracts ⇨99(1)

Mere fact that friendly relations exist between parties to a transaction does not necessarily establish confidential relationship between parties with a presumption of undue influence, shifting to parties contending validity of transaction between parties, burden of proving that transaction was fair, free from fraud or undue influence and made by a person in full possession of his faculties.

3. Master and servant ⚷6
Principal and agent ⚷23(5)

In action by executor against grantees to set aside deed executed by decedent, evidence was sufficient to support finding that grantees did not stand in relationship of attorney in fact, agent or employee with respect to decedent.

4. Deeds ⚷211(4)

In action by executor against grantees to set aside deed executed by decedent on theory that grantees took advantage of their alleged confidential relationship with aged, infirm, decedent to gain unlawful benefits, evidence was sufficient to support finding that decedent instructed grantees not to notify his sister of decedent's illness and that decedent requested his attending physician not to take him to a hospital and that such attending physician acquiesced in decedent's request.

5. Deeds ⚷211(4)

In action by executor against grantees to set aside deed executed by decedent on theory that grantees allegedly took advantage of alleged confidential relationship to gain unlawful benefits at expense of aged and infirm decedent, evidence was sufficient to support finding that confidential or fiduciary relations did not exist between grantees and decedent.

6. Fraud ⚷1

Fraud, undue influence and the like, are matters which necessarily depend upon the peculiar circumstances of a particular case rather than upon bare and academic rules.

7. Deeds ⚷211(3, 4)

In action by executor against grantees to set aside deed executed by decedent, evidence was sufficient to support finding that no fraud or undue influence was practiced, and that deed in question was decedent's voluntary act.

Chas. T. Rippy, Torrance, for appellant.

Donald Armstrong, Torrance, for respondents.

DORAN, Justice.

The action herein was instituted by appellant Executor of the Estate of William Joseph Hayman, Deceased, to set aside a certain deed to real estate executed by the decedent to the respondents Smith. It is alleged that a "friendly, confidential and/or fiduciary relationship" existed between respondents and decedent; that decedent, aged 81, was mentally and physically feeble, and that the respondents "took advantage of their confidential relationship to gain unlawful benefits at the expense of the decedent".

The trial court found in favor of defendant-respondents and gave judgment accordingly. It was specifically found that from 1941 to the time of decedent's death on November 11, 1949, Mr. and Mrs. Smith had been tenants of the decedent, "occupying an apartment on the rear of the real property * * *; that decedent occupied an apartment on the front of said real property from some time in 1947 to the time of his death". The court further found that the decedent was not mentally incompetent, and that the deed was executed "voluntarily and with a clear understanding of the material facts"; that while the property conveyed was "reasonably worth more than $8000.00 * * * the consideration for decedent's executing said deed was said $8000.00 and affection that decedent had towards defendants for their kindness and helpfulness to him".

[1] It is contended in appellant's brief that the evidence does not support the above findings and that the decision in respondents' favor is contrary to law. Under the well established rules of appellate practice, the power of a reviewing court, where sufficiency of evidence is attacked, begins and ends with the inquiry whether there is any substantial evidence in support of the findings and judgment.

In reference to the alleged confidential relationship the record discloses merely an arrangement under which the repondents collected rent on three of Hayman's apartments; that Smith cared for the lawn for which no compensation was paid because of respondents' low rent; that respondents took care of Mr. Hayman during the last illness; that there was some companionship between the parties and various acts of kindness on respondents' part. Respondents were not related to the decedent.

The deed in question was executed by the decedent on the night of November 3, 1949, eight days prior to Mr. Hayman's death. The record discloses that James M. Hall, the attorney who drafted the deed, was called on the telephone about 9:00 P.M. on that date by the respondent Kathleen Smith who stated that Mr. Hayman wished to see an attorney that night. Upon the attorney's arrival at the home, inquiry was made as to what was involved and Mrs. Smith stated, according to the attorney's testimony, "that I would have to talk to Mr. Hayman and that he was in the back bedroom. So she took me in the back bedroom". Mr. Hayman then stated a desire to transfer the property to respondents, and in response to the attorney's questions set the price at $8,000.00, payable $100.00 per month, with 5% interest. The attorney then drew the deed in longhand, together with a promissory note, and the papers were executed.

Attorney Hall testified that both documents were read to Mr. Hayman and that in the attorney's opinion the decedent was competent to execute the transfer. "I talked with him, oh, maybe for four or five minutes and asked him questions relating to the transfer, and his answers were clear and I felt he comprehended the transaction". It was also "Mr. Hayman's wish that the note be supplemented by a trust deed. I was not in a position to draw that up that evening. And the substance of the conversation was that formal papers would be drafted up and recorded". These formal documents were executed on the following day.

The notary public, Ruth Woodcock, corroborated the attorney's testimony as to the transaction, and stated that after reading the grant deed to the decedent, "Mr. Hayman sat in bed and read the deed to himself very slowly", and made no objections thereto. The notary "was afraid he was going to drop the pen upon the bed clothes".

In regard to Mr. Hayman's condition at the time of the conveyance, it appears that the decedent was seriously ill, and that, as one doctor expressed it, "it was a terminal case". Oxygen had been used but at the time of the transaction here in question, Mr. Hayman was not wearing an oxygen mask.

Dr. Stetson, who attended Hayman the night following the execution of the deed, testified that the decedent was then competent to understand the nature and consequence of the matters then under consideration, namely whether the patient should be hospitalized. "For a man around 80 years of age, why, even though he did seem short of breath, why, he seemed to be able to answer my questions all right, and the answers he gave were sufficiently to the point and clear that I don't think that he was mentally unbalanced". It may be noted that appellant "does not contend that the decedent was insane, nor that he was so ill, physically or mentally, that he was devoid of any understanding", but argues that "decedent did not fully understand the nature and consequences of his act and that he was so ill that he was influenced by the defendants".

[2] It is argued in appellant's brief that "Friendly relations constitute confidential relations in equity"; that in such cases there exists a presumption of undue influence which shifts to the respondents the burden of proving that "the transaction was fair, free from fraud or undue influence and made by a person in full possession of his faculties". However, as pointed out by respondents, the mere fact that friendly relations exist between the parties to a transaction does not necessarily carry with it any such chain of results.

[3] In the instant case the trial court found that defendants did not stand in the relationship of attorney in fact, agent or employee, with respect to the decedent, and the record contains evidence in support of such finding. Friendly relations there certainly were between the parties, but such relations may be said to furnish a reasonable motive for decedent's actions rather than damning the transaction as fraudulent. None of the cases cited go so far as to support the appellant's position.

[4] The appellant has laid some stress on the fact that the respondents failed to notify Lily Mead, decedent's sister, of Mr.

Hayman's illness. The trial court, however, found that "said decedent instructed defendants not to notify said sister", and the record affords evidence to support such finding. The same is true in respect to appellant's complaint that Mr. Hayman was not taken to a hospital, there is evidence that "decedent requested his attending physician not to take him to a hospital and that said attending physician acquiesced in said decedent's request".

[5] Appellant's argument that "Where confidential relations are shown, decedent must have independent advice", is answered by the trial court's finding, supported by substantial evidence, that confidential or fiduciary relations, in the legal sense of the term, did not here exist. And, as said in Wilbur v. Wilbur, 197 Cal. 1, 16, 239 P. 332, 338, involving a deed from parent to child, where "The evidence * * shows, and the court found, that the deed was made freely, voluntarily, and with a full understanding of all the facts and effect of the transfer * * * it was not necessary to show that the grantor acted upon independent advice". Moreover, as noted in respondents' brief, "Hayman did have the advice of an impartial attorney, namely James M. Hall, who drew the instruments in question after consultation with Hayman and the instruments were drawn according to the instructions of Hayman".

The same may be said in reference to appellant's point that "Inadequacy of consideration (is) sufficient to set aside deed". No confidential relationship was found to exist, and the trial court found from credible evidence that while the property was reasonably worth more than $8,000.00, the real consideration for the deed was "$8,000.00 and affection that decedent had towards defendants for their kindness and helpfulness to him". A witness produced by appellants, it is true, estimated the value at $18,000.00. This witness did not take into consideration the fact that the property rented for $84.00 per month. The assessed value of the property was but $3,800.00. The trial court's findings on this and other issues, on which conflicting evidence was presented, cannot be made the basis for reversal.

[6, 7] Many of the general principles quoted by appellant are undoubtedly correct and in a proper case would doubtless be decisive. However, fraud, undue influence and the like, are matters which necessarily depend upon the peculiar circumstances of a particular case rather than upon bare and academic rules. In the present litigation the trial court, who was best able to judge of the weight and credibility of the evidence presented, came to the conclusion that no confidential relation existed, that no fraud or undue influence was practiced, and that the deed in question was decedent's voluntary act. Under the evidence as reflected in the record the findings cannot be deemed unsupported.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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106 Cal.App.2d 163

SHEWARD v. MAGIT.

MAGIT v. SHEWARD.

Civ. 18215, 18216.

District Court of Appeal, Second District, Division 3, California.

Aug. 17, 1951.

Myron Sheward sued Harry Magit to recover damages for an alleged assault and battery. Nathan Magit, by his guardian ad litem, Harry Magit, sued Myron Sheward to recover damages for an alleged assault and battery. The cases were consolidated for trial. The Superior Court, Los Angeles County, Philip N. Richards, J., rendered judgments in favor of Sheward and appeals were taken from both judgments. The District Court of Appeal, Vallée, J., held that the award of damages was reasonable and that the discretion of the trial court in making award of exemplary damages had not been abused.

Judgments affirmed.

1. Appeal and error ⚷1010(1)

Trial court's findings, supported by substantial evidence, may not be rejected and contrary findings substituted by appellate court merely because there was evidence which would have supported contrary findings.

2. Assault and battery ⚷14

Father, who went to assistance of his eight and a half year old son who had fractured arm and was being assaulted by older boy, and father used no more force than was necessary to prevent further assault, was acting within his legal rights. Civ.Code, § 50.

3. Appeal and error ⚷1013

Reviewing court may not interfere with award of damages unless amount is so outrageously excessive as to suggest, at first blush, passion or prejudice.

4. Assault and battery ⚷40

Award of compensatory damages, $2,500 for general damages, $500 for loss of earnings, and $525 for medical expenses, to individual, who suffered three fractures in side of face and severe pain for several weeks from willful and malicious assault and battery, was reasonable.

5. Damages ⚷208(8)

Generally, granting or withholding of exemplary damages is wholly within discretion of trier of fact. Civ.Code, § 3294.

6. Damages ⚷208(8)

Discretion of trier of fact in awarding exemplary damages is limited by requirement that exemplary damages should bear reasonable relation to actual damages. Civ. Code, § 3294.

7. Damages ⚷94

There is no fixed ratio by which to determine proportion between exemplary and compensatory damages.

8. Assault and battery ⚷40

Where party was awarded compensatory damages of $3,525 for damages suffered from willful and malicious assault and battery, award of $1,000 exemplary damages had reasonable relation to award of compensatory damages and there was no abuse of discretion in making award. Civ. Code, § 3294.

Feinfeld & Feinfeld and J. L. Feinfeld, all of Los Angeles, for appellants.

Chase, Rotchford, Downen & Drukker and Henry A. Schultz, all of Los Angeles, for respondent.

VALLÉE, Justice.

These are appeals from judgments in two actions. They were consolidated for trial below, tried by the court without a jury, are submitted here on one set of briefs, and will be determined in one opinion.

In 18215 Myron Sheward sued Harry Magit to recover damages for an alleged assault and battery. Judgment was rendered in his favor for $3,525 compensatory, and $1,000 exemplary, damages. Harry Magit appealed.

In 18216 Nathan Magit, son of Harry Magit, sued Myron Sheward to recover damages for an alleged assault and battery. Judgment was rendered in favor of Sheward. Nathan Magit appealed.

Viewed in the light most favorable to respondent, the facts are these.

Sheward and his family, including his son Terry, eight and a half years old, lived at 1017 North Croft Avenue, Los Angeles. Harry Magit and his family, including his sons Nathan, eleven years old, and Michael, lived diagonally across the street at 1000 North Croft Avenue. The incidents to be related occurred about 7:00 p. m. on July 21, 1948, on the premises of Sheward. Terry, Nathan, Michael, and other boys were playing a game called "King of the Mountain" on the front lawn. Terry had a fractured arm at the time. The game was very rough; the children pushed and tackled each other. Sheward was working on his car at the curb in front of the house. Michael began crying, which attracted Sheward's attention. He saw Nathan strike Terry on the upper arm and shoulder, knocking him down in some bushes away from where the rest of the boys were playing. He told the boys to stop the game. He walked over to Nathan and Terry and said to them, "All right. Let's break this up. That is enough. This is it." He pushed the boys aside by putting "both hands out with the palms of the hands upward and pushed them aside." At the time Nathan was balanced on one knee but he did not fall to the ground. He went home.

When Nathan arrived home he was met by his father Harry Magit. He told his father that he had been hit by a man in a green sweater. Harry Magit immediately ran across the street. He was mad. He went up to Sheward, mumbled something, and struck him several times with his (Harry Magit's) fist on the right cheek bone, causing him great pain in his eye. At the time he was struck, Sheward's arms were at his sides and his hands were open. He sustained three fractures in the right side of his face, which were repaired by open reduction. The lower eyelid was black and blue. He wore a bandage on his face and head for some time, and suffered severe pain for several weeks. As a result of his injuries Sheward lost about $500 in earnings. His medical expenses were $525.

[1] Appellants first claim that the findings are not supported by the evidence. The claim is untenable. The cause is argued to us as it should have been, and no doubt was, argued to the trial judge. We are impelled to repeat what we said in Guardianship of Walsh, 100 Cal.App.2d 194, 199, 223 P.2d 322, 326: "We may not reject the findings of the trial court and substitute contrary findings. There is evidence that would have supported contrary findings. That the trier of fact rejected that evidence does not impeach the soundness of his conclusions. We do not have the opportunity of seeing and hearing the parties and the witnesses or of applying any of the tests by which the propriety of * * * [deciding the facts one way or the other] may be determined. Appellant 'has failed to establish any greater grievance here than she might in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the opposite party. Such a choice between two permissible views of the weight of the evidence is not error.' Riesenberg v. Riesenberg, 97 Cal.App.2d 714, 716, 218 P.2d 577."

[2] The assault and battery by Harry Magit was without provocation and was wilful. Separating the boys with his hand did not necessarily constitute an assault or battery on the part of Sheward. A father who goes to the assistance of his eight and a half year old son who has a fractured arm and is being assaulted by an older boy, and who uses no more force than is necessary to prevent further assault, is acting within his legal rights. Civ.Code, § 50; Rest., Torts, 162, § 76. See Ward v. De Martini, 108 Cal.App. 745, 292 P. 192; Martin v. Costa, 140 Cal.App. 494, 499, 35 P.2d 362.

Appellants argue that the findings and judgment "were not based on the evidence alone, but appear to be founded on passion and prejudice." Passion or prejudice is not a necessary consequence of disbelief of the testimony of a witness or of an adverse ruling or decision. Examination of the record discloses that the learned trial judge was singularly courteous, temperate, attentive, patient, and impartial. At no time did he exhibit the slightest passion or prejudice.

[3-8] It is next claimed that the awards of compensatory and exemplary damages were excessive. Two thousand five hundred dollars was awarded for general damages, $500 for loss of earnings, $525 for medical expenses, and $1000 exemplary damages. A reviewing court may not interfere with an award of damages unless the amount is so outrageously excessive as to suggest, at first blush, passion or prejudice. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 785, 117 P.2d 850. No such showing is made here. The award of compensatory damages appears to be reasonable. The court found that the assault and battery by Harry Magit on Sheward was wilful and malicious. The evidence supports the finding. Morgan v. French, 70 Cal.App.2d 785, 790, 161 P.2d 800. In an action for breach of an obligation not arising from contract when the defendant has been guilty of oppression, or malice, express or implied, the

"plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294. As a rule, the granting or withholding of exemplary damages is wholly within the discretion of the trier of fact. 8 Cal.Jur. 866, § 109. Its discretion is limited by the rule that exemplary damages should bear a reasonable relation to the actual damages. Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713. However there is no fixed ratio by which to determine the proportion between the two classes of damages. Finney v. Lockhart, 35 Cal.2d 161, 164, 217 P.2d 19. In the present case it is apparent that the relation is reasonable and that there was no abuse of discretion in making the award.

The appeals are wholly without merit.

The judgment in each action is affirmed.

SHINN, P. J., and WOOD, J., concur.

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106 Cal.App.2d 112

LEATHERBURY v. FAVEL et al.

Civ. 18233.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1951.

Action by Edward E. Leatherbury against Percy Favel and Marcia Favel for injuries sustained when defendants' pick-up in which plaintiff was riding, rounded corner at high speed and ran into a telephone pole. The Superior Court, Los Angeles County, Edward R. Brand, J., rendered judgment for plaintiff, and the defendants appealed. The District Court of Appeals, Drapeau, J., held that evidence was sufficient to support findings.

Judgment affirmed.

1. Automobiles 🔑181(1)

Where defendant driving a pick-up truck in opposite direction ran into plaintiff's automobile and did not stop and plaintiff got out of his automobile and into another one, chased defendant, apprehended him, and went to defendant's pick-up to get his license number, and while standing with his foot on running board defendant gunned truck, and plaintiff to save himself further injury grabbed side of cab and swung himself into rear of truck, after which defendant failed to make a corner at high speed and ran into a telephone pole, and plaintiff was thrown out of the truck and seriously injured, in subsequent action for injuries, statute dealing with liability for personal injury to or death of guest was inapplicable. Vehicle Code, § 403.

2. Automobiles 🔑244(20)

In action for injuries sustained when plaintiff was forced to leap into rear of pick-up truck to save himself from further injury when defendant gunned pick-up truck and started it with a jerk, evidence was sufficient to support judgment against driver and co-owner of truck. Vehicle Code, § 402(a).

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Spray, Gould & Bowyers, Los Angeles, for appellants.

Nat C. Recht, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff was driving his automobile west on Van Owen Boulevard in the San Fernando Valley. He was on his own right-hand side of the street, as far over as he could get, against a dirt embankment thrown up by a ditch digger.

Defendant was driving a pick-up truck in the other direction, drifting from side to side of the street. Defendant ran into the side of plaintiff's car, but he didn't stop; he just kept on going.

Plaintiff got out of his car and into another one going east on Van Owen. After chasing defendant for a mile or so they caught him, and headed him into the curb. The driver of the pursuing car left to call the police; plaintiff went to defendant's pick-up to get his license number.

The door of the cab on the pick-up was open. Plaintiff put his foot on the attenuated running board, or door sill, of the truck. Plaintiff had a pad of paper on his knee and a pencil in his right hand.

Then, without warning, defendant gunned his truck and started it with a jerk. The open door struck plaintiff. To save himself further injury he grabbed the side of the cab and swung himself into the rear of the truck.

Plaintiff beat on the top of the cab to stop defendant, but he only went faster. Without stopping for a boulevard sign, defendant rounded a corner at high speed and ran full tilt into a telephone pole. Plaintiff was thrown out of the truck, was seriously injured, and was in Birmingham Veteran's Hospital for two months.

The arresting officer tested defendant for sobriety, and testified that in his opinion defendant was under the influence of liquor. A witness who saw defendant's driving, and observed him after the accident testified to the same opinion. Defendant admitted he had been drinking.

Defendant appeals from the judgment rendered against him. He argues that plaintiff comes within the category "nor any other person" in Vehicle Code Section 403, and, therefore, as a guest in the pick-up may not recover; also that the judgment against the co-owner of the truck is without support in the record.

[1, 2] In the circumstances of this case section 403 of the Vehicle Code has no application. Kastel v. Stieber, 215 Cal. 37, 8 P.2d 474.

Section 402(a) of the Vehicle Code fixes the liability of the co-owner.

The evidence supports the findings, and the findings support the judgment in every respect.

The judgment is affirmed.

WHITE, P. J., concurs.

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106 Cal.App.2d 61

MURPHY v. LAKE COUNTY et al.

Civ. 7911.

District Court of Appeal, Third District,
California.
Aug. 14, 1951.

Action by J. R. Murphy against County of Lake and others for damage to truck which plunged over bank of narrow county road while being driven with right wheels on wet shoulder of road in order to meet another automobile. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment on a verdict in favor of plaintiff and named defendant appealed. The District Court of Appeal, Peek, J., held that implied finding that accident resulted from a dangerous or defective condition of the road of which county had notice was supported by substantial evidence.

Judgment affirmed.

1. Evidence 🔑141

While testimony that other accidents have occurred at the same place is some evidence that the condition there existing is dangerous, evidence of accidents occurring at other points on the same road is immaterial and inadmissible, unless it is shown that they were caused by the same condition common to the entire road.

2. Appeal and error 🔑1051(1)

Error in admitting evidence is harmless if the facts shown thereby are amply demonstrated by other evidence.

3. Negligence 🔑125

Evidence of the absence of previous accidents is inadmissible to show that no dangerous condition existed.

4. Automobiles 🔑305(6)

In action against county for damage to truck which plunged over bank of a county road due to alleged negligence of county in maintenance of road in a dangerous and defective condition, testimony that several months before accident witness had driven a ten ton grader without mishap on shoulder of the particular portion of road at which accident occurred was inadmissible. Government Code, § 53051.

4. Evidence ⚷471(19)

In action against county for damage to truck which plunged over bank of a county road due to alleged negligence of county in maintenance of road in a dangerous and defective condition, testimony as to what tracks on shoulder of road showed constituted the opinion of witness and hence was inadmissible. Government Code, § 53051.

6. Appeal and error ⚷996

To establish defense of contributory negligence as against verdict of a jury, the evidence must be such that appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of plaintiff proximately contributing to his own injury.

7. Appeal and error ⚷930(1)

On appeal from judgment entered on a verdict in favor of plaintiff, the evidence must be viewed in the light most favorable to plaintiff.

8. Automobiles ⚷306(8)

In action against county for damage to truck which plunged over bank of a county road while meeting another automobile, evidence was sufficient to support finding that truck driver was not contributorily negligent in failing to stop when automobile approached from opposite direction or in driving along wet shoulder of road for a distance of 45 feet without turning back onto the pavement. Government Code, § 53051.

9. Trial ⚷344

Affidavits and oral evidence of either concurring or dissenting jurors are inadmissible to contradict, impeach or defeat their verdict.

10. New trial ⚷145

Hearsay statements of jurors contained in affidavits of counsel are inadmissible to contradict, impeach or defeat jury's verdict.

11. New trial ⚷143(2), 145

New trial on ground of misconduct of juror was properly denied, where the only evidence in support of such ground of motion for new trial consisted of affidavits of jurors and affidavits by counsel as to information concerning alleged misconduct given him by juror charged with such misconduct.

12. Counties ⚷143

The liability of a county for injuries resulting from a dangerous or defective condition of public property is statutory. Government Code, § 53051.

13. Municipal corporations ⚷847

The notice of dangerous or defective condition of public property required under statute to render local agency liable for injuries resulting therefrom may be either actual or constructive and the existence of the defect over a long period of time will support a finding of constructive notice. Government Code, § 53051.

14. Municipal corporations ⚷847

Where plan of improvement of public property when carried out creates an inherently dangerous condition, no further proof of notice is required to render local agency liable for injuries resulting from such condition. Government Code, § 53051.

15. Counties ⚷224

Whether a dangerous condition exists with respect to public property and whether county has had actual or constructive notice thereof so as to be liable under statute for injuries resulting from such condition are questions of fact for jury. Government Code, § 53051.

16. Appeal and error ⚷1001(1)

Jury's verdict on questions of fact will not be disturbed on appeal if it is supported by substantial evidence.

17. Automobiles ⚷306(5)

In action against county for damage to truck which plunged over bank of narrow mountain road while being driven with right wheels on wet shoulder of road in order to meet an automobile, implied finding that accident resulted from a dangerous or defective condition of road of which county had notice was supported by substantial evidence. Government Code, § 53051.

Fred S. Crump, Dist. Atty., Lake County, Lakeport, for appellants.

H. G. Crawford, Lakeport, for respondent.

PEEK, Justice.

The County of Lake has appealed from a judgment in favor of plaintiff in an action for damages sustained by plaintiff as a result of the wrecking of his truck when it plunged over the bank of a county road in Lake county due to the alleged negligence of defendant and appellant County of Lake in the maintenance of the same in a dangerous and defective condition.

"Soda Bay Road", as it is commonly known, is a narrow, winding mountain road, the paved portion being twelve feet wide with a three foot shoulder on the side, which we will refer to as the right side, and an eighteen inch shoulder on the left or bank side. On the left side between the shoulder and the almost perpendicular bank was a shallow gutter or ditch. The right shoulder ended in an abrupt drop of about five hundred feet. As respondent's employee and driver of the truck, one Ayer, rounded a curve he observed the car operated by defendant Frances, which was approaching from the opposite direction. At that time the two vehicles were approximately fifty to seventy-five feet apart and both were traveling approximately fifteen miles per hour. Plaintiff's truck was seven feet five inches in width at its widest section and the Frances car was the standard width of four feet eight and one-half inches. In passing the Frances car the truck traveled a distance of about forty feet with the right wheels about one foot from the extreme edge of the right shoulder. While the paved portion of the road was dry, the shoulder was wet, and the wheels made deep tracks going to a depth of at least four inches for approximately fifteen feet. The right wheels of the truck went off the shoulder turning the truck over and plunging it approximately four hundred feet into the canyon below.

The evidence as to the precise manner in which the truck went off the road was sharply in conflict. That is, there was considerable testimony that the rear dual wheels of the truck were the first to go over when the shoulder caved in, as well as testimony that the right front wheel went off the shoulder first.

Although it is not questioned that the shoulder on the right side of the road was constructed of rocks and dirt with the surface thereof being dirt, the evidence was conflicting as to whether the rocks were loose with dirt on top or the rocks were firmly imbedded in the dirt. However, there was no retaining wall or other reenforcement, nor was there a fence, guard rail or other protection along the road at this point to prevent vehicles leaving the road. Neither were there signs to warn of any dangerous condition of the shoulder or otherwise until after the accident.

At the trial two witnesses testified that they had, within a year prior to the accident, discussed generally the dangerous condition of the road with county supervisor Maulden requesting that something be done about it, and that the supervisor replied that there were no funds available for such purpose. There was also evidence that at a meeting of the school board, which was attended by Maulden, the unsafe condition of the road was discussed, and the suggestion was made that the school bus should be taken off that road because of the danger. That in fact because of such condition the bus was discontinued for a short period and the children stopped from going to school because of the unsafe condition. The county auditor testified that during the period prior to the accident there was a fund of approximately $40,000.00 in the county treasury allocated to road improvement, of which $1,700.00 was specially allocated to the road district on which was situated the "Soda Bay Road", the remainder being in general and special road improvement funds. At the conclusion of the trial the jury returned a verdict in favor of plaintiff and against both defendants. The County of Lake has appealed, charging a number of errors, all of which are essentially attacks upon the sufficiency of the evidence, and all of which appear to be without merit.

[1, 2] Appellant first contends that it was error to admit testimony by a witness

concerning two other accidents which had previously occurred on the road at points two and three miles distant from the place where the accident here involved occurred. While it is true that testimony that other accidents have occurred at the same place is some evidence that the condition there existing is dangerous, it is also true that evidence of accidents occurring at other points on the same road where it is not shown that they were caused by the same condition common to the entire road, is immaterial and inadmissible. But even assuming that such contention is valid as an abstract principle it is completely answered by the further rule that an error in the admission of evidence is harmless if the facts shown thereby are amply demonstrated by other evidence. Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal.2d 121, 34 P.2d 139.

[3, 4] Appellant next contends that certain testimony was erroneously excluded in part and stricken in part. The testimony in question was given by a witness who stated that several months prior to the date of the accident he had driven a ten ton grader without mishap on the shoulder of the particular portion of the road. It is the rule that evidence of the absence of previous accidents to show that no dangerous condition existed is inadmissible. Thompson v. B. F. Goodrich Co., 48 Cal.App.2d 723, 120 P.2d 693, and hence the action of the court in excluding the same was proper.

[5] Appellant next charged that the trial court erred in refusing to permit a witness to testify as to what the tracks on the shoulder of the road showed. The question called for the opinion of the witness, and hence was inadmissible and properly excluded. Shafter Estate Co. v. Alvord, 2 Cal.App. 602, 84 P. 279.

[6] Appellant next asserts that Ayer was guilty of contributory negligence as a matter of law in failing to put on his brakes or stop when the Frances car approached, and in driving along the wet shoulder for a distance of forty-five feet without turning back onto the pavement. The applicable rule is thus stated in Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: "To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury."

[7, 8] In the present case the evidence was in conflict as to Ayer's speed when the two vehicles passed, and as to whether Ayer had any opportunity to turn back to the pavement before the shoulder collapsed. It cannot be said that the evidence viewed, as we must, in the light most favorable to plaintiff does not support a finding of no contributory negligence.

As an additional ground for reversal appellant alleges that one of the jurors was guilty of misconduct in bringing into the jury room a newspaper containing an article to the effect that the County of Lake and Frances had made a settlement with Ayer in a suit brought by Ayer for injuries sustained in the same accident. The only evidence in support of this contention consists of affidavits by several of the jurors and an affidavit by counsel for appellant stating that he was so informed by the juror who brought the newspaper into the jury room. These affidavits were presented to the trial court on the motion for a new trial.

[9–11] The rule is well established in this state that affidavits or other oral evidence of either concurring or dissenting jurors which tend to contradict, impeach or defeat their verdict, are inadmissible. Crabtree v. Western Pacific Ry. Co., 33 Cal.App.2d 35, 37, 90 P.2d 835. Neither are hearsay statements of jurors contained in affidavits of counsel admissible for that purpose. McWilliams v. Los Angeles Transit Lines, 100 Cal.App.2d 27, 222 P.2d 953. Hence a new trial on the ground of misconduct of the jurors was properly denied.

[12] Finally appellant contends that the County of Lake cannot be held liable because it had no notice of any defects in the

road. The liability of a county for injuries resulting from a dangerous or defective condition of public property is statutory. Section 53051 of the Government Code provides as follows:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[13–17] The required notice may be either actual or constructive and the existence of the defect over a long period of time will support a finding of constructive notice. Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989. Where the plan of improvement of the public property when carried out creates an inherently dangerous condition, no further proof of notice is required. Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773; Bigelow v. City of Ontario, 37 Cal.App.2d 198, 99 P.2d 298. Whether or not a dangerous condition exists and whether or not the county has had actual or constructive notice thereof are questions of fact for the jury, and their verdict will not be disturbed on appeal if it is supported by substantial evidence. Bigelow v. City of Ontario, supra; Rowland v. City of Pomona, 82 Cal.App.2d 622, 186 P.2d 447. In the present case, in view of the narrowness of the road, there can be no question but that the unpaved shoulder necessarily would have to be traveled on by larger vehicles when passing other cars. There was evidence that the generally dangerous condition of the "Soda Bay Road" was known in the locality and had been brought to the attention of the supervisors of the county at least a year prior to the accident. Furthermore, there was evidence that the type of construction of the shoulder created an inherently dangerous condition. Upon a thorough examination of the record we conclude that there was substantial evidence to support the implied finding of the jury that the accident resulted from a dangerous or defective condition of the road of which the County of Lake had notice.

Accordingly the judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

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106 Cal.App.2d 51

PEOPLE v. CHAPMAN.

Cr. 2728.

District Court of Appeal, First District, Division 1, California.

Aug. 14, 1951.

Petition by Milton Chapman for a writ of error coram nobis to set aside his conviction, in 1932, of burglary, on ground that his plea of guilty to that offense was induced by threats and coercion of certain police officers. The Superior Court, County of Santa Clara, William F. James, J., denied the petition and petitioner appealed. The District Court of Appeal, Peters, P. J., held that the application having been filed some 18 years after petitioner pleaded guilty, and some 14 years after he admitted that he knew of his claimed legal right to redress and not until after two police officers, charged by petitioner with beating him, had died and until after trial judge and court reporter had also died, application was filed too late and that trial court was justified in disbelieving the uncorroborated affidavits of the petitioner as to the charges made therein.

Order affirmed.

1. Criminal law 🔑997

Where petitioner seeking writ of error coram nobis contended in affidavit that he was not properly represented by his attorney at the time of his conviction of offense which he sought to set aside and attorney's affidavit averred that he informed the petitioner of all of his constitutional rights, including right to a jury trial, and record recited that petitioner was informed of his rights, and conflict was resolved against petitioner by trial court, conflict in affidavits precluded District Court of Appeal from reweighing the evidence.

2. Criminal law ⚷997

Fact that after petitioner's arrest on charge of burglary in 1932 he was not brought before magistrate for one week was a violation of the law, but error could not be corrected on petition for writ of error coram nobis but should have been raised on motion for new trial or on an appeal.

3. Constitutional law ⚷257
Criminal law ⚷997

To compel a plea of guilty by threats, fraud or coercion is denial of due process, and, in a proper case, if found to exist, would warrant issuance of writ of error coram nobis but to be entitled to writ, application must be filed with due diligence.

4. Criminal law ⚷997

Where petitioner's application for writ of error coram nobis to set aside his conviction, in 1932, of burglary, on ground that his plea of guilty to that offense was induced by threats and coercion of certain police officers, was filed some 18 years after petitioner pleaded guilty, and some 14 years after he admitted that he knew of his claimed legal right to redress, and application was not filed until after two police officers, charged by petitioner with beating him, had died, and until after trial judge and court reporter had also died, application was filed too late.

5. Criminal law ⚷997

One who applies for a writ of coram nobis must show that facts on which he relies were not known to him and could not in exercise of due diligence have been discovered by him at any time substantially earlier than at time of his motion for writ, otherwise he has stated no ground for relief.

6. Criminal law ⚷997

Where petitioner's explanation for his tardiness in applying for writ of error coram nobis was that although he had known of his legal rights to redress since 1936, he did not then seek such redress because by that date he had fully served his prison term and prior conviction only became important to him on his subsequent convictions in 1948, such explanation for lack of diligence was legally insufficient and petitioner was entitled to no relief.

7. Criminal law ⚷997

On petition for writ of error coram nobis, credibility of charges made by petitioner in his uncorroborated affidavits was for trial court and trial court was not required to believe uncontradicted evidence, at least where there was some reasonable ground for disbelieving it.

8. Criminal law ⚷997

Where petitioner sought a writ of error coram nobis to set aside 1932 burglary conviction on ground that his plea of guilty to 1932 offense of burglary was induced by threats and coercion of certain police officers but petitioner, a three-time convicted felon, first sought relief some 18 years after events were alleged to have occurred and 14 years after he admittedly knew of his right to redress and after persons charged with improper acts were dead, as were trial judge and court reporter, trial court was justified in disbelieving petitioner's uncorroborated affidavits.

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Brent M. Abel, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

By this petition for a writ of error *coram nobis*, Chapman seeks to set aside his conviction, in 1932, of burglary, on the main ground that his plea of guilty to that offense was induced by the threats and coercion of certain named police officers. The petition was denied by the trial court and Chapman appeals.

Appellant was arrested in Santa Clara County on a charge of burglary on January 20, 1932. He was not arraigned until January 27, 1932, at which time he was, according to the record, "informed of his rights." The preliminary examination was had on February 1, 1932, at which time he was held to answer. He was then represented by attorney E. R. Girvin. On February 5, 1932, appellant, still represented by Girvin, was arraigned, reading of the information was waived, and a copy was presented to appellant. He, thereupon, pleaded guilty to the offense charged and applied for probation. At the probation hearing (February 11, 1932) Girvin again represented appellant, two witnesses for appellant were heard, and the degree of the crime was fixed at second degree. Sentence was suspended for two years, and appellant was released on probation on condition that he serve four months in the county jail. On October 7, 1932, a hearing was held on a charge that appellant had violated the terms of his probation. Girvin again represented appellant. After a hearing, the court found that appellant had violated the terms of his probation, and probation was revoked. Appellant then stated that he had no legal cause to show why judgment should not be pronounced. In one place in the record it shows that, in open court, appellant was asked why he committed the crime, to which he responded: "I have no idea why I did these things. What I know is that I never benefited; it was more from foolishness." Thus, in addition to his plea of guilty, he then admitted, in open court, that he had committed the offense charged. At the conclusion of the hearing, he was ordered imprisoned in the state prison for second degree burglary. He served his term, and was discharged on June 11, 1936.

In 1948 appellant was convicted of robbery and assault and of two charges of first degree burglary, and is now serving two consecutive terms on these convictions in Folsom. By reason of the 1932 conviction, his two present terms have been increased an additional five years each.

On September 14, 1950, appellant filed this petition for a writ of error *coram nobis*. The accompanying affidavit avers that when appellant was arrested in 1932 he was but 20 years of age, uneducated and unversed in criminal procedure; that he was, in fact, innocent of the charged offense in that the stolen property found in his possession had been purchased by him; that after his arrest he was beaten by Black, the chief of police, and by police officer Guerin; that because of these beatings and other forms of duress, including a threat to shoot him, he pleaded guilty. He also avers that, although he was represented by Girvin in the 1932 proceedings, Girvin was then, in fact, a narcotic addict and did not advise him of his constitutional rights.

The record shows that Black and Guerin are now dead, as are the trial judge and court reporter. Girvin filed an affidavit in which he denies that he ever was a narcotic addict, and in which he avers that he acted as appellant's attorney without compensation, and informed appellant of all of his constitutional rights, including his right to a jury trial.

In a supplemental affidavit appellant admits that he first became aware of his legal right to vacate the 1932 judgment of conviction after he had served his sentence on that charge, which would mean that he has had such knowledge since 1936. He avers that he did not then raise the point because, having served his full sentence, that conviction was not detrimental to him, and did not become detrimental to him until after his subsequent conviction, at which time the prior conviction aggravated the sentence on the subsequent convictions.

[1] In the trial court some point was made of the charges contained in appellant's affidavit that Girvin did not properly represent him. Obviously, Girvin's affidavit created a conflict with those of appellant. That conflict was resolved against appellant by the trial court. Not only does Girvin aver that he informed appellant of all of his constitutional rights, including the right to a jury trial, but the record recites that appellant was informed of his rights. This conflict in the affidavits precludes this court from reweighing the evidence. See cases collected 1 Cal.Jur. p. 680, § 23.

[2] Appellant makes some point of the fact that the record shows that after his arrest he was not brought before a magistrate for one week which, of course, was a violation of the law. This, however, was an error of law. It should have been raised on a motion for a new trial or on an appeal, and cannot be corrected on a petition for a writ of error *coram nobis*. People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Coyle, 88 Cal.App.2d 967, 200 P.2d 546.

The only other point necessary to discuss is whether appellant should now be permitted to withdraw his guilty plea to the 1932 charge because of the averments in his affidavits, uncontradicted because the officers are dead, that such plea was induced by threats and duress.

[3] It needs no citation of authority to support the proposition that to compel a plea of guilty by threats, fraud or coercion is a denial of due process, and, in a proper case, if found to exist, would warrant the issuance of the writ of error *coram nobis*. But to be entitled to the writ, the application must be filed with due diligence. The following are a few typical cases where it was held that the application was not filed with due diligence:—People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375, where the period involved was 8 years; People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354, where the period was 6 years and 8 months; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27, where the period was 6½ years; People v. Vernon, 9 Cal.App.2d 138, 49 P.2d 326, where the period was 4½ years; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751, where the period was 5 years.

[4] In the present case the application has been filed some 18 years after appellant pleaded guilty, and some 14 years after he admits that he knew of his claimed legal right to redress. The application was not filed until after the two police officers, charged by appellant with beating him, had died, and until after the trial judge and court reporter had also died. Under such circumstances, the application was filed much too late.

The factual and legal situation is somewhat analogous to that involved in People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375, where, as already pointed out, the writ was filed eight years after the degree of the crime had been fixed. The trial judge and prosecuting attorney had died during this period. The record, as in the instant case, showed that defendant was represented by counsel at all stages of the proceeding. When the degree of the crime was fixed (defendant had first pleaded not guilty to murder, then changed his plea to guilty) as first degree murder, with life imprisonment, he was asked if he had any legal cause why judgment should not be pronounced, and replied that he had none. The record in the instant case shows the same question and answer. Eight years later he filed the writ requesting that he be permitted to withdraw his plea of guilty to murder and substitute a plea of guilty to manslaughter. The grounds urged were that he thought he was pleading guilty to second degree murder, and had been so advised by his attorneys, that the evidence showed, at most, manslaughter, and that his lawyers failed to tell him that he had a right to testify on his own behalf. In affirming a denial of the writ this court stated, 88 Cal.App.2d at page 773, 199 P.2d at page 379: "An application for a writ of error *coram nobis* should be made within a reasonable time. Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands."

[5] Of course, if appellant had not known of the facts upon which he relies for relief, mere lapse of time might not bar relief, if, in the exercise of due diligence, he could or should not have discovered the facts sooner. But here he knew the facts for 18 years, and even knew of his right to legal redress for 14 years. In such circumstances, the following quotation from People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330, 336, is applicable: "One who applies for a writ of *coram nobis* upon a ground such as the one here presented must show that the facts upon which he relies were not known

to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." See, also, People v. Coyle, 88 Cal.App.2d 967, 975, 200 P.2d 546.

[6] Appellant tries to explain his tardiness by pointing out that, although he has known of his legal right to redress since 1936, he did not then seek such redress because by that date he had fully served his term and the prior conviction only became important to him upon his subsequent convictions in 1948. Such explanation is legally insufficient. This court is duty-bound to protect the rights of the people as well as those of appellant. When a person claims a right to legal redress and admits that he has known of his claimed right for at least 14 years, but does nothing to enforce his rights during that period, and waits until everyone who can contradict him is dead, it must be held that he has not proceeded with due diligence, and is entitled to no relief.

[7, 8] Even if laches were not present, on the merits appellant is entitled to no relief. The only evidence of the claimed threats and duress is contained in the uncorroborated affidavits of the appellant. The trial court did not believe the charges made in these affidavits. This question of credibility was for the trial court. Berg v. Journeymen's Plumbers & Gas Fitters Union, 5 Cal.App.2d 582, 42 P.2d 1091. It is true that the affidavits were uncontradicted, but they could not be contradicted because the two police officers charged with the improper acts were dead. It is not the law that the trial court is required to believe uncontradicted evidence, at least where there is some reasonable grounds for disbelieving it. Here a three-times convicted felon, some 18 years after the events are alleged to have occurred, and after the persons charged with the improper acts are dead, asks us to hold that a trial court was not justified in disbelieving his uncorroborated charges. The above facts warranted the trial court in finding that the averments made in the affidavit were not true. Olson v. Olson, 4 Cal.2d 434, 49 P.2d 827.

The order appealed from is affirmed

BRAY, and FRED B. WOOD, JJ., concur.

106 Cal.App.2d 105

PEOPLE v. HAYDON.

Cr. 2745.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1951.

Hearing Denied Sept. 13, 1951.

Harold G. Haydon was convicted in Superior Court of the State of California in and for the County of Santa Clara, William F. James, J., of a violation of Penal Code section 72, in that with intent to defraud he wilfully presented for payment a false and fraudulent claim for unemployment insurance and received payment thereon, and he appealed. The District Court of Appeal, Bray, J., held that provision of the Unemployment Insurance Act making it a misdemeanor to wilfully make a false statement or representation or knowingly fail to disclose a material fact to obtain a benefit or payment, repealed pro tanto the penal statute providing that every person who with intent to defraud presents for allowance or payment to any state board any false or fraudulent claims is guilty of felony.

Judgment reversed.

1. Social security and public welfare 🔑751

Unemployment Insurance Act provides specifically the penalties for all false claims made in relation to unemployment relief. Gen.Laws, Act 8780d, §§ 100–102.

2. Statutes 🔑223.4

Generally, absent extraordinary results of such construction a specific later statute, rather than an earlier general one, applies to a given transaction described by both acts.

3. Statutes ⚷165

When a latter statute is enacted inconsistent with preceding statute and covers the entire ground of the subject matter, and where different penalties are imposed for the same offense, the lighter penalty, when imposed in the later statute, is presumed to supersede the earlier and heavier.

4. Social security and public welfare ⚷751

Provision of unemployment insurance act that to wilfully make a false statement or representation or knowingly fail to disclose a material fact to obtain a benefit or payment is a misdemeanor, repealed pro tanto the prior penal statute providing that every person who with intent to defraud presents for allowance or for payment to any state board any false or fraudulent claim is guilty of a felony. Penal Code § 72; Gen.Laws, Act 8780d, § 101.

◆

John Mark Chargin, San Jose, Irving S. Rosenblatt, Jr., and Tobriner & Lazarus, all of San Francisco, amicus curiae, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Winslow Christian, Deputy Atty. Gen., for respondent.

BRAY, Justice.

This appeal presents the question of whether section 72 of the Penal Code was repealed pro tanto by the enactment of section 101 of the Unemployment Insurance Act. Stats.1935, p. 1226, Deering's General Laws, Act 8780d.

Record.

Defendant was convicted of the crime of felony, to wit, violation of section 72 of the Penal Code, in that with intent to defraud he wilfully presented for payment a false and fraudulent claim for California unemployment insurance and received payment thereon. He does not attack the sufficiency of the evidence, but contends that the later enactment of section 101(a) of the Unemployment Insurance Act constituted a pro tanto repeal of section 72 of the Penal Code.

Is Section 72 of The Penal Code Repealed Pro Tanto?

Section 72 of the Penal Code, enacted in 1872, provides: "Every person who, with intent to defraud, presents for allowance or for payment to any state board * * * any false or fraudulent claim * * * is guilty of a felony."

Section 101 of the Unemployment Insurance Act, as amended, Stats.1943, p. 3051, provides: "It is a misdemeanor: (a) Wilfully to make a false statement or representation or knowingly fail to disclose a material fact to obtain, increase, reduce, or defeat any benefit or payment under the provisions of this act * * *."

Respondent concedes that if the two provisions are in conflict section 101(a) must prevail as it is the later and more specific provision. Such conflict is clearly shown by an examination of the two sections. Section 72 makes it a felony to (1) present a false claim (2) to a state officer or board authorized to pay the claim if genuine (3) with intent to defraud. Section 101(a) makes it a misdemeanor to (1) wilfully submit a false claim or knowingly fail to disclose a material fact affecting any payment to be made under the provisions of the act (2) to the California Employment Stabilization Commission (a board authorized to pay the claim if genuine) (3) to obtain a payment under the act. Boiled down, section 72 deals with one who makes a false claim to a state board with intent to defraud. Section 101(a) deals with one who wilfully makes a false claim to the particular state board to obtain, increase, reduce or defeat any benefit or payment under the act. Section 7(1) of the Penal Code defines "wilfully": "* * * when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage". "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission". Penal

Code, § 7(5). In comparing merely the words "with intent to defraud" with the words "knowingly" and "wilfully," there is a difference of meaning and the latter do not necessarily include the former. However, if a person wilfully or knowingly submits a claim, knowing it to be false, to the commission for the purpose of obtaining, increasing, reducing or defeating any benefit under the act, he necessarily does so to defraud. He evidences a purpose or willingness to present a false claim to affect the payment under the act and hence is presenting such claim with intent to defraud. Again, one who presents a false claim with intent to defraud is wilfully and knowingly presenting such false claim with intent to obtain, etc., a benefit or payment under the act.

[1] That the Legislature specifically was providing penalties for all false claims made in relation to unemployment relief appears from an examination of article 8 of the act, sections 100 to 102, headed "Penalties." Section 101 sets forth the offenses. In addition to the offenses set forth in subdivision (a) there are five other types of offenses which can be committed. Section 101.6 provides a catch-all. It reads: "Every person who wilfully violates any provision of this act or any rule or regulation promulgated or published by the commission in accordance with this act, is guilty of a misdemeanor." Section 102 provides that one half of all fines collected for violations of the provisions of the act shall be paid to the state treasury to the credit of the unemployment fund, and one-half to the treasurer of the jurisdiction in which the offense is prosecuted. Thus, it is apparent that the Legislature was intending to provide that all offenses in violation of the provisions of the act were to be made misdemeanors so that half of the fines therefrom would go into the unemployment fund, and the other half to the city or county where the prosecution took place. Under section 72 of the Penal Code no fines could be imposed. Penal Code, § 18. "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." Code Civ.Proc., § 1859.

Respondent urges the application of certain other principles of statutory construction, such as the requirements that the courts are reluctant to find that a statute has been repealed by implication, and that a law should not be construed as impliedly repealing a prior law unless no other reasonable construction can be applied. Having those principles in mind, still section 72 of the Penal Code has been repealed pro tanto by section 101(a). While the latter section may be broader than section 72, a person submitting a false claim with intent to defraud is included therein. Respondent argues that one making a false representation which he believes to be true would be guilty of a misdemeanor under section 101(a) but not liable under section 72. We doubt this statement. A person making a false representation which in good faith he believes to be true is not doing so wilfully or knowingly. While he is not required to know the unlawfulness of the act to come within the definition of "knowingly" or "wilfully" he certainly must know that his statement is false or untrue.

The reasoning in People v. Armstrong, 100 Cal.App.2d Supp. 852, 224 P.2d 490, 494, where the court found that a violation of section 101(a) constituted an offense necessarily included in petty theft, applies here. There the court pointed out that to constitute a violation of section 101(a) "There must be an intent to defraud, i. e., an intent to obtain a payment (property) wrongfully" and that "The false statement must be used for the purpose of perpetrating the fraud, i. e., obtaining the payment" and that these two elements are the same elements going to make up the crime of obtaining money under false pretenses.

[2, 3] Respondent contends that the situation here is analogous to that in connection with section 499b of the Penal Code and section 503 of the Vehicle Code. Section 499b provides that any person, who shall without the permission of the owner,

take any automobile for the purpose of temporarily using or operating it, is guilty of a misdemeanor. Section 503 of the Vehicle Code provides that any person who drives or takes a vehicle not his own, without the owner's consent and with intent to permanently or temporarily deprive the owner of his title to or possession of such vehicle is guilty of a felony. In People v. Neal, 40 Cal.App.2d 115, 104 P.2d 555, it was held that there is a distinction between these two sections in that under section 499b, the so-called "joyride" statute, there need be no proof of intent to deprive the owner of his title or possession either temporarily or permanently; while under section 503 such proof is necessary. A violation of section 499b occurs when a person, without the consent of the owner, takes a vehicle for the purpose of temporarily using or operating it, whether or not he intends to deprive the owner of its possession or title. People v. Zervas, 61 Cal. App.2d 381, 142 P.2d 946; People v. Bailey, 72 Cal.App.2d Supp. 880, 165 P.2d 558; People v. Gherna, 80 Cal.App.2d 519, 182 P.2d 331, follow the Neal case. But under section 101(a) of the Unemployment Insurance Act, as well as under section 72 of the Penal Code, there must be an intent to defraud, i. e., an intent to obtain etc. a benefit or payment under the act to which the person is not entitled. United States v. Gilliland, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598, cited by respondent, is not in point. One of the contentions there made was that an act of 1935, 15 U.S.C.A. § 715 et seq., with relation to "hot oil" operated to repeal pro tanto a general act of 1934 prohibiting the filing of false claims with the government. The court held that there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. In fact it held that the earlier act "has its place as a fitting complement" to the later act. 312 U.S. at page 95, 61 S.Ct. at page 523, 85 L.Ed. 598. In United States v. Moore, D.C., 95 F.Supp. 227, 228, it was pointed out that the "Hot Oil" statute considered in the Gilliland case did not condemn the "presentation of false papers" as an unlawful act nor did it provide a penalty for such conduct, while the earlier act did. In the Moore case the defendant was charged with presenting to the Wage and Hour Division of the Department of Labor certain false documents concerning wages and hours of employees. The indictment was framed in the exact language of a general criminal act. A motion to dismiss the indictment was denied on the ground that the acts alleged in the indictment were condemned by the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., and the prosecution could proceed under its provisions as "This legislation dealing specially with this conduct prevails over the general legislation found" in the general criminal statute. 95 F.Supp. at page 228. As in our case. In Bartlett v. United States, 10 Cir., 166 F.2d 920, cited by respondents, the court held that there was no repugnancy between a general statute concerning false statements and a section of the Emergency Price Control Act, 50 U.S.C.A.Appendix, § 925, which also made it an offense to make a false statement as to any matter required by the act. The court, construing both statutes, held that the general act was broader in scope and in degree of culpability than the special act and hence there was no implied repeal. While there is some comfort for respondent in the language of the Bartlett case, the situation between the two statutes there is not analogous to that in the case at bar for the reason that here it appears that the Legislature had worked out a scheme of penalties for any and all acts of fraud towards the matters covered by the act. United States v. Serpico, 2 Cir., 148 F.2d 95, cited by respondent, may be distinguished from our case by the lack of similarity between the statutes involved. There defendant was tried for possessing and passing counterfeit gasoline ration coupons under a general statute prohibiting the counterfeiting of any writing for the purpose of defrauding the United States. Defendant contended that he could be prosecuted only under the Second War Powers Act, 50 U.S.C.A.Appendix, § 633, because the coupons could only be issued under that act and that such act repealed pro tanto the general statute. In holding that there was no such repeal the court distinguished between the two acts by indicating that the general statute required an intent to defraud the United States, while the special statute only required a showing of " 'impairment of the administration of its governmental functions' " 148 F.2d at page 95. The rule of Shelton v. United States, 83 U.S.App.D.C. 32, 165 F.2d 241, at page 244, applies here: "* * * the next question is whether the defendant's false oath as to liens may be prosecuted and punished under the general perjury statute. It is clearly within the statutory definition of perjury in that statute, quoted above. But there can be no question about the general rule that, absent extraordinary results of such construction, a specific later statute, rather than an earlier general one, applies to a given transaction described by both acts, i. e., generally by the earlier act and specifically by the later." Also applicable here is the following from United States v. Windham, D.C., 264 F. 376, 377: "The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with a preceding statute and covering the entire ground of the subject-matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supersede the earlier and heavier."

[4] A comparison of the statutes involved here and a study of article 8 of the Unemployment Insurance Act and the scheme of penalties and their disposition, therein provided, shows that section 72 of the Penal Code was repealed pro tanto by section 101(a) of the Unemployment Insurance Act.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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106 Cal.App.2d 185

ROZELLE v. WATTS et al.

Civ. 18181.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

Rehearing Denied Sept. 6, 1951.

Action by Donald L. Rozelle against Cassius M. Watts and others to quiet title to realty. The defendants filed a cross complaint. The Superior Court, Los Angeles County, Elmer D. Doyle, Judge assigned, entered judgment for defendants William L. Fox and Amelia Fox, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the evidence sustained finding of an easement by necessity.

Affirmed.

1. Easements ⚿36(3)

In action by owner to quiet title to realty, evidence sustained finding that defendants owned land which they reached by crossing involved realty.

2. Easements ⚿36(3)

In action by owner to quiet title to realty, evidence sustained finding that ingress and egress over involved realty was matter of necessity. Gen.Laws, Act 8589, §§ 48, 49.

3. Pleading ⚿349

Where complaint in action to quiet title alleged defendants claimed interest in realty and answer denied allegations generally, but defendants filed cross complaint and pleaded as separate defense a claim of easement, plaintiff was not entitled to judgment on pleadings on ground that defendants in answer had admitted lack of interest.

4. Easements ⚿36(1)

It is essential that party claiming easement in land as means of ingress and egress prove ownership of dominant tract.

5. Evidence ⚿471(26)

In action by owner to quiet title to realty, defendant's answer to question whether his grantor had granted him any right in adjoining property would have called for conclusion and objection to question was properly sustained.

6. Appeal and error 🔑1048(6)
Easements 🔑36(2)

In action by owner to quiet title to realty used by defendants as means of ingress and egress, defendant's answer to question whether he owned any property in particular tract would have been admissible but sustaining objection to question was not prejudicial error, in view of fact that witness claimed easement in property based on necessity, and plaintiff cross examined defendant at length on that subject.

7. Appeal and error 🔑1048(1)
Easements 🔑36(2)

In action to quiet title to realty used by defendant as means of ingress and egress, claimant of easement should have been permitted to answer question as to payment of rent to owner of servient tract but sustaining of objection to question was not prejudicial error, in view of fact that claimed easement was based on necessity.

8. Easements 🔑15

To establish easement of necessity it is not essential to establish easement by prescription.

Donald L. Rozelle, pro per.

Randolph Karr, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiff appeals from a judgment which decreed that respondents have a right of ingress and egress over a parcel of realty.

Plaintiff brought the action to quiet title to a parcel of realty five feet wide, which we refer to for convenience as lot 1, which lies westerly of a parcel owned by respondents, which we refer to for convenience as lot 2, and between lot 2 and a public street. Respondents answered, alleging that for more than twenty years lot 1 had been continuously and openly used as a part of and in connection with lot 2, including the right, among other things, to use lot 1 "as a means of ingress and egress to" lot 2. They also filed a cross-complaint in which they alleged they are the owners of lot 1 and that plaintiff claimed some rights therein but had none. The court found that plaintiff is the owner of lot 1; respondents are the owners of lot 2; lot 2 is immediately adjacent to lot 1 and is 100 feet deep; in 1923 lots 1 and 2 were owned by the Wattses and they used lot 1 as a means of ingress to and egress from lot 2; there was no other way to reach lot 2 from the public street except by using lot 1; at all times since 1923 lot 1 has been used as a means of ingress to and egress from lot 2, and physically there was no other means of ingress and egress; the use of all of lot 1 is necessary as a means of ingress to and egress from lot 2 and "includes not only surface use but sewer, water, gas line use, public utility use and incidental use," and respondents are entitled to use it "as a means of ingress and egress and for all incidental uses thereto."

[1, 2] Plaintiff contends the evidence is insufficient to sustain the findings that respondents are the owners of lot 2 and as to necessity. Respondent William L. Fox testified that he is the owner of lot 2. This was sufficient evidence of ownership. (5 Cal.Jur. 10-Yr.Supp. [1944 Rev.] 713, § 278, and cases there cited.) A fence separates lot 2 from the lot immediately adjacent to the east, which for convenience we refer to as lot 3. Lot 3 abuts on Alameda Street. Lots 2 and 3 were at one time in common ownership. Plaintiff argues that there is no necessity for respondents' using lot 1 as a means of ingress and egress for the reason that they may remove a portion of the fence and thus have access to Alameda Street. There is no evidence that respondents own lot 3. Lots 2 and 3 were registered as one parcel under the Torrens Act. There was evidence that a deed of trust covering lots 2 and 3 was foreclosed and the lots acquired by Huntington Park Building & Loan Association at the trustee's sale; that the latter conveyed lot 2 to respondents; and that a new certificate of title was issued covering lot 2 and a separate new certificate issued covering lot 3. The new certificate covering lot 2 was issued to respondents. The inference is that the respondents did not acquire, and have no right of ingress or egress over, lot 3. Torrens Act, Stats.1915, p. 1932, §§ 48, 49, 3 Deering's Gen. Laws, Act 8589, §§ 48, 49. Further, a map in evidence indicates that re-

spondents do not own lot 3. The evidence is sufficient to sustain the findings.

[3] The complaint alleged that respondents claim to have some right, title, or interest in lot 1. The answer of respondents denied this allegation generally, but as a separate defense plead the facts on which they predicated their claim of an easement. After plaintiff introduced a deed of lot 1 to himself in evidence, he moved for judgment on the pleadings, claiming that respondents had admitted they had no interest in lot 1 and that therefore they had no defense. The motion was denied. Plaintiff claims error. There was no error. In view of the separate defense and the cross-complaint it is apparent that the denial in the answer was an inadvertence.

[4] Plaintiff asserts that the court erred in permitting respondents to prove their title to lot 2. To prove an easement in lot 1 it was essential that respondents prove their title to lot 2.

[5, 6] Plaintiff contends that the court erred in refusing to permit one of respondents to testify with respect to his ownership of lot 1. On cross-examination plaintiff asked Mr. Fox whether at the time he acquired lot 2 the grantor granted him any right in lot 1. An objection was sustained. The question called for a conclusion and the objection was properly sustained. Plaintiff then asked the witness, "Mr. Fox, do you own any property in Sheehan's Tract?" Lot 1 is in Sheehan's Tract. An objection was sustained. The question was proper and the objection should have been overruled. However, the error was not prejudicial. Respondents' claim to an easement in lot 1 is based on necessity. Plaintiff cross-examined respondent Fox at length on that subject.

[7] On cross-examination plaintiff asked Fox if he ever paid any rent to the owner of lot 1. An objection was sustained. Plaintiff claims error. The witness should have been permitted to answer. It cannot be said that the error was prejudicial. It is clear from the entire testimony of Fox that he did not pay rent to the owner of lot 1 and that his claim was based solely on the fact that his only means of ingress to and egress from lot 2 is over lot 1.

[8] Plaintiff's other points are predicated on the erroneous theory that it was essential that respondents established an easement by prescription. The case was tried on the theory that respondents either did or did not have an easement of necessity. They proved that they did. Whether the evidence was sufficient to establish an easement by prescription is immaterial.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

105 Cal.App.2d 816

CASTLE RURAL COUNTY FIRE PROTECTION DIST. et al. v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY.

Civ. 8031.

District Court of Appeal, Third District,
California.

Aug. 3, 1951.

Petition for a writ of prohibition by the Castle Rural County Fire Protection District, a public corporation, in the State of California, and another, against the Superior Court of the State of California, in and for the County of San Joaquin. The District Court of Appeal, Adams, P. J., held that the Superior Court was without jurisdiction to try an election contest involving the election of a director of a fire protection district where there was no specific statutory provision for such a contest to be filed.

Writ granted.

Elections 🔑269

The superior court was without jurisdiction to try an election contest involving the election of a director of a fire protection district where there was no specific statutory provision for such a contest to be filed. Health and Safety Code, §§ 14610–14640.

Blewett, Blewett & Macey, Stockton, for appellant.

Parkinson, Nichols & May, Stockton, for respondent.

ADAMS, Presiding Justice.

This is a petition for a writ of prohibition directing the Superior Court of San Joaquin County to desist from proceeding to try an election contest instituted by respondent William F. Garden against the District and L. J. Evans. The petitioners allege that on January 19, 1951, an election was held to determine whether the petitioning district should be formed, and to elect directors of same; that on January 29, 1951, the Board of Supervisors declared the district duly formed and Evans elected a director of Division 1 thereof; that on March 5, 1941, William F. Garden, who was a candidate for director of Division 1 filed a contest in the Superior Court of San Joaquin County charging misconduct in the election and the receipt of illegal votes in favor of the formation of the district and in favor of Evans as director, which illegal votes, if taken away, would result in a majority of votes against the formation of the district and reduce the votes for Evans below the number cast for Garden.

Petitioners assert that a contest of a fire protection district election is not provided for by statute in this state, that the right to contest an election is dependent upon statute, and that the superior court has no jurisdiction to hear such a contest when not provided for by statute.

In opposition to the petition, Garden asserts that the "sole question involved here is whether the Superior Court has any jurisdiction whatever to pass upon the validity of an election of director of a fire protection district under the Code Sections which have been invoked in calling this election"; and he contends in his brief, that, conceding that there is no specific statutory provision for a contest such as he has filed, nevertheless such a contest will lie, first, because the statute under which the election is held adopts the general election law by reference, and second, because of the general equity powers of the court. In his argument before us, however, the attorney for contestant conceded that the general election law is not applicable, but he urged that the court has jurisdiction under its general equity powers, asserting that same may be invoked where no provision is made by statute for a contest.

The matters which the petition states were sought by Garden to have considered in his contest are: "* * * that the precinct board in Precinct No. 1 was guilty of malconduct in the conduct of the election in said Precinct and that illegal votes cast in the said Precinct in favor of the formation of the District and in favor of L. J. Evans as Director, which if taken from the votes in favor of the District and in favor of said candidate as Director would have resulted in a majority vote against the formation of the District and would have reduced the number of legal votes for L. J. Evans beyond the number of legal votes given to contestant."

Garden's opposition charges, in addition to the grounds as above recited, that his contest sets forth:

"(1) That the name of William F. Garden, though well-known to the election officials, was placed upon the ballot as 'William F. Gardener', a name by which he was not known.

"(2) That the election board throughout the day knowingly permitted persons to stand at the gate constituting the only entrance to the polling place and no more than twenty feet from the polls, and to pass out to incoming voters slips of paper reading. 'Vote for L. J. Evans, director'.

"(3) That L. J. Evans himself acted as clerk of the election board and was present throughout the voting.

"(4) That Bertha B. McIntosh who had previously been active in circulating petitions favoring the formation of the district, and who was then acting as inspector at the precinct introduced voters to L. J. Evans in the polling place itself and suggested that they vote for him."

The sole question for our determination is whether the superior court has jurisdiction to hear the contest. It is conceded that the Health and Safety Code provides for the formation of such districts and for an election to be held to determine whether the electors want the district, and for the election of directors, Health and Safety Code, §§ 14610–14640; but there is no provision in that Code for a contest of such an election or even a recount of the votes cast.

Petitioners rely upon three decisions of this court, viz.: Huck v. Rathjen, 66 Cal. App. 84, 225 P. 33; Hunt v. Superior Court, 93 Cal.App.2d 504, 209 P.2d 411, and Costa v. Banta, 98 Cal.App.2d 181, 219 P.2d 478. In the Hunt and Costa cases hearing in the Supreme Court was denied. The Costa case was a purported contest by a defeated candidate for director of an irrigation district. On the question whether the court had jurisdiction to hear or entertain the contest, this court said 98 Cal.App. 2d at page 182, 219 P.2d at page 479: "In the Hunt case it was decided that elections in irrigation districts are governed by the provisions of the Water Code, secs. 21705–21713, and not by the provisions of the Elections Code, and that as no provision is made in the Water Code for election contests in the superior courts, the superior court had no jurisdiction to try the contest therein instituted. It follows therefrom that in the case before us the superior court was without jurisdiction to try the contest instituted by appellant Costa."

In the Huck case it was said 66 Cal.App. at page 86, 225 P. at page 33: "* * * it clearly appears that an irrigation district is not a political subdivision of a county, and that a contest of the right of a person declared elected to the office of director thereof is not authorized by the provisions of section 1111."

The Hunt case was based on facts similar to those which formed the basis for the Huck case, and it followed that decision.

In Puccinelli v. Superior Court, 183 Cal. 775, 192 P. 707, which was an election contest brought by a defeated candidate for the assembly in a primary election, charges of misconduct of the election officers were made which are comparable to those alleged by Gardner in the contest here. The court there said, 183 Cal. at pages 776–777, 192 P. at page 707:

"* * * Thereupon petitioner sought to introduce evidence to sustain his allegations of fraud and misconduct on the part of election officers and the reception of illegal votes. The contestee objected to the introduction of any such evidence on the ground that such matters may not be inquired into in a contest under the direct primary law. The court sustained such objection. This is an application for mandate to compel the superior court to hear and receive such evidence as may be offered in support of his allegations of fraud and misconduct, and claim of illegal votes.

"Assuming but not deciding that mandate will lie in such a situation, we are nevertheless of the opinion that the position of the learned judge of the trial court is correct. Section 28 of the direct primary law (St.1913, p. 1409), the only provision of law relative to a contest of nomination, is, to our minds, entirely plain in this regard. It provides only for 'a recount of the ballots cast' in the precincts as to which a recount may be sought. This is as far, apparently, as the Legislature saw fit to go in providing a judicial review of the returns of the election officers of a primary election, possibly deeming that in the brief time afforded for any review between the declaration of the result of the official canvass and the printing of the ballot for the general election a more extended inquiry would be impracticable. In any event, we think it clear that they so limited the subject-matter of the inquiry."

In Howe v. Board of Supervisors, 118 Cal.App. 306, 5 P.2d 28, the action was brought by a recall candidate for supervisor. The recall had failed. Howe alleged error in the count and misconduct on the part of election officials. Demurrer to the complaint was sustained and the action dismissed. 118 Cal.App. at page 312, 5 P.2d at page 31, the court said:

"* * * The right to contest an election is purely statutory, and must be determined in accordance with the provisions of the statute. Powers v. Hitchcock, 129 Cal. 325, 61 P. 1076; Austin v. Dick, 100 Cal. 201, 34 P. 655. The Code provisions (title 2, part 3, Code Civ.Proc.) relating to the contesting of certain elections are not applicable to a contest of the character which is here attempted.

"It follows therefore that the court's order sustaining respondent's demurrer without leave to amend was proper, and the judgment of dismissal as to respondent is affirmed."

Respondent Garden relies upon the decisions in Cerini v. De Long, 7 Cal.App. 398, 94 P. 582; Gibson v. Board of Supervisors, 80 Cal. 359, 22 P. 225, and Roche v. Superior Court, 30 Cal.App. 255, 157 P. 830, asserting that they hold that where no specific *procedure* for review by the courts is provided by statute, any suitable procedure may be adopted, and that the courts have jurisdiction to hear such contest because of their general equity powers. In short, his contention seems to be that though, where statutory power to contest an election is limited and under the authority of the cases relied upon by the petitioners courts have no jurisdiction to entertain election contests except in so far as statutory limitations allow, nevertheless, where the legislature has made no provision whatsoever for contests the courts have apparently unlimited power to entertain such contests in their capacity as courts of equity.

We do not concur in such reasoning. If it were sound, then where the legislature has by statute given to courts limited powers to hear contests it would seem to follow that such courts could, nevertheless, entertain contests unimpeded by the limitations provided by the legislature. Conceding that courts of equity may entertain a contest based upon equitable grounds such as fraud, no such grounds are relied upon by Gardner in his contest. The alleged grounds are no more than violations of the general election laws.

We are satisfied that the trial court has no jurisdiction to hear Garden's contest, and that the writ prayed for should issue. It is so ordered.

VAN DYKE, and PEEK, JJ., concur.

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106 Cal.App.2d 57

BELLOWS v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14590.

District Court of Appeal, First District, Division 2, California.

Aug. 14, 1951.

Action by Amanda Bellows against City and County of San Francisco, a municipal corporation, First Doe, Second Doe and Third Doe, for personal injuries sustained while plaintiff was a passenger on a street car of municipal railway. The Superior Court, in and for the City and County of San Francisco, Eustace Cullinan, J., rendered judgment upon verdict for defendants, and plaintiff appealed from judgment and order overruling motion for new trial. The District Court of Appeal, Goodell, J., held that instruction which in part charged jury that before a verdict could be found for plaintiff and against defendants, jury must find from a preponderance of the evidence that plaintiff was not guilty of negligence proximately contributing to happening of accident, shifted burden of proving plaintiff's contributory negligence from defendant to plaintiff, and therefore constituted reversible error.

Judgment reversed.

1. Negligence ⚷122(1)

Negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by a defendant unless it can be inferred from the evidence given in the plaintiff's case.

2. Trial ⚷296(1)

If an essential principle of law is stated to the jury materially incorrect, the prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction.

3. Trial ⚷296(1)

The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment for the reason that it is impossible to determine which charge controlled the determination of the jury.

4. Trial ⚷296(4)

Instruction which in part charged jury that before verdict could be found for plaintiff and against defendant, jury must find from a preponderance of the evidence that plaintiff was not guilty of negligence proximately contributing to the happening of the accident, shifted burden of proving plaintiff's contributory negligence from defendant to plaintiff and therefore constituted reversible error, especially since other instructions though containing correct abstract statements of the law did not charge jury that burden of proving plaintiff's contributory negligence was on defendant with anything like incisiveness of instruction which appeared to cast burden of proof on plaintiff. Const. art. 6, § 4½.

5. **Trial** ⚿295(1)

Where court first correctly states the rule in correct terms, and then directly states the contrary rule in language pointed specifically to the instant case, it is not appropriate to hold that the error is cured by a general view of the instructions as a whole.

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Philander Brooks Beadle, Howard Magee, San Francisco, Morton L. Silvers, San Francisco, of counsel, for appellant.

Dion R. Holm, City Atty., City & County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, for respondent.

GOODELL, Justice.

Plaintiff sued for personal injuries claimed to have been sustained while she was a passenger on a street car of the municipal railway. The jury returned a verdict for defendant, and after the denial of a new trial plaintiff appealed from the judgment.

On March 4, 1947 plaintiff, then aged 69, boarded a northbound Bryant Street car at the southeast corner of 20th and Bryant streets in San Francisco. At that intersection there is an offset or jog in Bryant street, and to sidle around it the tracks curved toward the west in what the motorman called a "snake turn" and then straightened out again and resumed a northerly course. The curve began about 90 feet southerly of 20th street (which is 34 feet wide) and ended about 70 feet northerly thereof. It was while the car was traveling on this piece of track, and close to the point where it straightened out to the north, that the accident happened.

Plaintiff was standing at the time. The conductor testified that traveling over that curved track was dangerous to standing passengers if they were not holding onto something, whether the car was going slow or fast, and that if it went too fast on the curve there would be a lurch. Plaintiff testified that there was a lurch which threw her against the side of the car.

The city pleaded contributory negligence, and appellant's sole contention is that the court erred in one of its instructions on that subject.

[1] The rule is that negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by a defendant unless it can be inferred from the evidence given in the plaintiff's case. Blanton v. Curry, 20 Cal.2d 793, 804, 129 P.2d 1; 19 Cal.Jur. § 104, p. 681; Id. § 119, pp. 697–699; Id. § 152 pp. 755–757.

Defendants proposed, and the court gave, the following instruction: "Before you are authorized to find a verdict against defendant * * * it must appear by a preponderance of the evidence that the employees of defendant were guilty of the negligence charged in this complaint, and that such negligence proximately caused or proximately contributed to the injuries, if any, sustained by plaintiff, *and also before you can find a verdict in favor of plaintiff and against defendant, you must further find, from a preponderance of all the evidence, that plaintiff herself was not guilty of negligence proximately contributing to the happening of said accident.*" (Emphasis added.)

Appellant concedes that the first part of the instruction is sound, but points out that the emphasized part runs counter to the settled rule.

In Howard v. Worthington, 50 Cal.App. 556, 559, 195 P. 709, 710, the court instructed the jury in language substantially the same as that used in this case, i. e., that "* * * 'you must further find that the evidence shows, by a preponderance thereof, that the plaintiff was not guilty of negligence, however slight, contributing proximately thereto; otherwise, your verdict should be for the defendant'." On appeal it was said: "The court thus * * * shifted from the defendant the burden of proving plaintiff's contributory negligence, and imposed upon plaintiff the burden of proving that he was not guilty thereof. This is not the law, and the giving of such instruction to the jury was erroneous."

Several years later the Supreme Court had occasion to consider a similar, if not identical, situation where, in Rush v. Lagomarsino, 196 Cal. 308, 314, 237 P. 1066, 1068, the court said: "* * * it was not necessary in order to entitle the plaintiff to recover that he should show that the accident occurred without his fault." Among other cases, the court cited Howard v. Worthington, thus definitely approving that case.

In Rush v. Lagomarsino, as in Howard v. Worthington, the instruction was in substantially the same language as that used here, i. e., that "It must also appear to your satisfaction, that the plaintiff was without fault or negligence on his part which may in any wise have contributed to the accident." The court said, 196 Cal. at page 314, 237 P. at page 1067: "The instruction thus given was manifestly erroneous because, in effect, it instructed the jury that the plaintiff could not recover unless he affirmatively established that he was not guilty of contributory negligence * * *."

The city does not deny that the instruction was erroneous. At oral argument its counsel conceded that it *appeared* to shift the burden of proof of contributory negligence, and respondent's reliance on § 4½ of art. VI of the constitution is a further concession. Moreover, although appellant's opening brief makes it clear that she relies on the Lagomarsino and Worthington cases, the city's brief makes no mention of either. Instead of attempting to distinguish them, respondents labor the point that other instructions correctly stated the law and that all of them must be read as a whole.

[2, 3] Appellant of course concedes that instructions must be so read, also that "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby." Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675, 678. But she points out, correctly, that the present situation is not touched by that rule. She invokes the rule stated in the Marriott case as follows: "If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury [citations]."

That rule is applicable to this case.

Soda v. Marriott is cited approvingly in Sebrell v. Los Angeles Railway Corp., 31 Cal.2d 813, 817, 192 P.2d 898, where other citations are to the same effect.

[4, 5] We have already seen that the instruction under discussion was essentially the same as the one in Howard v. Worthington. That case and this are likewise parallel with respect to conflicting instructions. There it appears, 50 Cal.App. 559, 195 P. 709, 710, that "The court correctly instructed the jury that the burden was upon the defendant to prove his allegations of contributory negligence by a preponderance of the evidence." Appellant concedes that such was the case here, but despite the concession we are constrained to remark that the jury was not by any means thus instructed *in so many words*. The instructions relied on as curing the error embraced the subjects of burden of proof, preponderance of the evidence, and contributory negligence, but they were very general in scope. Although they contained correct abstract statements of law none of them stated that the burden of proving contributory negligence was on the defendant with anything like the incisiveness of the

instruction under review, which told the jury that *"before you can find a verdict* in favor of plaintiff and against defendant, *you must further find,* from a preponderance of all the evidence, *that plaintiff herself was not guilty of negligence* * * *." (Emphasis added.) In the Worthington case, the court said, 50 Cal.App. at page 559, 195 P. at page 710: "Where, as here, the court first correctly states the rule in general terms, and then directly states the contrary rule *in language pointed specifically to the instant case,* it is not appropriate to hold that the error is cured by a general view of the instructions as a whole." (Emphasis added.)

Admittedly the evidence bearing on contributory negligence was contradictory and, as said in Rush v. Lagomarsino, 196 Cal. at page 315, 237 P. at page 1068: "* * * in view of the conflict of the evidence adduced upon the entire case, the error of the instruction must have prejudiced the plaintiff and contributed to the verdict found for the defendant." It therefore cannot be held that the error comes within the purview of § 4½ of art. VI of the constitution.

The judgment is reversed.

NOOURSE, P. J., and DOOLING, J., concur.

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106 Cal.App.2d 74

AMERICAN TRANSIT MIX CO., Inc. v. WEBER et al.

AMERICAN LUMBER CO. v. WEBER et al.

WEBER v. RINALDI et al.

Civ. 7962.

Sac. 6155.

District Court of Appeal, Third District, California.

Aug. 14, 1951.

Actions by American Transit Mix Comany, Inc., a corporation, and by American Lumber Company, a corporation, against Richard F. Weber, and another, to foreclose materialmen's liens and action by Richard F. Weber against Francis O. Rinaldi, and wife, and others, to quiet title. The actions were consolidated for trial. The Superior Court, Stanislaus County, Sherrill Halbert, J., rendered judgments in two of the actions against certain defendant for the amount of materials furnished and in the third action rendered judgment quieting title in plaintiff against all defendants, and the first two named plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that where vendor and vendee entered into executory agreement for sale of lot which provided that vendee in consideration of small initial payment would construct dwelling on lot, and vendor posted notice of nonresponsibility upon property and recorded copy of notice and lien claimants furnished materials for dwelling construction at vendee's request, and vendee defaulted under purchase agreement, vendor's notice of nonresponsibility was ineffective to defeat the liens upon building and termination of land purchase contract did not nullify claimants' liens against building.

Judgments reversed and cases remanded with directions, and judgment modified.

1. Mechanics' liens 🔑57(1)

It is not essential to existence of a mechanic's lien on a building that person causing its erection should have owned or had any interest in real property on which building is located. Code Civ.Proc. §§ 1192, 1203.

2. Mechanics' liens 🔑78

Where vendor and vendee entered into executory agreement for sale of lot which provided that vendee in consideration of small initial payment would construct dwelling on lot, and vendor posted notice of nonresponsibility upon property and recorded copy of notice, and lien claimants furnished materials for dwelling construction at vendee's request, and vendee defaulted under purchase agreement, vendor's notice of nonresponsibility was ineffective to defeat liens upon building and termination of land purchase contract did not nullify claimants' liens against building. Code Civ.Proc. §§ 1192, 1203.

3. Mechanics' liens 🔑199

Where vendor and vendee entered into executory agreement for sale of lot which provided that vendee would construct building on lot, and vendor posted notice of nonresponsibility upon property and recorded copy of notice, and lien claimants furnished materials for dwelling construction at vendee's request, vendor's alleged lien under land purchase contract was not superior to lien of materialmen since vendor who permitted vendee into possession without a deed remained the owner within lien statute and until deed was given for property vendor did not stand in position of holder of vendor's lien. Code Civ.Proc. §§ 1192, 1203.

4. Mechanics' liens ⚿136(2)

Under code providing that no mistake or errors in description of property shall invalidate lien, unless innocent third party without notice has become bona fide owner of property liened upon, claimant's lien which described property as certain lot in block 2677, although lot involved was actually in block 3677 was not fatally defective in its description of property. Code Civ.Proc. §§ 1192, 1203.

5. Mechanics' liens ⚿72

Where vendor and vendee entered into executory agreement for sale of lot which provided that vendee in consideration of small initial payment would construct dwelling on lot, and vendor posted notice of nonresponsibility upon property and recorded copy of notice and lien claimants furnished materials for dwelling construction at vendee's request, and vendee defaulted under purchase agreement, vendee was not agent of vendor within contemplation of lien law and liens of claimants did not extend to land upon which building was erected. Code Civ.Proc. §§ 1192, 1203.

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Myron Moyle and Frank B. Collier, Modesto, for appellants.

Breed, Robinson & Stewart, Oakland, Herbert E. Paul, Modesto, for respondents.

VAN DYKE, Justice.

The three actions involved here were consolidated for trial and are consolidated on appeal. Two of the actions were to foreclose materialmen's liens. These actions were brought by the American Transit Mix Company, Inc., and American Lumber Company against Richard F. Weber, the owner of the land, and Francis O. Rinaldi, the person requesting the materials. The American Transit Company furnished materials in the amount of $242.16, and the American Lumber Company furnished materials in the amount of $2,832.31. Weber's defense to these actions was the posting and filing of notice of nonresponsibility in accordance with Section 1192 of the Code of Civil Procedure. The answer of Rinaldi in each of the two lien cases was a general denial. Judgments were rendered against Rinaldi for the amount of the materials furnished and costs. Liens were not allowed against the lot and building thereon. The third action was brought by Weber to quiet title against Rinaldi, American Transit Mix Company, and American Lumber Company. The judgment quieted title in plaintiff against all defendants. American Transit Mix and American Lumber Company appeal from the judgments. Rinaldi has not appealed. The parties have presented a settled statement in lieu of reporter's transcript.

The record shows that Weber and Rinaldi entered into an agreement on January 18, 1948, under which Weber agreed to sell and Rinaldi agreed to buy certain property. The agreement provided for a purchase price of $1,000, with a down payment of $45, and monthly payments of $20 until January 18, 1951, when the balance became due. The agreement also provided: "In consideration of the small initial payment accepted by the vendor herein, vendee shall and does agree to forthwith begin the construction of and continue without undue delay the erection of at least one 'duplex' dwelling on said lot."

Rinaldi entered into possession of the premises and commenced the construction of the duplex on February 15, 1948. Appellants furnished materials at Rinaldi's request between March and September, 1948. Weber posted a notice of nonresponsibility upon the property February 20, 1948, and recorded a copy of the notice. Rinaldi paid only the down payment of $45, and being in default under the purchase agreement, a notice restoring time of the essence was served upon him January 6, 1949. Rinaldi remained in possession, and thereafter the action to quiet title was commenced.

[1] Appellants contend that respondent Weber's notice of nonresponsibility was ineffectual to defeat the liens upon the lot and building thereon. We shall first discuss this contention as it relates to the claim of lien against the building. The case of English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281, sustains appellants' contention. In that case the lessee was authorized under the provisions of the lease to construct an auditorium on the leased premises. The plaintiffs furnished labor and materials, and in due time filed their claims of lien. The lessor filed a notice of nonresponsibility in accordance with the provisions of Section 1192 of the Code of Civil Procedure. By unlawful detainer action, the lessor evicted the lessee and nullified the lease. In the action to foreclose the liens upon the building and the land, the trial court denied all relief. On appeal, it was held that a lien attached against the building and that the owner's notice of nonresponsibility could not defeat it. The court pointed out the distinction between liens against improvements upon which the claimants had bestowed labor and materials and those against the land upon which the improvements stood. In commenting upon Sections 1183 and 1192 of the Code of Civil Procedure the court states, 217 Cal. at page 639, 20 P.2d at page 949: "'* * * Under these statutory provisions, the lien on the building, or other structure, is the primary thing, and the lien on the land is merely an incident to it. No lien can be acquired on the land, if none is acquired on the building, but a lien may exist on the building without attaching to the land. Hence it is not essential to the existence of a mechanic's lien on a building that the person causing its erection should have owned or had any interest in the real property on which it is located. This distinction between land and superstructure, the lien attaching primarily to the latter, and to the former only as it was embraced in a common ownership with the building, has existed in California from the very earliest times.'"

In discussing the effect of the termination of the leasehold estate upon the liens against the building, the court states, 217 Cal. at page 640, 20 P.2d at page 950:

"'Having reached the conclusion that the lien upon the building exists separately from the land, the unlawful detainer action by which the respondents herein had the lease declared forfeited as to the Auditorium Company, and thus obtained possession of the property, becomes immaterial. However, the lease itself provides that the lessee may erect a building and, further, that any improvements erected could not be removed by the lessee. Thus respondents have by their own voluntary act made the building a part of their land, and therefore have taken the same, burdened with the liens of plaintiffs, and which liens do not depend upon the leasehold interest of the Auditorium Company.

"'Should the lien laws be so interpreted as to destroy the liens because the leasehold interest has ceased to exist, such interpretation would render such laws unconstitutional. Section 15, art. 20, Cal. Const.'"

[2] We conclude that the termination of the land purchase contract by the decree in the quiet title action did not nullify appellants' liens against the building. Respondent Weber attempts to distinguish the English case upon the ground that a lessor-lessee relationship there existed. As the lien relates to buildings and improvements, we see no distinction. In commenting upon this subject, the writer in 22 California Law Review, page 319 states: "The question arises whether in the light of the Olympic [English] case a mechanic placing a building on the land without the knowledge of the vendor, or after a notice of nonresponsibility has been filed by him, can claim a lien against the building and sell and remove it. It is submitted that he would clearly have this right under the holding of that case, as there is no fundamental difference between a vendor's position and that of a lessor in this respect." See, also, McDowell v. Perry, 9 Cal.App.2d 555, 564, 51 P.2d 117.

[3] Also without merit is respondent Weber's contention that the vendor's lien

under the land purchase contract is superior to the lien of materialmen. In Allen v. Wilson, 178 Cal. 674, 174 P. 661, it was held that an owner who has given an executory contract to sell land and let the vendee into possession without a deed remains the "owner" within the lien statute, and until a deed is given he does not stand in the position of a holder of a vendor's lien. Also see Oaks v. Kendall, 23 Cal.App.2d 715, 721, 73 P.2d 1255.

[4] Respondent contends that the claim of lien of the American Transit Mix Company is fatally defective in its description of the property. The lot involved is Lot 2 in Block *3677* of Richland Tract, and the recorded lien describes the lot as Lot 2 in Block *2677* of Richland Tract. Section 1203 of the Code of Civil Procedure provides in part that no mistake or errors in the description of the property shall invalidate the lien, unless the court shall find that an innocent third party without notice has, since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the third party upon further inquiry in any manner.

[5] Appellants further contend that the liens should also have been allowed upon the land or lot upon which the building was constructed. The contention is wholly based upon the provision in the sales contract entered into by respondent Weber and Rinaldi which obligated Rinaldi, as buyer, to construct the building. Appellants argue that this provision constituted Rinaldi as an agent of Weber within the contemplation of the lien law, and by reason thereof Weber could not avoid liability by posting a notice of nonresponsibility. Appellants rely upon Ott Hardware Co. v. Yost, 69 Cal.App.2d 593, 159 P.2d 663. The case involved the responsibility of a lessor to materialmen who furnished supplies to the lessee. That case held that *the entire estate or property* of a lessor may be subject to a mechanic's or a materialman's lien for improvements or repairs of the building on his property by a lessee where the terms of the lease and other writings covering the transactions show that the lessee acted as agent of the owner, was obligated to make the improvements and submit plans of the same to the owner for approval, and was to repay the lessee the estimated costs of the major portion of the improvements out of the rents of the premises and was to be entitled to a return of the leased property in an improved condition on breach of the conditions or covenants. Such a participating owner, it was held, was not entitled to relieve his property from liens by filing a nonresponsibility notice. See, also, Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal.App. 4, 108 P. 891, and Hines v. Miller, 122 Cal. 517, 55 P. 401.

Appellants reason that the principles of the Yost case should apply to a land purchase contract where the buyer is obligated by such contract to place improvements upon the premises. We cannot agree with this reasoning. In the application of the lien law there is a fundamental distinction between the lessor-lessee situation and that of seller-buyer under a land purchase contract. The reason that the lessor cannot defeat the lien against the land in those instances where the lease obligates the lessee to improvements or repairs is well stated in English v. Olympic Auditorium, Inc., supra, 217 Cal. at page 643, 20 P.2d at page 951: "* * * In many jurisdictions mechanics' liens have been held to attach, not only to the building but also the estate or property of the lessor for improvements made by the lessee, which improvements, by the terms of the lease, are to belong or revert to the lessor, or are permanent in nature, becoming part of the realty and of benefit to the lessor. [Citing cases] These cases are based on the theory that since the lease contemplates the construction of a building which will enhance the value of the fee to the benefit of the lessor, the lessee must be deemed the statutory agent of the lessor for the purpose of the construction."

It is apparent that such considerations in the lessor-lessee relation are not present in the seller-buyer relation. In the latter case, the improvements vest in the buyer upon performance of the contract. During the term of the contract, the seller is benefited only in so far as his security interest is enhanced by reason of the improvement.

A similar contention was made in McDowell v. Perry, supra. The court held in an action to foreclose a mechanic's lien for the drilling of a well, where the drilling was contracted for by the vendee of the land upon which the work was done, the mere fact that the vendee was obligated by his contract with the vendor to drill the well did not of itself give authority to the vendee to bind the vendor, and in such case the lien did not attach to the vendor's estate in the land where a notice of nonresponsibility had been filed in accordance with Section 1192 of the Code of Civil Procedure. The court states, 9 Cal.App.2d at page 562, 51 P.2d at page 121: "* * * The contention that the vendee in contracting with appellant for the drilling of the well was acting by the authority of the vendor depends solely on the fact that the contract between respondent and France obligated the latter to drill a well. It is our conclusion that the basis for the contention does not fulfill the statutory requirement, and that the burden rested upon appellant *to show that the person to whom he furnished labor and materials for the drilling of the well was authorized by the landowner to contract for the furnishing of the very labor and materials that were used in the drilling of the particular well for which appellant claims a lien.*" (Italics added.)

We therefore conclude that the liens of appellants do not extend to the land upon which the building in question was erected.

It appears from the record here that there was no conflict in the evidence concerning the amount of the liens which the claimants were entitled to if they were entitled to any liens at all. We think, therefore, that the appeals presented here may be disposed of without the necessity of any further trial proceedings.

In the cases of American Transit Mix Company, Inc., a corporation, v. Richard F. Weber et al., and American Lumber Company, a corporation, v. Richard F. Weber et al., being respectively Nos. 38084 and 38085 in the records in the trial court, the judgments appealed from are reversed and the trial court is directed to enter judgments as follows: That plaintiffs have and recover of respondent Rinaldi the same sums which they were adjudged to recover from him in the judgments heretofore rendered; that the plaintiffs in those actions respectively have liens upon the building erected by said Rinaldi upon the land of respondent Weber; that said liens be foreclosed in accordance with law. In the case of Richard F. Weber v. Rinaldi et al., being No. 38852 in the records in the trial court, the judgment is ordered modified so as to declare that the title of plaintiff to said building is subject to said liens. The cases are remanded for further proceedings in accordance therewith.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

106 Cal.App.2d 8

PEOPLE v. LANDRY.

Cr. 2718.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1951.

Hearing Denied Sept. 11, 1951.

Louis Landry was convicted in the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., of illegal possession of narcotics, and he appealed. The District Court of Appeal, Dooling, J., held that there was no error in rulings on objections nor in instructions, and evidence supported conviction.

Affirmed.

1. Criminal law 🔑695(5)

In prosecution for possession of narcotics, objection to offer of incriminating statements, on ground that no foundation had been laid to show that defendant had been informed of his rights, was insufficient to raise question of failure to show that statements were freely and voluntarily made. Health and Safety Code, § 11500.

2. Criminal law 🔑518(1)

A confession is not rendered involuntary by failure to advise suspect of his right to counsel, right to remain silent or that his statements may be used against him.

3. Criminal law 🔑736(2)

While testimony of confession or admission of important incriminating facts is not admissible unless confession or admission was freely and voluntarily made, it is for trial judge to determine admissibility, and considerable discretion must be allowed.

4. Criminal law 🔑736(2)

The ultimate determination of the voluntary character of a confession or incriminating statement is for the jury to determine.

5. Criminal law 🔑359

In prosecution for possession of narcotics, wherein defense was that some one had left the drug in defendant's night club, proof that defendant's creditor was attempting to get possession of defendant's club tended only to prove motive of another to cause trouble for defendant, and was too remote and speculative without other evidence tending to connect such person with actual commission of crime charged. Health and Safety Code, § 11500.

6. Criminal law 🔑359

In prosecution for possession of narcotics, evidence that defendant's attorney had called narcotics officer prior to defendant's arrest to advise that defendant had been warned of a plot to plant narcotics in his club was properly excluded. Health and Safety Code, § 11500.

7. Criminal law 🔑1036(1)

When witness was asked general question, which did not disclose proof expected to be adduced, concerning contents of conversation with one whom defendant sought to implicate in plot against him, and objection was sustained but offer of proof not made, no question was presented for review.

8. Criminal law 🔑867, 1137(5)

Where state's witness in criminal prosecution for illegal possession of narcotics volunteered statements concerning prior arrest of defendant on similar charge and court ordered statements stricken and instructed jury to disregard them, it was not error to refuse to grant mistrial, and if defendant's cross-examination and enlargement of subject tended to blind jury to court's admonition, defendant could not complain. Health and Safety Code, § 11500.

9. Criminal law 🔑808½

Where jury was instructed that defendant was charged only with possession of narcotics, it was not error for court to read entire statute making it unlawful for any person to possess, conceal, transport, etc., narcotics. Health and Safety Code, § 11500.

10. Criminal law 🔑808½

In instruction based on Penal Code provision requiring joint operation of act and intent, or criminal negligence, the words "criminal negligence" should be omitted where inappropriate. Pen.Code, § 20.

11. Criminal law 🔑823(5)

In prosecution for possession of narcotics, use of words "criminal negligence" in instruction requiring joint operation of act and intent, or criminal negligence, was not prejudicial error, in view of fact that jury was instructed that they must find that defendant knowingly had such objects in his possession. Pen.Code, § 20; Health and Safety Code, § 11500.

12. Criminal law 🔑824(10), 829(16)

Failure to give statutory instruction concerning credibility of witnesses in prosecution for possession of narcotics was not error, in absence of request, and defendant suffered no prejudice since instruction given served the same purpose. Code Civ.Proc. § 2061, subd. 2; Health and Safety Code, § 11500.

13. Criminal law ⚿822(8)

In prosecution for possession of narcotics, failure to give requested instruction on accident and misfortune did not prejudice defendant when instructions as whole made it clear that possession must have been intentional. Health and Safety Code, § 11500.

14. Criminal law ⚿824(4)

In prosecution for possession of narcotics, failure of judge to give instruction on motive, on his own motion, was not error, in view of fact that proof of motive was not indispensable to conviction. Health and Safety Code, § 11500.

15. Poisons ⚿9

Evidence supported conviction for possession of narcotics. Health and Safety Code, § 11500.

◆

Leslie C. Gillen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Winslow Christian, Deputy Attys. Gen., for respondent.

DOOLING, Justice.

The defendant, who was convicted of the possession of narcotics, appeals from the judgment and the order denying a new trial.

Defendant operated a night club in San Francisco and had his living quarters in the same building. At about 2.30 a. m. on May 25, 1950 a party of Federal narcotics agents and San Francisco police officers, after knocking several times at the door and attracting the defendant's attention, forced an entrance into the building occupied by him. As the party entered defendant was descending the stairway. Hearing the noise of the water tank of a toilet refilling the officers went to the bathroom. They found a capsule floating in the toilet bowl and recovered from the trap of the toilet a paper package. Analysis showed that a sample of the water taken from the bowl was impregnated with heroin and that the capsule and paper package each contained heroin. On the trial the defendant admitted that he had had physical possession of the capsule and package and had attempted to flush them down the toilet just before the officers entered the building. His defense was that he had found them on the floor of his night club while sweeping up after closing, and suspecting the nature of their contents had decided to dispose of them through the toilet.

Several officers testified to various incriminating statements made by the defendant. Three testified that when one of the officers said, "Well, Louis, I guess we have you this time," defendant replied, "Yes, I guess you got me good." There was testimony that defendant said of a two by four timber which had been hollowed out and fitted with a spring door that it was his "working plant", that he showed some of the officers an empty can hidden in an adjoining basement which he said had been used to conceal narcotics, and a hollow place above the kitchen door which he said had been used for the same purpose; and that he also stated that he had been forced into the sale of narcotics by a big operator of whom he was afraid. Defendant denied making any of these statements.

[1, 2] Defendant argues that the admission of these statements without proof that they were free and voluntary was error. When the first witness was asked about a conversation with defendant his counsel urged the following objection, which was overruled:

> "I am going to offer the objection that no proper foundation has been laid to determine that Mr. Landry was told as to the situation at the time now with reference to the time he was under arrest * * *
>
> "If it is by way of an alleged confession we ought to know whether the man was informed that he was under arrest, or informed of his rights."

Conceding that the incriminating statements were of such a character as to be admissible only if freely and voluntarily made, People v. Nagle, 25 Cal.2d 216, 222–223, 153 P.2d 344, the objection actually interposed was without legal validity. In People v. Hoyt, 20 Cal.2d 306, 314, 125 P.2d 29, the court expressly held that a confession is not rendered involuntary by the failure to advise the suspect of his right to counsel, his right to remain silent if he desires, and that his statements may be used against him. This was followed in People v. Pongetti, 72 Cal.App.2d 749, 752, 165 P.2d 479, and People v. Triplett, 70 Cal.App.2d 534, 539, 161 P.2d 397.

[3, 4] No objection of any kind was thereafter interposed to the further testimony of any witness concerning statements made by defendant. While testimony of a confession or of an admission of important incriminating facts is not admissible unless freely and voluntarily made; People v. Dabb, 32 Cal.2d 491, 495–496, 197 P.2d 1; People v. Nagle, supra, 25 Cal.2d 216, 153 P.2d 344, it is for the trial judge in the first instance to determine its admissibility "and a considerable measure of discretion must be allowed that court in determining it." People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12. The better practice would be to lay the foundation in advance, even where there is no objection on the ground that it has not been proved that the incrimating statements were freely and voluntarily made, but the entire course of conduct of the officers during the questioning of defendant was ultimately disclosed to court and jury not only by the prosecution's witnesses but also by the defendant when he took the stand. No claim of threats or promises which would make the statements involuntary was at any time urged upon the court. There is no magic in the order of proof and from the evidence of all witnesses, including the defendant, the court would properly have concluded that the evidence of the statements was admissible if the proper objection had at any stage of the proceedings been brought to its attention. Most significant is the fact that while the ultimate determination of the voluntary character of a confession or incriminating statement is for the jury to determine, People v. Gonzales, 24 Cal.2d 870, 877, 151 P.2d 251, defendant proposed no instruction to the court on this subject. A reading of the transcript demonstrates conclusively that no prejudicial error was committed in the admission of this evidence.

On the trial defendant attempted to develop the theory that some other person through evil motive had left the narcotic drug on the floor of his club with the design of entrapping him into the appearance of its illegal possession. To this end defendant was questioned and, after objection sustained, an offer of proof was made that a creditor was attempting to get possession of his club, including a telephone conversation overheard between the creditor and his attorney and other statements and conduct of the creditor. The court, in sustaining the objection to this testimony, which from the offer of proof contained no reference to the use of narcotics, said: "If you can get something a little bit closer to this and can tie it in, I'll permit you to put him back on the stand. But you have to show something a little closer than just the mere fact that (the creditor) said he was going to try to get his place. If you produced evidence that (the creditor) told some one to plant this package in the Club, or something like that, then maybe it would be material."

[5] This ruling was not error. Evidence merely of a motive to make trouble for the defendant is too remote and speculative to justify its admission. People v. Mendez, 193 Cal. 39, at pages 51–52, 223 P. 65, 70, discusses this question at some length. The conclusion is there expressed that "mere evidence of motive in another person, or of motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged." See also People v. Perkins, 8 Cal.2d 502, 514–515, 66 P.2d 631; People v. Wagner, 21 Cal.App.2d 92, 95, 68 P.2d 277; People v. Gentekos, 118 Cal.App. 177, 182, 4 P.2d 964.

[6] This was followed by the offer to prove by a narcotics enforcement officer that defendant's attorney had called him

on the telephone some time before the arrest to advise him that defendant had been warned of a plot to "plant" narcotics in his club, and by a police officer that defendant at one time had given the officer some cigarettes which defendant told the officer he had found in his club and suspected of being marihuana. The trial court properly sustained the objections to this testimony. In People v. Perkins, supra, 8 Cal.2d at page 514, 66 P.2d at page 637, the court quoting from People v. Gonzales, supra, said that it seems clear "that evidence which simply affords a possible ground of possible suspicion against another person should be inadmissible."

[7] The defense produced a witness who testified that while he was loading a truck in front of defendant's club he saw an acquaintance known as Little Jesse get out of an automobile in which he recognized defendant's creditor before spoken of as the driver, that Little Jesse came over and held a conversation with the witness in which he asked him "to do something" and then went back to the car and was driven away. The court sustained objections to questions directed to what was said in this conversation. In his brief defendant now asserts that he would have proved by this witness that Little Jesse offered the witness money to drop or place a small package in defendant's club. No offer of proof was made to the court, counsel contenting himself with the question: "Now, what was it that Little Jesse asked you to do?"

We are not called upon to decide whether it would have been error to sustain an objection if the defendant had offered to prove in the trial court that Little Jesse had offered the witness money to drop a package in defendant's club. Such an offer would have approached the trial judge's suggestion in the language quoted above: "If you produced evidence that (the creditor) told some one to plant this package in the Club, or something like that, then maybe it would be material." We are not required to speculate on what ruling the trial judge might have made had there been an offer of proof disclosing that the request to the witness was to place a package surreptitiously in defendant's place of business. "The asking of questions, unless they disclose the proof expected to be adduced, is not the equivalent of an offer of proof." People v. Daniellly, 33 Cal.2d 362, 376, 202 P.2d 18, 26; People v. Fredeen, 101 Cal.App. 105, 224 P.2d 849.

[8] While a narcotics officer was on the stand he volunteered the statement that defendant had previously been arrested on a narcotics charge. Defendant's counsel assigned this as misconduct and asked for a mistrial. The court struck out the offending testimony and instructed the jury to disregard it. The refusal to grant a mistrial was not error. Defendant's counsel himself, over the district attorney's objection that the testimony in chief had been stricken, returned to the subject on cross-examination of the witness and enlarged upon it. The insistence of defendant's counsel in pointedly going back to this testimony, after the court had stricken it out and directed the jury to disregard it, might possibly have tended to blind the jurors to the court's admonition. If so counsel cannot blame the prosecution over whose objections he persisted in belaboring the question through the medium of cross-examination.

[9] Several attacks are directed to the instructions. The court read to the jury section 11500 of the Health and Safety Code. The defendant was charged only with *possession* of narcotics and the jury were clearly so instructed. They cannot have been misled by the language of the section which makes it unlawful for any person "to have in his possession, conceal, transport, carry, convey, sell, furnish, administer or give away or attempt to conceal etc. * * * a narcotic", since the only disputed question was whether the defendant's possession was wilful and intentional and the jury was clearly instructed that the charge against defendant was that he "did * * * have in his possession a preparation of heroin" and further correctly instructed as to what constitutes possession within the meaning of the law.

[10, 11] In an instruction based upon section 20 of the Penal Code the court included the words "or criminal negligence". This is a stock instruction from which the reference to "criminal negligence" should be omitted where it is not an issue in the particular case. People v. Womble, 67 Cal.App.2d 885, 889, 155 P.2d 838. However the jury was instructed at defendant's request that in order to find defendant guilty they must find "that he *knowingly* had such objects in his possession", and we are not persuaded that the jury was in any wise misled by the use of the words "or criminal negligence" in a general instruction.

[12] The court gave no instruction in the language of subdivision 2 of section 2061 Code of Civil Procedure: "That they (the jury) are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds." No such instruction was requested but defendant's counsel cites People v. Bemis, 33 Cal.2d 395, 202 P.2d 82, and People v. Dail, 22 Cal.2d 642, 140 P.2d 828, in which cases the Supreme Court held it the duty of the trial judge on his own motion to instruct the jury in proper cases on other subdivisions of this section. We are convinced that defendant suffered no prejudice by the failure to give an instruction in the exact language of subd. 2, sec. 2061 since other instructions given served the same purpose. We quote from the instructions given:

"If there is a reasonable doubt as to the credibility or reliability of any witness whose testimony is necessary in order to convict the defendant, even though the testimony of such witness may be uncontradicted, such reasonable doubt is sufficient to acquit the defendant.

"You are instructed that all people charged with crime are presumed, under the law, to be innocent. It is your duty to listen to the testimony of all witnesses in the light of this presumption. When you finally retire to the jury room * * * it becomes your duty to consider such evidence in the light of this presumption. This presumption is sufficient to acquit any person charged with crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused; and, unless you are so satisfied it is the sworn duty of you, and each of you to vote 'not Guilty'."

In the light of these instructions if "the declarations of any number of witnesses" for the prosecution did not "produce conviction" in the minds of the jurors they could not bring in a verdict of guilty for they were expressly instructed not to base a guilty verdict on the testimony of any witness for the prosecution "if there is *a reasonable doubt* as to the credibility or reliability" of such witness, and in addition to weigh the testimony of every such witness in the light of the presumption of innocence and to bring in a verdict of not guilty unless the presumption of innocence was overcome by evidence that *satisfied their minds* to a moral certainty and beyond a reasonable doubt.

[13, 14] The failure to give a requested instruction on accident and misfortune did not prejudice the defendant since the instructions as a whole made it clear that the defendant's possession of narcotics must be intentional to warrant a conviction; nor was it error on the part of the trial judge to fail to give an instruction on motive on his own motion. Some reasonable limit must be put on the range of instructions which a judge will be required to give *sua sponte* and without request. If not the failure of a defendant to request instructions may become a trap for the unwary judge, who might well have given the instruction if requested but who cannot foresee the fertility of counsel's mind in producing as afterthoughts possibly relevant instructions which neither he nor the judge thought of during the trial. An instruction on motive clearly falls outside of any such reasonable limit since "proof of motive is never indispensable to a conviction." 7 Cal.Jur. 855.

[15] Unless we assume that an entire group of enforcement officers committed

deliberate perjury the evidence abundantly supports the judgment.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

106 Cal.App.2d 204

MIDDLEKAUF v. VINSON et al.
VINSON et al. v. MIDDLEKAUF.

Civ. 18207.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

Hearing Denied Oct. 18, 1951.

Action by Marie Middlekauf against Alice Vinson and California Trust Company to enjoin foreclosure of a trust deed, wherein Alice Vinson and Walter Vinson filed a cross-complaint against Marie Middlekauf. The Superior Court, Los Angeles County, Roger A. Pfaff, J., gave judgment for the plaintiff and the defendant Alice Vinson and the cross-complainants appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding of usury.

Judgment affirmed.

1. Appeal and error ⇨1010(1)
Usury ⇨119

Whether a transaction is usurious is a question of fact, and it is incumbent upon party appealing from adverse findings to show wherein findings have no substantial support in the evidence.

2. Usury ⇨117

In action by borrower against lender to enjoin foreclosure of trust deed on ground that loan was usurious, evidence sustained finding of usury.

3. Apeal and error ⇨1011(1)

Where evidence as to relationship existing between parties was conflicting, appellate court was bound by trial court's findings.

4. Joint adventures ⇨1.15
Partnership ⇨53
Usury ⇨117

In action by borrower against lender to enjoin foreclosure of trust deed on ground that loan was usurious, evidence sustained finding that neither a partnership nor a joint venture relationship existed and that only relationship between the parties was that of borrower and lender.

5. Usury ⇨34

Where note and trust deed for $40,000 were given as security for loan of $30,000 which at time of attempted foreclosure had been in effect for a period of six months, at which time there was due on the trust deed note the sum of $46,840, transaction was usurious as an attempt to receive a benefit in excess of the 10% maximum interest permitted by law. Const. art. 20, § 22; Gen.Laws, Act 3757.

6. Trial ⇨66

Where lender's counsel, on hearing of motion to reopen usury case 15 days after parties had rested, for further testimony on issue of whether a partnership existed between the borrower and lender, stated that the new evidence would not be different from that introduced at the trial, but might be cumulative in some respects, denial of motion was not abuse of discretion.

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Russell E. Parsons, Morris Lavine, Los Angeles, for appellants.

Geo. W. Rochester, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant Alice Vinson and cross-complainants Alice Vinson and Walter Vinson, husband and wife, from a judgment decreeing that a loan of $30,000 made by Alice Vinson to plaintiff and cross-defendant was a usurious transaction.

Plaintiff at all times was the owner of a parcel of realty at Oceanside, California. On March 14, 1946, she executed a $40,000 promissory note in favor of A. L. Gindling, due March 15, 1952, bearing interest at the rate of 5% per annum from March 15, 1946, interest payable monthly beginning April 15, 1946, continuing to and including September 15, 1946, and providing for payment of principal and interest in installments of $400 or more on the 15th day of each month beginning October 15, 1946, continuing to and including February 15, 1952. The note was secured by a trust deed (a first lien) upon the Oceanside property. Subsequently, Gindling assigned the note and trust deed to Peggy Shirk, plaintiff's sister.

Prior to March 25, 1949, plaintiff commenced the erection of a building on the property for the staging of athletic matches and other amusements. She became hard pressed for money, was about to lose her license from the California Athletic Commission, and was only able to partially complete the building. Alice Vinson, an acquaintance of some twenty years, who was familiar with all phases of plaintiff's activities in connection with the property, agreed to loan her $30,000 for the completion of the building. On March 25, 1949, they opened an escrow. The escrow officer testified Mrs. Vinson told him "she was to make a loan to Mrs. Middlekauf for the purpose of completing a building at Oceanside * * * and she was to assign or cause to be assigned a note and trust deed for the sum of $40,000 that was then in existence, for security for this loan; that the loan money was to be put in escrow and paid out under a building contract for the construction of this boxing arena." The escrow officer told the parties that in his opinion "this sort of loan" was usurious. Notwithstanding this admonition, Mrs. Vinson stated that "if the title company would insure it she would take it along that line." Escrow instructions were signed by the parties, providing that the $40,000 note, secured by the trust deed, be assigned by Peggy Shirk (assignee of Gindling) to Mrs. Vinson, and the $30,000 be deposited by Mrs. Vinson "to be used for building purposes and to be released upon demand and affidavit of the Owner, to release to the contractor for said building purposes." The withdrawals were approved by both parties. At the time Mrs. Vinson received the $40,000 note and trust deed she knew plaintiff had never made any payment thereon and that the note was then in default. The matter of repayment was discussed by the parties but not incorporated in the escrow instructions because "it was such an indefinite time as to when the place was to be finished or the amount to be paid." Payments for the completion of the building were made over a period of months and the escrow was finally closed in the early part of September, 1949.

On September 26, 1949, Alice Vinson signed a notice of default and election to sell under the trust deed, stating there was due "the sum of $40,000.00 principal, together with interest thereon at the rate of 5% per annum from April 15, 1946." The notice was recorded October 6, 1949.

On November 23, 1949, plaintiff filed the present action, alleging the transaction was usurious and seeking to enjoin the foreclosure of the trust deed. In her answer, Alice Vinson alleged that she told plaintiff she did not have the $30,000 but would have to get it from her husband; thereupon plaintiff represented to her that if she, defendant, could procure the $30,000 she would make a partnership agreement with her, give her a half interest in the operation of the business, and lease the concessions to her husband. Defendant Alice Vinson also filed a cross-complaint for declaratory relief, an accounting, and the appointment of a receiver to take possession of, operate and conduct plaintiff's amusement establishment. Prior to the trial, and on December 16, 1949, plaintiff tendered the sum of $3,400.25, with the balance of the $30,000 to be paid on February 15, 1950, which offer was not accepted. At the trial, the sum of $30,000 was tendered into court for payment of the full amount of the loan.

Among other matters, the court found it was true, as alleged in plaintiff's complaint, that plaintiff borrowed $30,000 directly from Alice Vinson and assigned the $40,000 promissory note and trust deed to her; that Alice Vinson knew that no payments had been made on the note of $40,000, and "that there was due and owing thereon at said time, subject to the terms thereof, the principal sum of $40,000, plus interest"; that for the loan and use thereof Alice

Vinson "contracted to receive for said loan the sum of $40,000 in addition to 5% per annum upon said $40,000, so provided to be paid by the terms of the said promissory note and trust deed hereinabove mentioned, when in fact only the sum of $30,000 was loaned to and used by the plaintiff"; and that none of the allegations of the affirmative defenses set forth in Alice Vinson's answer, nor the allegations of her cross-complaint, were true. The court concluded that the transaction was usurious and void; that Alice Vinson was not entitled to any interest upon the loan, but was entitled to the $30,000, theretofore tendered; that within fifteen days after the judgment becomes final plaintiff should pay the sum of $30,000 to Alice Vinson; that plaintiff was entitled to a permanent injunction enjoining Alice Vinson and the trustee under the trust deed from selling the realty or from asserting any lien of any kind under the trust deed; and that plaintiff was entitled to a duly executed reconveyance. Judgment was entered accordingly.

[1-4] Appellants urge that the findings and judgment are not supported by the record. While the evidence is conflicting upon some of the elements of the transaction, the findings and judgment are adequately supported. Whether a transaction is usurious is a question of fact, Traders' Credit Corp. v. Thyle, 116 Cal.App. 252, 254, 2 P. 2d 568, and where findings on this issue are adverse it is incumbent upon an appellant to show wherein the findings have no substantial support in the evidence. This appellants have failed to do. They merely set forth in their briefs portions of the evidence which support their theory of the case and which, at the most, created but a conflict in the evidence. A review of the evidence shows that all of the parties to the transaction treated it as simply a contract to loan money for the completion of plaintiff's building. Mrs. Vinson testified, "I told him [the escrow officer] I was making a loan of $30,000; I was getting a $40,000 trust deed that had been made in 1946 and told him that the money was to be used for the construction of a building." She sought to prove that in addition to the loan it was agreed that plaintiff would give her a half interest in the business and assign the concessions to her husband, and claims that a partnership or a joint venture was established by the acts and conduct of the parties. This was emphatically denied by the plaintiff. In addition, Mrs. Vinson admitted that she had never made a written demand upon plaintiff for any partnership agreement nor had she ever made a demand for an accounting prior to the filing of this action. Since the evidence on this issue was conflicting, we are bound by the trial court's findings. The only relationship between the parties, as found by the trial court and supported by the evidence, was that of borrower and lender.

[5] Under the law, the maximum interest Mrs. Vinson could demand for her loan was 10%. Const., art. XX, § 22; Stats.1919, p. lxxxiii, 2 Deering's Gen. Laws, Act 3757. When she signed the declaration of default and election to sell on September 27, 1949, the $30,000 loan had been in effect for a period of but six months and two days. At that time there was due on the $40,000 note, including interest from April 15, 1946, the sum of approximately $46,840. A simple computation of the maximum interest which Mrs. Vinson could charge for the $30,000 loan clearly indicates that, under the guise of foreclosing the trust deed under the circumstances here, she was attempting to receive a benefit in excess of the rate permitted by law.

[6] Appellants' contention that the court erred in denying their motion to reopen the case fifteen days after the parties had rested for further testimony on the partnership phase of the case is without merit. On the hearing of the motion the court asked counsel whether the new evidence would be different from that introduced at the trial, to which counsel stated "No. * * * it may be cumulative in some respects." There was no abuse of discretion.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

WALTER M. BALLARD CORP. v. DOUGHERTY.

Civ. 14697.

District Court of Appeal, First District, Division 1, California.

Aug. 14, 1951.

As Corrected Sept. 13, 1951.

Hearing Denied Oct. 11, 1951.

Action by the Walter M. Ballard Corporation against Jack Dougherty for balance claimed to be due for designing and architectural services rendered to defendant. The Superior Court of the County of Monterey, Henry G. Jorgensen, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, J., held that statute making it misdemeanor for person to practice architecture without license did not preclude corporation, pursuant to contract between hotel owner and corporation for remodeling of hotel, from hiring licensed architect for preparation of plans with services of architect to be compensated for by fee ultimately paid to corporation by hotel owner.

Judgment affirmed.

1. Licenses ⚷39.40

Statute making it misdemeanor for unlicensed person to practice architecture did not prohibit foreign corporation engaged in business of hotel decoration from contracting with hotel owner whereby corporation was to hire licensed architect for preparation of plans and specifications agreed upon as portion of scheme set out in contract between corporation and hotel owner. Business and Professions Code, §§ 5536, 5537.

2. Licenses ⚷39.40

The policy of statute making it misdemeanor for unlicensed persons to practice architecture except that person without license may accept employment as architect if he fully informs person for whom services are being performed in writing that person purposing to furnish services is not architect, is to prevent unlicensed persons from preparing plans and specifications unless client knows and is informed that such person is unlicensed and, it is not policy that unlicensed person should not share in fees of licensed architect. Business and Professions Code, §§ 5535, 5536, 5537.

3. Licenses ⚷40

The preparation of preliminary sketches is not architectural work within meaning of statute making it misdemeanor to practice architecture without license. Business and Professions Code, §§ 5535, 5536, 5537.

◆

Edmond M. Sullivan, Monterey, for appellant.

Noland & Lawson, Salinas, for respondent.

PETERS, Presiding Justice.

Plaintiff corporation brought this action for the balance claimed to be due for designing and architectural services rendered to defendant. The complaint alleges that plaintiff, a foreign corporation, is duly qualified to do business in California, and that all the architectural services were rendered by an agent of the corporation, Jones by name, who was a duly licensed architect. The defendant's answer admits that the architectural services were rendered by Jones, and that Jones is a duly licensed architect, but avers that plaintiff is a corporation and is not licensed to practice architecture in this state, and did not, at any time, notify defendant, in writing, that it was not so licensed. The answer denies any indebtedness to plaintiff. Defendant also filed a counterclaim to recover $5,000 already paid to plaintiff by defendant for claimed architectural services. On motion the counterclaim was stricken. On the issues thus framed, the cause proceeded to trial before the court without a jury. Judgment was entered in favor of the plaintiff in the sum of $2,790.65, the precise sum prayed for in the complaint. This judgment is predicated upon a general finding that all of the allegations of the complaint are true and that those of the answer are untrue.

The major contentions of appellant are that a corporation cannot practice architecture, and that, in any event, since the corporation was not licensed as an architect in this state, it may not recover for architectural services. There is no merit to these or the other contentions made.

Appellant is the owner of the Casa Madras Hotel in Monterey. Respondent corporation is not licensed to practice architecture in this state. It renders services as a hotel consultant, designer and decorator. It has been in this business for twenty-seven years. Architectural service is only one of the services rendered to its clients. Whenever architectural services are required, the corporation hires a duly licensed architect to perform them.

On April 18, 1945, appellant and respondent entered into a written contract. By the terms of that contract respondent contracted to submit a comprehensive report on work needed on the hotel; to submit plans, specifications and general recommendations for scheduling the work; to conduct competition among qualified bidders; to obtain the best possible prices on contracting, and to assist in purchasing furnishings, materials and supplies; and to supervise the completion of the work. The fee was to be ten per cent of a predetermined budget with a retainer of $750 due on acceptance of plans and designs, the retainer to be applied against the ten per cent fee.

One Moyer, an employee of respondent, while stationed in New York, had performed some work for appellant under the contract in arranging for the purchase of various kinds of supplies. In October of 1945, Moyer came to San Francisco as the local manager of respondent. By the end of December, 1945, appellant had approved the final preliminary plans submitted by respondent in reference to building alterations, and had authorized respondent to proceed with working drawings and decoration schemes. About this time government restrictions on building materials were lightened, and appellant decided upon more extensive alterations than had been originally planned. Sometime before January 6, 1946, Moyer and appellant had a conversation in which the new ideas were discussed. Moyer told appellant, and appellant agreed, that, in view of the change in plans, a new method of payment would have to be agreed upon. Appellant requested that the new payment plan be reduced to writing. The terms of this new contract are set forth in a letter from Moyer to appellant dated January 7, 1946. It states, among other things, that the proposed work is to be conducted in three phases, with a progressive fee payment plan for each phase. The three phases were to be:

1. Survey of existing conditions, with recommendations and preliminary sketches and layouts;

2. Working plans and specifications, and all details preparatory to the execution of the work; and

3. Supervision of the execution of the work on the job with the contractors, and at mills and factories in connection with furnishings and equipment for the interiors of the buildings.

It was estimated that the total cost of the project would be about $100,000, and the total fee was to be ten per cent of the total cost, which, based upon the estimate, would be $10,000. Twenty-five per cent of this fee, or $2,500, was to be paid to cover phase 1, fifty per cent of the total fee, or $5,000, for phase 2, and twenty-five per cent of the fee, or $2,500, upon completion, for phase 3. If phase 3 was not completed as contemplated, defendant was to pay for phases 1 and 2.

Appellant, by a letter dated January 9, 1946, approved this proposition and enclosed a check for $2,500 to apply to phase 1. On May 17, 1946, Moyer wrote to appellant and informed him that preliminary plans and sketches had been submitted to a contractor, and that it was estimated that the total cost would be $300,000. By June of 1946 appellant, however, had determined to expend only $200,000 on improvements. Accordingly, he sent to Moyer another check for $2,500, which, based upon the $200,000 estimate, was the full balance due for phase 1.

In the meantime, appellant had requested that a local architect be employed to work on the plans and specifications. Pursuant to this request, and with the knowledge of appellant, in April of 1946 respondent employed Jones, a licensed architect, under a written contract, to make working plans and specifications for the job under phase 2. Prior to the hiring of Jones, the preliminary plans had been completed by respondent. These preliminary sketches were prepared pursuant to the ideas and corrections submitted by appellant. After Jones was hired, he prepared final and detailed working plans. All of the plans submitted by him bear his name as architect and make no reference to respondent. After these plans were prepared, appellant again changed his mind. He now decided that he wanted outside corridors instead of inside corridors, and also wanted other changes. He talked these new ideas over with Jones, and requested him to redraw the plans, and agreed to pay him for his work in making the changes. He ultimately paid Jones $522 for this extra work. Jones redrafted the plans, and a bid was secured from a contractor. His bid was $55,813 for the construction work. Jones submitted a bill to respondent, pursuant to his contract with the corporation, based upon the amount of the bid.

In the meantime, and before the plans were redrafted by Jones, appellant told Moyer that the plans prepared by Jones were unsatisfactory; that he did not intend to go ahead with the alterations at that time; that he would deal with Jones, directly; and that he desired to break off the arrangements with respondent. Moyer replied that as soon as cost estimates were secured so that the amount owed by appellant under phase 2 for the work performed by Jones could be ascertained, appellant would be billed for this service, and the account closed. As soon as the bid of $55,813 was secured from the contractor, respondent billed appellant for $2,790.65. This is the full amount due for phase 2, that is, it is fifty per cent of ten per cent of the contractor's bid, as provided in the contract. In March of 1947 appellant disclaimed any liability to respondent. This suit resulted.

It is the main theory of appellant that the contract between him and respondent required respondent, a corporation, and unlicensed as an architect, to perform architectural services, and that any such contract, under the law, is void and unenforceable. Appellant relies upon sections 5536 and 5537 of the Business and Professions Code. Section 5536 makes it a misdemeanor for any unlicensed person to practice architecture in this state. Section 5537 provides: "This chapter does not prevent any person from making any plans or drawings for his own buildings or from furnishing to other persons, plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans, drawings, specifications, instruments of service, or other data, the person, so furnishing such plans, drawings, specifications, instruments of service, or data, fully informs such other person or persons, in writing, that he, the person proposing to furnish such plans, drawings, specifications, instruments of service, or data, is not an architect."

[1] Appellant also argues that respondent was, in effect, practicing architecture, that architecture is a "learned profession," and that a corporation may not be licensed to practice that profession, citing cases dealing with the legal and medical professions. None of these contentions is sound. These very contentions were decided adversely to appellant in Binford v. Boyd, 178 Cal. 458, 174 P. 56. There, an assignee of a corporation brought an action to recover for the balance claimed to be due for the preparation of plans and specifications for the construction of a building. The corporation, as in the instant case, was unlicensed, and did not inform the defendant, in writing, of such fact. As in the instant case, the plans and specifications were drawn by a licensed architect hired for that purpose by the corporation. A judgment for plaintiff was affirmed. The Supreme Court stated, 178 Cal. at page 462, 174 P. at page 58: "The act is effective upon corporations only to this extent that, if it undertakes to do business of that character, either the persons whom it engages therein must be certificated architects under this statute, or, when contracting for plans and specifications for the erection of buildings for other persons, such persons must be informed that the plans and specifications will be prepared by someone who is not a certificated architect. The act does not prohibit a corporation from contracting to

furnish to another person plans and specifications which are to be prepared by a third person who is a certificated architect. Nor is there anything in the object of the act, or the evils to be removed thereby, which would raise the necessary implication that it was intended to prevent such practice. The main object of the act, so far as furnishing plans and specifications alone is involved, was to secure the erection of buildings from plans prepared by those who were sufficiently schooled in the profession to secure a license from the state board and who had complied with the state law by securing such license. But it was deemed best to qualify the absolute prohibition of the law by allowing the owners of property and persons who were not certificated architects, to contract freely with each other for furnishing such plans and specifications, provided the person furnishing the same informed the owner that he was not a certificated architect. It is obvious that, if such plans and specifications have been prepared by certificated architects, there could be no object in which the public are concerned which should prevent the sale thereof by the person who prepared them, or by someone to whom he has sold them. The act as a whole shows that it was not intended to prevent the sale of plans prepared by a qualified person, but to prevent their preparation by an unqualified person, unless the purchaser was informed of that fact. The act does not forbid a corporation to employ certificated architects, have them prepare plans and specifications, and then furnish such plans and specifications to other persons. Either a corporation or an individual could do this without transgressing the terms of the act when interpreted in the light of its object and purpose. The corporation was therefore acting lawfully in the matter." See, also, People v. Allied Architects Ass'n, 201 Cal. 428, 257 P. 511, where it was held that a corporation could practice architecture.

[2] Appellant recognizes, as he must, that the holding in the Binford case is directly contrary to his contentions made on this appeal. He attacks that case as being "utterly unsound" and as not being "consonant with present-day law." (App.Op. Br. p. 10.) These attacks on that opinion are unwarranted. It is not the policy of the law, as contended by appellant, that unlicensed persons should not share in architect's fees. The policy is to prevent unlicensed persons from preparing plans and specifications, unless the client knows and is informed that such person is unlicensed. The fact that an unlicensed corporation or individual may share in the fee is an immaterial fact. That was the holding of the Supreme Court in the recent case of Joseph v. Drew, 36 Cal.2d 575, 225 P.2d 504. That case held that under section 5539 of the Business and Professions Code a partnership may exist between architects and contractors; that the partnership may contract and collect for architectural services as long as licensed architects perform the work; and the fact that non-licensed contractors thus share in architectural fees is immaterial. Certainly, if a partnership, composed partly of unlicensed persons, can recover for architectural services, as long as the services are rendered by a licensed architect, an unlicensed corporation can recover for such services where the architectural work is done by a licensed architect, and the plans and specifications so show.

Appellant next complains that some of the services rendered by respondent were rendered long before Jones, the architect, was hired. That is so. But the contract called for other services as well as architectural services. The architectural work was only one phase, and for that phase Jones was hired, and performed the services.

Appellant next contends that the final plans were drawn by Jones, not for the corporation but pursuant to an independent contract with appellant. That is not a correct summary of the evidence. Jones was hired by respondent for the specific purpose of drafting the plans and specifications on appellant's job. He drafted complete plans, and then appellant wanted some further changes and did employ Jones for this purpose, and did pay him $522 for this extra work. But that was not in full payment for the architectural work performed. Jones billed the respondent for the full amount of his services based upon the contractor's bid. The only material change in the plans was to substitute outside for inside corridors. It is, to say the least, a reasonable inference that the major services rendered by Jones were rendered pursuant to his contract with respondent.

[3] In reference to the counterclaim, appellant argues that the contract for architectural services was illegal, and since he was not *in pari delicto,* he should have been permitted to offer evidence to support his claim to recover the $5,000 already paid. As already held, the contract was not illegal, so the basic premise of this argument is unsound. Moreover, the $5,000 was paid for phase 1, which involved nonarchitectural services. The preparation of preliminary sketches is not architectural work. Joseph v. Drew, 36 Cal.2d 575, 225 P.2d 504.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

BENTON et al. v. SLOSS.

Civ. 4224.

District Court of Appeal, Fourth District, California.

Aug. 10, 1951.

Rehearing Denied Sept. 5, 1951.

Hearing Denied Oct. 5, 1951.*

Beatrice J. Benton, a minor, and another, by Dorothy H. Benton, their guardian ad litem, brought action against L. D. Sloss, and another, for injuries sustained in automobile accident. The Superior Court of San Diego County, Arthur L. Mundo, J., rendered judgment in favor of plaintiffs, and the named defendant appealed. The District Court of Appeal, Griffin, J., held that even if owner of automobile was negligent in giving possession to minor unlicensed operator of a defective automobile, he was not liable to plaintiff guests injured in accident occurring while minor was driving.

Judgment reversed.

1. Automobiles 🔑181(1), 192(1)

Under Vehicle Code, a guest may recover from driver or any other person legally liable for conduct of driver only in case injury resulted from intoxication or willful misconduct of driver, and under such circumstances, liability is not imputed to owner of automobile. Vehicle Code, § 403.

2. Automobiles 🔑192(1)

Under Vehicle Code, no liability is created for willful misconduct or intoxication of the driver in a guest case, merely by virtue of ownership of the automobiles. Vehicle Code, § 403.

3. Automobiles 🔑181(1), 192(1)

The purpose of Vehicle Code provision that guest who accepts ride in vehicle has no right of action for damages against driver or any other person legally liable unless damages proximately resulted from intoxication or willful misconduct of driver, is to prevent recovery for ordinary negligence by a guest, and therefore, an owner who is not driving automobile would not be liable for his ordinary negligence to a guest of the driver. Vehicle Code, § 403.

4. Automobiles 🔑145

Mere absence of an operator's license, under certain conditions, is not prima facie evidence of incompetency to drive an automobile.

5. Automobiles 🔑192(11)

Knowingly placing an automobile in the hands of an incompetent operator amounts to ordinary negligence as distinguished from willful misconduct.

6. Automobiles 🔑192(11)

Even if owner of automobile was negligent in placing automobile in hands of incompetent driver, and in that automobile was defective, he would not be liable under Vehicle Code to guest of driver in absence of showing of willful misconduct on owner's part. Vehicle Code, § 403.

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* Subsequent opinion 240 P.2d 575.

7. Principal and agent ⚷19

Generally, there is no presumption that agency exists, and a party who alleges or relies upon it has burden of proving same.

8. Automobiles ⚷193(1, 8)

To recover against owner of automobile for negligence of driver on theory of respondeat superior, guests in the automobile would have to prove that driver was agent of owner for some purpose, that use of vehicle was a contemplated incident of the agency, and that at time of collision driver was operating vehicle in transaction of owner's business. Civ.Code, § 2295; Vehicle Code, § 403.

9. Automobiles ⚷193(10)

Where minor without operator's license was given possession of auotmobile which minor intended to purchase, but owner after receiving down payment and discovering minor's age told him that minor's father would have to sign sales contract, but father would not sign contract and told son to take automobile back and accident occurred before minor took automobile back injuring guest passengers, minor was obtaining signature of father to contract for benefit of minor, and minor was not engaged in transacting owner's business at time of accident, and therefore, owner was not liable to passengers on theory of agency. Civ.Code, § 2338; Vehicle Code, § 403.

10. Automobiles ⚷244(26)

In action by passengers of minor who intended to purchase automobile against owner, evidence on issue of whether minor was agent of owner in transaction of owner's business at time of accident was insufficient to support verdict for passengers.

11. Appeal and error ⚷1010(1)

Judgment predicated upon a finding which is lacking in evidentiary support must be reversed.

◆

McInnis & Hamilton, San Diego, John W. McInnis, San Diego, for appellant.

Johnson & Johnson, San Diego, for respondents.

GRIFFIN, Justice.

Defendant Jay C. Fetters was 19 years of age, living at home with his father in La Mesa, and had no driver's license. Defendant Sloss was in the used-car business in that city. On May 23, 1947, Jay visited the used-car lot and selected a 1935 Chevrolet owned by Sloss. Sloss required a down-payment of $100. Jay had only $75, which he gave to Sloss and agreed to bring in $25 at a later time. Sloss told him he "could take the car home and in the morning come back and we would fill out a contract". Sloss made no inquiry as to Jay's age or whether he had a license to drive a car. Jay drove the car home and returned the next morning with it and the $25. When making out the purchase order Sloss discovered Jay was only 19 years of age and told him he could not sign the contract. He stated that Jay's father must sign it. Sloss testified that Jay was to return with the contract within one hour. When Jay returned home with the car on Saturday, the 24th, Jay's father saw it, phoned to Sloss, and informed him Jay was a minor, had no operator's license, had no driving experience, could not have the car, informed him the car was nothing but a wreck, and told him to "come and get" it because the "kid had no business with it". Sloss told the father he would not pick it up. The father then told the son to take it back as he would not sign the contract.

Jay testified he went back with the car on Saturday afternoon but Sloss was not there; that he went again to his place of business on Sunday morning and "I think he was closed", so he went back home; that on Sunday evening he picked up plaintiffs and started for a ride towards Spring Valley, a near-by town. One Eldon was driving in another car. According to the testimony of the witnesses, the two drivers were "racing" or passing each other on a two-lane highway in excess of 45 miles per hour. About the time Jay's car was passing the Eldon car, another car which was approaching him came "suddenly out of a dip" and to avoid striking it Jay turned suddenly to his right to go in front of the Eldon car and between it and a car traveling immediately in front of the Eldon car. The testimony is that Jay was unable to blow a horn because the Chevrolet was not equipped with one; that the brakes were faulty, and that the right rear wheel grabbed or locked and the other wheels did not grab at all when the brakes were applied; that as a result, Jay's car careened across the highway and struck a pole, injuring plaintiffs.

The evidence shows that Jay had driven other cars on a few occasions without a license. Defendant Sloss testified that he took the Chevrolet in on a trade, drove it himself, found it to be in good mechanical condition at the time, and that the brakes operated satisfactorily.

Upon this evidence the court found generally that on May 23rd defendant Sloss knew that the automobile was out of repair, knew it was equipped with worn and defective brakes, and that it had no horn; knew that Jay C. Fetters was not authorized by the Motor Vehicle Department to operate a motor vehicle; that he was 19 years of age, that he was an incompetent driver of motor vehicles and was, at the time, incapable of safely operating a motor vehicle upon the public streets and highways of the state; that he delivered the car to Fetters for the purpose of having Fetters drive the car to his father to effect the sale of the motor vehicle; that after the refusal by the father to consent to the sale Sloss was notified of this fact but that he nevertheless authorized and permitted Fetters to remain in possession of the motor vehicle for the purpose of sale; that on the 25th of May, while defendant Fetters was acting as the agent for defendant Sloss in a contemplated sale of a motor vehicle plaintiffs became guest passengers of defendant Fetters; that at the time and place Fetters operated the motor vehicle at an excessive rate of speed and with a wilful, wanton, and reckless disregard of the probable consequences of his acts; that the collision was directly and proximately caused by the negligence of the defendant Sloss in entrusting the defective motor vehicle to an incompetent minor, and was also directly and proximately caused by the defective condition of the brakes upon the automobile and the lack of a horn; that it was also directly and proximately caused by the wilful misconduct of the defendant Jay C. Fetters. Judgment was rendered against both defendants in favor of plaintiffs in the sum of $2000 plus special damages.

On appeal defendant Sloss challenges the sufficiency of the evidence to support the findings in the following respects: (1) that the undisputed evidence establishes conclusively that defendant Jay C. Fetters was not the agent of defendant Sloss at the time of the accident; (2) that it conclusively shows that at the time and place of the happening of the accident Fetters was operating the automobile without Sloss' express or implied permission; (3) that the owner of the vehicle was not liable to guest passengers for the wilful misconduct of the operator of the car; (4) that the proximate cause of the accident was the wilful misconduct of the driver Fetters; (5) that the finding that the automobile involved had defective brakes, which condition was known to Sloss, is without support in the evidence; and (6) that the placing of the automobile in the hands of Fetters was not, in itself, a negligent act under the evidence.

[1] In support of these contentions the appealing defendant cites such cases as Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Berryman v. Quinlan, 29 Cal.App.2d 608, 85 P.2d 202; Caldwell v. Miller, 61 Cal.App.2d 1, 141 P.2d 745; McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909; and Prager v. Isreal, 15 Cal.2d 89, 98 P.2d 729; which, in effect, hold that under section 403 of the Vehicle Code a guest may recover from the driver or any other person legally liable for the conduct of such driver only in case the injury resulted from the intoxication or wilful misconduct of the driver, and that liability under section 403 is not, under such circumstances, imputed to the owner of the car.

Plaintiffs concede this general rule and attempt to distinguish these cases from the instant case in this, that plaintiffs here are not relying on the imputed negligence of the driver of the car but upon the owner's own negligence in knowingly permitting an incompetent and unlicensed operator to operate the car when it was in an unsafe and dangerous condition, out of repair, and while equipped with worn-out brakes. Defendant concedes that if third persons, other than guests, had been injured, Sloss might have been liable on the theory of imputed negligence to an owner, or possibly on the theory of his own negligence. He contends, however, that the instant case does not come within the purview of that statute for the reason that the undisputed evidence shows the plaintiffs to be guests.

Apparently plaintiffs, in their complaint, have endeavored to state a cause of action against the defendant car owner predicated upon certain specified acts of negligence and against the driver upon certain other specified acts constituting wilful misconduct. The trial court found that the specific acts of negligence chargeable to the defendant owner were true and that the collision was caused by the direct and proximate negligence of the defendant Sloss, as specified, and that the collision was also directly and proximately caused by the wilful misconduct of the defendant Fetters. It is therefore apparent, from the pleadings and the findings, that plaintiffs are not relying upon the imputed negligence of the driver of the car to obtain a recovery from the owner, but upon the owner's own negligence, as alleged.

Weber v. Pinyan, supra, citing Walling v. Rugen, 3 Cal.App.2d 471, 39 P.2d 827, and Taylor v. Joyce, 4 Cal.App.2d 612, 41 P.2d 967, indicates a distinction between these two theories of recovery. There it is said, 9 Cal.2d at page 237, 70 P.2d at page 189: "If an owner is himself guilty of negligence in knowingly permitting an intoxicated or incompetent person to operate his car, he may be liable for his own negligence in so doing—not for the tort of the operator, except for the special statute which imputes to him the negligence of the operator. * * The clear purpose of this portion of the statute was to declare that a guest should have no right of recovery for injuries arising from negligence in the operation of the car. In short, therefore, we find the Civil Code section imputing to the owner liability for negligence and the guest law adopted at the same time declaring that he shall not be held liable for negligence to a guest."

The court then concluded that the liability under the guest act was limited to acts of the owner or driver arising from the intoxication or wilful misconduct of the owner or driver, as the case may be, and that the owner who merely permits another to drive his car, where no other relation exists, is not liable under either statute for injuries to a guest arising from the intoxication or wilful misconduct of the driver. The guest law, sec. 403 of the Vehicle Code, as it now exists, provides that "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, * * * has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury * * * of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." Walling v. Rugen, supra, approached this question but did not determine it.

[2] In Mish v. Brockus, 97 Cal.App.2d 770, 218 P.2d 849, 851, the question was presented. In that action plaintiff guest brought an action against the driver, alleging wilful misconduct. She alleged general negligence against the owner, i. e., lack of brake fluid in the hydraulic brakes, and in permitting the driver to drive his automobile knowing that she was a reckless and incompetent driver. A verdict was rendered against both. The appellate court held the facts insufficient to constitute wilful misconduct and said since plaintiff "was a guest in the car neither Robbins (the owner) nor Miss Brockus (the driver) would be liable for her injuries unless wilful misconduct or intoxication on the part of the driver is proved." (Citing Vehicle Code sec. 403.)

"Therefore no consideration will be given to the allegation of defendants' negligence * * *." No liability is created for the wilful misconduct or intoxication of the driver in a guest case, merely by virtue of ownership of the car. Weber v. Pinyan, supra; Sec. 403, Vehicle Code; Caldwell v. Miller, 61 Cal.App.2d 1, 141 P.2d 745; Smith v. Pope, 53 Cal.App.2d 43, 127 P.2d 292.

In Smith v. Pope, supra, 53 Cal.App. at page 48, 127 P.2d at page 295, this court said: "Prior to the enactment of any 'guest statute' in California, the driver of an automobile was liable to his guest for acts of ordinary negligence. This was the common law rule. * * * The overwhelming weight of authority in this country is to the effect that in the absence of statute, under the common law, a guest may recover for failure of the driver to use ordinary care. It has consequently been held that section 403 of the Vehicle Code (the guest statute) was but a restriction on a common law right, and being in derogation of a common law right, such a statute may be extended only so far as a strict construction of the language of the statute makes it imperative. * * * Therefore, only those persons who were guests within the definition adopted by the Legislature may be considered to have been deprived of the right to recover except for injuries due to the wilful misconduct or intoxication of the driver."

[3] The purpose of the enactment of section 403 (guest law) was to prevent recovery on account of mere negligence of a motorist by those persons who, on a highway, accept gratuitous rides in vehicles traveling there. Fairman v. Mors, 55 Cal.App.2d 216, 130 P.2d 448. The primary policy underlying these statutes is to prevent recovery for ordinary negligence by a guest in an automobile who has accepted the hospitality of the owner or driver. Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704. See, also, Stober v. Halsey, 88 Cal.App.2d 660, 199 P.2d 318; Berryman v. Quinlan, 29 Cal.App.2d 608, 85 P.2d 202; and Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520.

It would defeat the purpose of the guest law to hold that merely because an owner was not driving the car at the time, he would be liable for ordinary negligence to a guest, when if he were driving, he would not be liable to the guest for such ordinary negligence. Ohlson v. Frazier, 2 Cal.App.2d 708, 39 P.2d 429.

[4–6] This court has held that the mere absence of an operator's license, under certain conditions, is not prima facie evidence of incompetency to drive a car. Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160. See, also, Wysock v. Borchers Bros., 104 Cal.App.2d 571, 232 P.2d 531. There is no evidence that defendant had knowledge of any such claimed incompetency until he was told by the father that the son was not licensed and had no driving experience. This knowledge came long after the son had been placed in possession of the car. It has been held that knowingly placing a car in the hands of an incompetent operator amounts to ordinary negligence, as distinguished from wilful misconduct. Kananankoa v. Badalamente, 119 Cal.App. 231, 6 P.2d 338; Stephen v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683.

Whether the brakes on defendant's automobile would have been defective under ordinary driving conditions is not shown. The evidence shows that one of the brakes may have proved defective, traveling at the rate of speed and in the manner indicated. It is questionable whether defendant was obligated to anticipate this form of driving and that Fetters would be engaged in automobile racing with guests in his car. However, the question of defective brakes and the absence of a horn upon the car were only questions bearing upon ordinary negligence and come within the rule stated. 60 C.J.S., Motor Vehicles, § 403, p. 1023.

Plaintiffs further rely upon the theory that defendant Fetters was agent for defendant Sloss at the time and place of the accident and was engaged in a service to the owner and that accordingly the principal was liable to the guest for the acts of the agent, citing such cases as Sanford v. Grady, 1 Cal.App.2d 365, 36 P.2d 652, 37 P.2d 475; and Anderson v. Thacher, 76 Cal.App.2d 50, 172 P.2d 533. The evidence is insufficient to support any such finding.

[7–11] Generally speaking, the law indulges in no presumption that agency exists. A party who alleges or relies upon agency has the burden of proving it. 3 C.J.S., Agency, §§ 314 and 315, pp. 252–253; Nofsinger v. Goldman, 122 Cal. 609, 55 P. 425. To recover against a principal upon the theory of respondeat superior, it is necessary for plaintiffs to establish: (1) that the driver was the agent of the defendant for some purpose; (2) that his use of the vehicle was a contemplated incident of his agency; and (3) that at the time of the collision he was operating the vehicle in the transaction of the principal's business. 2 Cal.Jur. Ten Year Supp. p. 492, sec. 315; p. 542, sec. 351; Lane v. Bing, 202 Cal. 577, 262 P. 317; 16 Cal.Jur. p. 1104, sec. 63. The fundamental principal of agency is that the agent must be acting for his principal at the time and place. Sec. 2295, Civ.Code. It affirmatively appears from the evidence that the purchaser was obtaining the signature of his father to the contract for the benefit of the purchaser. A principal is only liable for the agent's negligence where such negligence was committed in and as a part of the transaction of the principal's business. Sec. 2338, Civ.Code. It conclusively appears that Fetters was not so engaged at the time. Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93; 60 C.J.S., Motor Vehicles, § 399(5), p. 1011. A judgment predicated upon a finding which is lacking in evidentiary support must be reversed.

Judgment against appellant Sloss is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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106 Cal.App.2d 25

McEWEN v. TAYLOR et al.

Civ. 7944.

District Court of Appeal, Third District, California.

Aug. 13, 1951.

Action by A. R. McEwen against Ray E. Taylor and Spero Voudouris for sum for lumber allegedly sold and delivered by plaintiff to defendants at defendants' request. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment for plaintiff and the first named defendant appealed. The District Court of Appeal, Van Dyke, J., held that evidence was insufficient to warrant a finding of joint and several liability against the alleged buyers.

Judgment reversed and cause remanded with instructions.

1. Sales ⚿52(5), 181(11)

In seller's action for sum due for lumber allegedly sold and delivered to buyers, evidence was sufficient to sustain finding that a sale and delivery of lumber was made to buyer through agency of another party who ordered the lumber and was the actual agent of buyer.

2. Principal and agent ⚿145(4)

Proper time for creditor's election to be made to hold either agent or undisclosed principal is before entry of judgment but after, in cases of conflict, the issue of agency or none has been settled by findings.

3. Principal and agent ⚿145(4)

Better rule where doubt exists regarding relation between alleged agent and undisclosed principal is to require motion for election to hold either agent or principal, holding motion under advisement until liability and relationship has been determined.

4. Principal and agent ⚿145(4)

Demand for election by creditor to hold either agent or undisclosed principal, if not raised by demurrer, motion, or otherwise during trial by either agent or undisclosed principal is waived.

5. Principal and agent ⚿145(4)

Where seller, who brought action for sum for lumber allegedly sold and delivered to buyers, requested clerk of court to enter default against one of the alleged buyers, but no judgment was then entered, and judgment was subsequently entered against both buyers, entry of default against one of the buyers did not constitute an election by seller to hold either agent or undisclosed principal, since default was entered at time seller had no knowledge that alleged buyer had acted as agent.

6. Principal and agent ⚷145(4)

In seller's common court action for sum due for lumber allegedly sold and delivered to buyers where buyers, who were entitled to benefit of election by seller to hold either agent or undisclosed principal waived right to compel election by failure to make motion or otherwise to compel election, an election by seller was not required and judgment against both alleged buyers could be upheld.

7. Sales ⚷87(3)

In seller's common count action for sum due for lumber allegedly sold and delivered to buyers, evidence was insufficient to warrant a finding of joint and several liability against the alleged buyers.

8. Appeal and error ⚷1177(8)
Principal and agent ⚷197

Where common count complaint alleged that buyers became indebted for lumber sold, but allegations failed to disclose seller's theory as that of agent and undisclosed principal, and no demand to compel an election had been made, and evidence was insufficient to adjudge a joint and several liability in accordance with complaint, and evidence on agency or undisclosed principal was conflicting, and it could not be determined whether trial court believed that agency existed and gave judgment against both agent and principal or whether trial court believed relationship existed as would justify judgment against buyers upon joint and several liability, judgment of joint and several liability was improper and case would be remanded.

9. Principal and agent ⚷184(2)

Before close of trial and after relationship of principal and agent has been established, plaintiff must elect as between principal and agent whom plaintiff desires to hold liable by judgment.

10. Principal and agent ⚷184(2)

Right of election operates in favor of principal and agent and it is their duty to seasonably make demand for election since duty does not rest upon third party creditor.

◆

L. C. Anderson, Roseville, for appellant

Burke & Rawles, Ukiah, for respondent.

VAN DYKE, Justice.

Plaintiff brought this action against defendants Taylor and Voudouris by complaint wherein he alleged that on June 19, 1947, defendants became indebted to him in the sum of $3,992.32 for lumber sold and delivered by him to them at their request. The pleading is in the form of a common count. Some six months after the complaint was filed and at plaintiff's request the clerk of the court entered the default of Voudouris, but no judgment was then entered against him. Defendant Taylor, after his demurrer was overruled, answered, generally denying the allegations of the complaint as to him. The case was tried and thereafter findings of fact were signed by the trial court which found that all the allegations of the complaint were true. No specific findings were made. Judgment was entered against both defendants in the sum prayed for plus interest and costs. Defendant Taylor has appealed from the judgment. He has also noticed an appeal from his order denying his motion for new trial, but such an appeal does not lie.

We shall refer to the plaintiff as respondent and to defendant Tayor as appellant. Some facts were developed at the trial which are without dispute. Voudouris, who has not appealed from the judgment, though it went against both himself and appellant Taylor, was shown without conflict to have been what in the trade is known as a "finder" or "scout", whose business it was to find lumber suitable for the needs of a buyer, to inform the buyer where the lumber could be procured, and generally to arrange a purchase and sale of the lumber. For this the buyer would pay a finder's fee. Voudouris was engaged in that business during the period when respondent's lumber was shipped from Longvale, near Willits, to Sacramento. It fairly appears from the record that all parties realized at the trial that for respondent to hold appellant liable for the debt sued on he must show Voudouris to have been the agent, disclosed or undisclosed, of appellant in the buying of the lumber and that the sale through such agency was in fact made to appellant. This was so because there was no evidence that any business relationship existed between appellant and Voudouris unless it be that of principal and agent.

Voudouris testified that about June 1, 1947, he contacted appellant by telephone, saying he had found some 60,000 feet of mill run redwood lumber near Willits which respondent wanted to sell; that he informed appellant as to the quality of the lumber and the price and that appellant, as the witness put it, "accepted it" and directed him to have the lumber shipped to certain planing mills in the Sacramento area. He further testified that appellant thereafter paid him his commission of $200 on the first 40,000 feet of lumber so delivered, but that he had not received his commission on the rest of the lumber. Voudouris also said that upon the direction of appellant he had the lumber hauled by truckers Farr and Vercuyssen. These truckers almost immediately demanded of appellant that he pay the freight charges and, although appellant denied that he had purchased the lumber, it appeared that he did make out a check payable to the truckers and Voudouris for $479.70, which Voudouris endorsed over to the truckers and which check bore the notation "Payment of freight upon lumber from Longvale to Sacramento". Later on appellant drew a check for $147.81, which amount was the balance of the freight charge. Appellant, concerning these checks, explained that he drew them only for the purpose of enabling the truckers to get their money and that as consideration he bought from Voudouris sufficient lumber from the quantity shipped to offset the amount of the checks. He also said that later on he bought more of the lumber from Voudouris and the check therefor was, at Voudouris' request, made payable directly to respondent. These explanations of appellant, however, are in conflict with the inferences that may be drawn and in conflict also with the testimony of Voudouris who throughout his testimony maintained that appellant had purchased the lumber through him from respondent.

It is without conflict that during the time the lumber was being purchased from respondent he, the respondent, had no direct dealings or communications with appellant, but dealt entirely with Voudouris and from this it results that it is only on the theory of agency that respondent could be found to have sold the lumber to appellant.

Before discussing the specific contentions of appellant, we further observe that appellant at no time sought to have respondent compelled to elect which defendant, agent or undisclosed principal he would hold.

[1] Appellant first contends that "the finding of sale and delivery of the lumber to the appellant is unsupported by the evidence" and he argues that the record shows affirmatively the respondent and the appellant at no time came to an agreement concerning the sale of lumber to appellant. However, the testimony we have hereinbefore recited, while conflicting sharply with that of appellant was, nevertheless, sufficient to have sustained a finding of sale and delivery to appellant through the agency of Voudouris.

Appellant next contends that Voudouris was not appellant's agent and that the evidence is insufficient to support a finding to that effect. The same evidence which we have referred to, however, would support such a finding of actual agency.

[2–5] Appellant next contends that if a finding of agency in fact was supported by the evidence, yet appellant Taylor had been released from liability by the act of respondent in first causing the default of Voudouris to be entered and next in taking judgment against Voudouris. As we have stated, the entry of judgment against Voudouris occurred simultaneously with the entry of judgment against appellant, and the judgment in form is joint and several against both. The contention that when respondent caused the entry of the default of Voudouris he thereby elected to hold him only and not to proceed further against the undisclosed principal is disposed of by the cases of Klinger v. Modesto Fruit Co., Inc., 107 Cal.App. 97, 290 P. 127, and Sears v. Whiston, 139 Cal.App. 682, 34 P.2d 818. In such actions it is true that in theory at least the plaintiff cannot hold both the agent and the undisclosed principal and must upon demand of the principal or the agent elect which he will hold. This election, however, is not required until the plaintiff has obtained sufficient knowledge as to the status of the alleged principal so as not only to enable him to make an intelligent election, but to require him in fairness to do so. Since the default is entered upon failure to appear in response to service of summons and complaint it would ordinarily be true that the plaintiff at that time had no such knowledge. At that point in the proceeding the proof is not in and the plaintiff is in no better position to make an election than at the time of filing the complaint. As stated in Klinger v. Modesto Fruit Co., Inc., the proper time for an election to be made is before entry of judgment but after, in cases of conflict, the issue of agency or none has been settled by the findings. Said the court therein, 107 Cal.App. at page 103, 290 P. at page 129: "* * * It is illogical and unjust to require a creditor on his own initiative and without a demand or motion to make an election as to whether he will seek to hold an agent or his principal liable upon an obligation. This would require him to speculate upon the decision of the court regarding the relationship of the principal and agent. An election before the rendition of judgment might not accord with the court's view of the relationship as disclosed by the evidence. A premature choice might result in an erroneous selection and a total loss of a valid claim. Conflicting evidence regarding the liability of the agent or his principal would require the affirmance of a judgment at variance with the election. The uncertainty and injustice of an erroneous election is apparent. The law will not require a litigant to gamble on his remedy. It would seem to be a wiser and better rule of procedure, where there is an issue or a doubt as to the relationship of a principal and agent, to require a motion for election to be made, and even then to hold the motion under advisement until the liability and relationship of the respective parties has been determined, and then render judgment accordingly. If both are found to be liable because of the relationship of agent and undisclosed principal, then the court should direct an election to be made and enter judgment accordingly. If the demand for an election is not raised by demurrer or motion during the progress of the trial by the party for whose benefit this doctrine is intended, it should be deemed to have been waived."

We conclude that the entry of default against Voudouris did not constitute an election.

[6] Concerning appellant's contention that by taking judgment against Voudouris respondent elected to hold him and release appellant, it appears in the foregoing quotation from Klinger v. Modesto Fruit Co. that our courts have held that in such an action as this election is not required until and unless the party entitled to the benefit of an election seeks by motion or otherwise to compel the election to be made and if no such action be taken by him then he has waived the right to compel such an election, and judgment against both the agent and the undisclosed principal may be upheld. Craig v. Buckley, 218 Cal. 78, 21 P.2d 430; Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585; Schwaegler v. Marchesotti, 88 Cal.App.2d 738, 199 P.2d 331.

[7, 8] Appellant finally contends that the findings and judgment herein are not supported by the evidence and we think this contention must be sustained. Respondent chose to cast his complaint in the form of a common count and therein he alleged simply that upon a given date the defendants became indebted to him for lumber sold to them and for which they agreed

to pay. The findings made by the court exactly accorded with these allegations. These allegations disclosed nothing of the plaintiff's real theory of the case, which quite apparently was that of agent and undisclosed principal, either of whom he might hold if the agency in fact existed and the contract made, therefore, was in fact the contract of the undisclosed principal. The denials in appellant's answer were as broad as the allegations of the complaint. It is true there was no evidence at the trial upon which any joint and several liability, such as was alleged by the complaint, could have been adjudged. Had respondent seen fit to state the facts justifying an action based upon the theory of undisclosed principal, the situation with which we are now concerned could hardly have arisen. This he did not do, however, and his course of conduct in pleading as he did by common count, even though he expected to present a case of undisclosed principal, has good precedent to support it. In McDevitt v. Chas. Corriea & Bros., 70 Cal.App. 245, 250, 233 P. 381, 384, where the pleadings were in the same form as here and an undisclosed principalship was depended upon to fix the liability of the principal, the court said: "Under the allegations of the complaint, it was competent to prove whatever might have been the contractual relation existing between the defendants as to the transactions involved herein." Here the evidence on the subject of agency or undisclosed principalship was squarely conflicting and we have no specific findings that such a relationship existed between the two defendants. As was aptly said in McDevitt v. Chas. Corriea & Bros., supra, where the findings, as here, were in the language of the complaint and the judgment was against both the agent and the principal, "The findings, following as they do the language of the complaint, are not specific, and, taken alone or without reference to the judgment, it would be impossible to determine from them what the decision of the court is as to the legal relation existing between the defendants in the business of purchasing the turkeys. In that condition of the findings, however, the presumption must be indulged that they support the judgment and the theory upon which it proceeds. The theory of the judgment upon its face is that the defendants, in the carrying out of the transactions upon which the action is founded, were both jointly and severally liable. Whether that theory was founded in the belief that a principal and his agent, as to any contract the latter has made within the scope of his authority as such for the former, are jointly or both jointly and severally liable thereon, cannot be ascertained from the findings."

In the instant case, with the evidence on agency conflicting, we cannot tell from the pleadings, findings and judgment whether the trial court believed that the agency did exist and therefore, in the absence of a motion to compel election gave judgment against both the agent and the principal or whether the trial court believed the agency did not exist but believed that, from the testimony, such relationship did exist as would justify the entry of judgment against both defendants upon a joint and several liability, as was done. If the latter situation prevailed, then the evidence does not support either the findings or the judgment, for joint and several liability was not proven. If the court intended to give judgment based upon the fact of agency then that fact should have been found, and since the evidence bearing thereon was conflicting the trial court alone can make that finding. But the finding made was of joint and several liability, which in so far as it tells us anything tells us the trial court found against the claim of agency. So considered, the evidence does not support the finding and the judgment against appellant must be reversed.

[9] Since the case must be remanded it is necessary to set forth certain directions for the guidance of the trial court in view of the language used in McDevitt v. Chas. Corriea & Bros., supra. It was there stated that plaintiff, before the close of the trial and after the relationship of principal and agent has been established, must elect as between the principal and agent which he desires to hold liable by a judgment. From

this proposition, the court then concluded that if on a retrial of the issues the court found that an undisclosed agency existed, the principal was entitled to judgment since the plaintiff had an unimpeached judgment against the agents.

[10] The factual situation is the same in the instant case. Since the judgment as to appellant Taylor is reversed and Voudouris has not appealed, there now stands an unimpeached judgment against Voudouris. Should the trial court find an agency relationship exists between appellant and Voudouris, we hold that the result would not be that appellant Taylor would be entitled to a judgment since a judgment would already stand against the agent. This holding we recognize is contrary to the above mentioned language in the McDevitt case. However, the question of waiver of the right to an election was not before the court in so far as can be determined, and the statement that the plaintiff must demand the election we deem is disapproved by later cases. The right to an election operates in favor of the principal and agent, and it is their duty to seasonably make the demand. Such duty does not rest upon the plaintiff or third party creditor. Fleming v. Dolfin, supra, 214 Cal. at page 271, 4 P.2d 776, 78 A.L.R. 585; Craig v. Buckley, supra, 218 Cal. at page 82, 21 P.2d 430.

We are, therefore, of the opinion that appellant has waived his right to force plaintiff to elect as to which party, the principal or agent, he intends to hold liable by a judgment, and if the trial court finds an agency relationship exists, an entry of judgment against the appellant principal will be proper, notwithstanding the existence of a judgment against the agent Voudouris.

For the reasons given the judgment against the appellant is reversed, but since it appears from the record that the case has been fully tried the cause is remanded to the trial court with instructions that from the evidence taken and from any additional evidence which the court for good cause may permit the parties to introduce, the court make findings adequate to settle the issues of fact presented and to thereupon render judgment in accordance therewith. The purported appeal from the order denying a new trial is dismissed.

ADAMS, P. J., and SCHOTTKY, J. pro tem, concur.

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106 Cal.App.2d 208

PEOPLE v. BECKER.

Cr. 4562.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

As Modified on Denial of Rehearing Aug. 31, 1951.

Hearing Denied Sept. 17, 1951.

Eva Marie Keller Becker was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of murder in the first degree and from the judgment and sentence and from an order denying her motion for a new trial, defendant appealed. The District Court of Appeal, Wood, J., held that evidence warranting an inference as to a deliberate and premeditated purpose to kill estranged husband sustained conviction of first degree murder.

Purported appeal from sentence dismissed and judgment and order denying motion for new trial affirmed.

1. Homicide 🔑**253(3)**

Evidence warranting an inference as to deliberate and premeditated purpose to kill estranged husband sustained conviction of first degree murder.

2. Criminal law 🔑**1023(10)**

Sentence for first degree murder was not appealable.

Al Matthews, Doris R. Baker, Harold J. Ackerman and Robert P. Dockeray, all of Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of murder. Trial by jury was waived. She was adjudged guilty of murder in the first degree and was sentenced to life imprisonment (the sentence to run concurrently with a sentence she was then serving in the penitentiary). She appeals from the judgment, sentence, and order denying her motion for a new trial.

Her contention is that the evidence is insufficient to support the judgment; and that, even if the evidence is sufficient to support a conviction of murder, it is not sufficient to support the finding of murder in the first degree.

Defendant, formerly known as Eva Marie Keller, and Max E. Keller (the deceased) were husband and wife and they lived at 401 West Ramona Boulevard in Wilmar until they separated in 1944. Then he lived at that address and she lived in their mountain cabin at Crestline.

On January 24, 1947, about 8 a. m., a telephone repair man went to the home of Max Keller to test whether the receiver was off the telephone hook. No one responded to his knocks at the front and back doors, and he did not see anyone on or near the premises, but he determined from a test made outside the house that the receiver was off the hook of an extension telephone in a building at the rear of the house and that the telephone service at that address was a one-party line. He testified that when the receiver is off the hook of the extension telephone in the rear building a person cannot telephone from the house. The next day, January 25th, about 9 a. m., another telephone repair man went to said address to restore the receiver to the hook. He knocked on the front and side doors of the house, and then (without going into the house or the building) he disconnected the extension telephone (which was in a workshop at the side of the garage) and thereby made the house telephone usable. A next door neighbor came out, and the telephone man explained what he was doing.

Mrs. Zinnen, who lived next door to said address, saw the telephone man at the Keller house on January 25th and she talked with him. She had last seen Mr. Keller on January 23rd about 5:30 p. m., at which time he was in his kitchen shaving, and she was in the dining room of her home. On January 25th, after seeing the telephone man, she became suspicious, and then she and her mother walked around the Keller house to see if the doors or windows were open, but they did not find any of them open. She (Mrs. Zinnen) looked in the window of the workshop and noticed that the telephone receiver was off the hook. She then had a conversation with a neighbor, Mr. Ellsworth, who lived across the street, and he walked around the Keller house to see whether he could open any doors or windows, but he did not find that he could enter through any of them. Then, by using a stepladder and a pry bar, he raised the kitchen window, which is above the sink and about 6 feet above the driveway, and entered the house through that window. He went through various rooms and upon opening the door of the den he saw the body of Mr. Keller on the floor of the den in front of a closet door. Mr. Ellsworth then left the house by going through the kitchen window. He told Mrs. Zinnen what he had learned, and then he went home and telephoned to the sheriff's office.

Two deputy sheriffs arrived at the Keller house about 10:50 a. m., and Mr. Ellsworth climbed through the kitchen window and opened a door. Then they followed him to the den and saw the body of Mr. Keller on the floor in front of a closet. After ascertaining that Mr. Keller was dead, they made a search of the body, the room and the house for a weapon, particularly a gun, but they did not find any weapon. They found that all the doors of the house were locked and the windows were closed securely or locked. The door of the closet was open and there was a bullet hole in the door. The bullet had gone through the door, the Venetian blind, the windowpane and screen, and outwardly into the yard. On the ground beneath the shattered window they found a .38 caliber slug. They searched the house for a pocketbook but none was found.

The bullet hole in the door was 3 feet 9 inches above the floor. Two other deputy sheriffs arrived at 11:35 a. m. They searched every room in the house, all the clothing in the house, the clothing worn by the deceased, the garage, the workshop, the automobile and truck in the garage, and they found no gun or wallet. They observed that the telephone receiver was off the hook of the telephone in the workshop.

Thie chief autopsy surgeon of the coroner's office, who performed an autopsy on the deceased, testified that the immediate cause of death was hemorrhage due to a gunshot wound of the chest and neck; that one wound was through the soft tissues of the neck, severing blood vessels and fracturing the fifth cervical vertebra, and the other wound was through the heart and the lower lobe of the left lung. The two bullets were found in the soft tissues of the body at the back of the neck and chest. There were no powder flecks at the entrance of either wound, but the margins of the entrances were seared. The wounds were not contact bullet wounds—that is, they were not the kind of wound that results when the gun is held against the skin.

On January 23, 1947, between 9 p. m. and 9:30 p. m., Mr. House, who lived about 437 feet from the Keller house, testified that at said time he was at home and he heard what he thought were three shots, and the first two were pretty close together, and there was a pause and then another one.

Mr. Blaine, the employer of deceased, testified that he saw Mr. Keller on Thursday, January 23, 1947, about 5:15 p. m., when he (deceased) left the place of employment at the Farmer's Market in Los Angeles; he had known deceased three or four months, and on many occasions he had seen the pocketbook (Exhibit 5 hereinafter referred to) in possession of the deceased; he noticed particularly the ten-pointed star on the pocketbook.

A gasoline station operator in Wilmar testified that he knew the deceased and defendant; on January 22 or 23, 1947, in the late afternoon, when it was getting dark, deceased came into the station and bought gas; deceased was excited and nervous; he left his wallet on the counter, but about fifteen minutes later he returned and asked the operator to cash a check for him; the check, which was for $50 or $60, was cashed and the deceased put the money in his wallet; when he started to go, the wallet which had quite a bit of money in it was left on the counter again; the wallet was similar to the wallet involved herein (Exhibit 5). He also testified that about a week thereafter the defendant came to the station in an automobile and asked him if the officers had questioned him about Mr. Keller; when he told her they had, she asked him what he said and what he knew about it; he said he did not remember the conversation with the officers; she said, "Well, the officers are trying to pin this thing on me," and "the night Max got killed I was in a hospital out in Hollywood."

Two deputy sheriffs, who were at the Keller house in the morning of January 25, 1947, went in the afternoon of that day to Crestline to talk with defendant; she was at the home of Mr. Kellogg in Crestline, and they talked to her in front of his cabin; they told her they were deputy sheriffs of Los Angeles County and were conducting an investigation; they asked permission to search her car, and she gave that permission, but nothing was found in the car; the officers and defendant went to the town of Crestline where they had a further conversation. One of the deputies asked her if she could account for her movements for the last two or three days and she said she could; he asked her to start with Thursday afternoon, January 23, 1947; she said that from 7 p. m., January 23rd, until 8 a. m., January 24th, she remained at her cabin in Crestline; she had no visitors during that time; about 8 a. m., on January 24th, she went to the home of Mrs. Ferguson in Crestline and took Mrs. Ferguson's daughter to school; then she went to a drugstore; then she went to a restaurant in San Bernardino, then she took some chickens from her frozen food locker to a hospital in San Bernardino; about noon she went to a beauty parlor in San Bernardino and remained there about two hours; then she was at Dr Savage's office from 3 p. m. to 5 p. m. approximately;

then she was in her attorney's office in San Bernardino until 6:30 p. m. approximately; then she went with Mr. and Mrs. Ferguson to the Royal Palm and remained there rather late, and then went to the Ferguson's home where she slept that Friday night. They asked her if she ever owned any guns; she said the only guns she knew anything about were a .22 rifle, a .22 B–B gun, and an old rusty gun which she had given to a druggist in Crestline in December, 1946. They asked her if she had had any difficulties with Mr. Keller, and she said she had not. They asked her if she had had any quarrels with him. She said that shortly after midnight on January 1, 1947, she had gone to the Keller house in Wilmar to wish him a Happy New Year, that he noticed her about the premises and came out of the house, they had a conversation, a fight ensued and he struck her several times on the leg with a crowbar. She said she had not been in that vicinity since that time. When they began the conversation with her, they did not say anything in regard to Mr. Keller and did not tell her that he had been killed. Near the end of the conversation, one of the deputies told her that her husband had been shot, and she replied: "Oh, no, he cannot be dead. You are joking."

On January 18, 1947, defendant was in the office of her physician Dr. Savage, and he found that on her legs below the knees there were bruises which had become infected, and he sent her to a hospital in San Bernardino. She was in the hospital from January 18th to January 21st. According to the doctor's direction, she also went to his office on January 22nd and 24th.

On March 12, 1947, the said officers, in the presence of two other officers and a deputy district attorney, had a conversation with defendant at the sheriff's office in Hollywood. She was not under arrest. They asked her where she was on the night of Thursday, January 23, 1947. She said she had gone to two shows in San Bernardino; she had gone to the Fox Theater about 6 p. m., but she left it early because she didn't like the picture; after she left there she ate a hamburger at a restaurant; then, about 8 p. m., she went to the Ritz Theater. They asked her if she knew the name of the picture there, and she said she did not know it. In response to leading questions as to the names of the pictures at that theater and what the pictures were about, she said the cartoon was about a big dog named "Pluto," that she thought one picture was "Decoy," and that one was "The Time, The Place and The Girl." She said she left the Ritz Theater about midnight, and after she had been away from the theater about five minutes, and while she was driving toward her home, she noticed that she had lost her scarf; she then returned to the Ritz Theater and knocked at the front doors, which were locked, and attracted the attention of the manager and told him she had lost her scarf; then she and the manager and the janitor proceeded to the seating area in the theater, and the janitor found her scarf and returned it to her; the manager told her he was glad that she found the scarf; then she went home. One of the officers asked her if she remembered a conversation with him on January 23 (25), 1947 at Crestline, and she said that she remembered it. He asked her if she didn't tell him at that time that on Thursday night, January 23, 1947, she had remained at home at Crestline the entire night. She replied that he must have misunderstood her.

The assistant manager of the Ritz Theater testified that the pictures showing at that theater on January 23, 1947, were "Decoy" and "The Time, The Place and The Girl"; the picture "Decoy" was not shown after 5:30 p. m. of that day; the show was over at 11:55 p. m.; about midnight, after the doors were locked, he heard knocking at the front door; he opened the door and saw the defendant who said that she had lost her scarf in the theater and she would like to go in and get it; he let her in, but he did not accompany her or see what she did; after that, she said she found her scarf, and while she was putting it on she left the theater. He also testified that he knew her before said January 23rd; that months before that date she told him that she and her husband were split up, that he was running around with teen-age girls and she did not like that.

The janitor of the Ritz Theater testified that after the show was over on the night of January 23, 1947, a lady, who was "similar" to defendant, knocked at the door of the theater and said she had lost her scarf and asked him if she might look for it; he gave her permission and she went ahead of him; she bent over between the seats then straightened up and said she had found the scarf; then she went out of the theater. He did not find the scarf; the first time he saw it was when she had it in her hand.

The distance between the Keller house and the Ritz Theater is about 50 miles. An officer testified that he drove from that house to the sheriff's office in San Bernardino (about four blocks from the theater) in approximately one hour and seventeen minutes without driving over 50 miles per hour.

On May 23, 1947, two deputy sheriffs, the defendant and her attorney met by prearrangement at the Keller house. Defendant then said she was going to search the house in an attempt to find letters or notes that might have been left by the deceased. The officers followed her while she searched various areas about the house and garage. While at the garage she showed them a barrel, and stated that it was the place where, two days previously, she found a capsule in which there was some writing that she had identified as the writing of the deceased. (The article referred to as a capsule is a tube that is covered with material which appears to be imitation leather. The capsule, with the writing therein, had been delivered previously to the officers by defendant's attorney.) That writing is Exhibit 24. The officers then showed the writing to her and asked her if she could identify it, and she replied that it was the writing of the deceased. Then she looked in one or two places in the garage, and then she went into the bathroom and she looked under the washbowl and found another note, Exhibit 25. It is toilet paper about a yard long upon which there is writing. Defendant handed the note to one of the officers, and he asked her if she could say whose writing it was. She looked at the note and said in her opinion it was the writing of the deceased. One of the officers then obtained practically the same length of paper and asked her if she would write the contents of Exhibit 25 and she replied that she would. He dictated the note to her and she wrote it while he dictated. That paper, with her writing thereon, is Exhibit 26. When the defendant's attorney delivered the capsule to the officers he also delivered to them several letters which were written by the deceased to defendant. Those letters were placed in evidence as exemplars of decedent's handwriting. Also, several documents were received in evidence as exemplars of defendant's handwriting, and it was stipulated that those exemplars (Exhibit 33) were in defendant's handwriting.

An examiner of questioned documents, who was qualified to testify as a handwriting expert, testified that he had examined Exhibits 24, 25, 26 and the exhibits which were the exemplars of decedent's handwriting and of defendant's handwriting; that he examined those exhibits for the purpose of determining who wrote Exhibits 24 and 25; that in his opinion Exhibits 24 and 25 are in the handwriting of defendant and that Max E. Keller, the deceased, did not write them.

Exhibit 24 (the writing which was in the capsule) is as follows:

"To whom It May Concern

"Everett and my attorney and the Doctor Day colled on me the wanted me to Dress, it was past 3 a. m. I am on the floor, I afraid something will happen. I cannot see clear. The tolk about money and will The are made because I did not wanted to kill my wife, I am not sure to do thise thinks but There may be is a other solution. If the make my wife a widow pleace send for my B. to stand by her. My Dearest I love her so. Max E. Keller
My will is not to be changed.
M E Keller 23-47"

Exhibit 25 (the writing on the toilet paper is as follows:

"To my Honey!
"I wrote you 5 letters last week look for, my attorney B. Everett J. and Doctor D. they got me out of bad they want me to write a will, put I want the old will to be the right one. Ball have me sign papers Everett said now I'll get the Keller woman Now I can pay back. The after you to, the get me, for Barbara told Everett I will not harm you, the was together after my money Ball got $7930.00 and about $1000, for his fee."

"Dearest Honey I love you get my Brother to help you.

"Well I have to say good By and Good night my love Thousand Kisses, they are calling well say goodby to Bethle and the children be careful stay in Boulder Creek pay for me tell Charley & Lillian good by for me Darling forgive me if you can Remember me to every body
"Till we meet again
"Yours as ever always loving Hubby
"Get money out of Truck in Garage you will ned it."

On January 21, 1947, defendant filed a verified complaint for divorce in San Bernardino County. She alleged therein that she and the deceased were the owners of community property consisting of the following: four parcels of real property of the total value of $37,700, subject to encumbrances totaling $10,000; personal property consisting of furniture, tools, automobile, and truck of the total value of $4,100; life insurance policies in the approximate amount of $15,000; and cash in possession of deceased in excess of $5,000. In that complaint she asked the court to award all the community property to her.

On October 24, 1948, the seven-room house, in which defendant was living in Crestline, was destroyed by fire. Mr. and Mrs. Zinnen (who lived next door to the Keller house in Wilmar) and Mr. and Mrs. McHolland owned a mountain cabin in Crestline. On October 27, 1948, the defendant, who had married Mr. Becker, asked Mrs. Zinnen for the use of the Zinnen-McHolland cabin for two weeks until they could find a place to live which was near Mr. Becker's work. Mrs. Zinnen granted the permission and gave the cabin keys to her.

An arson investigator for the National Board of Fire Underwriters investigated the cause of the fire which burned defendant's house. On December 9, 1948, while the defendant, the arson investigator, a deputy sheriff and Mr. Becker were on the way to the sheriff's office in San Bernardino, the defendant requested that they stop at a certain cabin in Crestline (the Zinnen cabin) for the purpose of releasing a cat. They replied that they would do that in the morning. The next day, December 10th, the investigator, the officer, defendant's husband and the fire chief at Crestline went to the Zinnen cabin. They did not have a key, and they cut the lock and entered the cabin. The gas in the gas range was burning. They released the cat, turned the gas off, put another lock on the door, and delivered the key to the justice of the peace at Crestline.

On December 16, 1948, two deputy sheriffs, the fire chief and the arson investigator entered the cabin just referred to. They searched the cabin, looking for a gun. Clothing and numerous boxes were on the bed and davenport, and things in the cabin were in disorder. In one of the boxes there was an old wallet (Exhibit 5), but no significance was attached to it at that time and it was left there and picked up later. While searching the bed, they rolled the mattress about halfway back and there, in the middle of the bed between the mattress and the springs, they found a package which was wrapped with tissue paper and bound by wire and thread. Inside the wrapping there was a .38 caliber Smith & Wesson revolver (Exhibit 12) which was encased in two gloves (Exhibit 13)—they were ladies' right-hand gloves and one glove was over the back part of the gun and the other one was over the front of it. The gun was not loaded. Some of the numbers on the gun had been punched out, but the last three numbers thereon could be seen.

A ballistics expert fired four test bullets from the revolver (Exhibit 12) and compared them with the two bullets which were taken from the body of the deceased. He testified that in his opinion the two bullets which were taken from the body of the deceased were fired from that revolver. He also testified that he attempted to make a comparison with the bullet which was found on the ground beneath the shattered window of the Keller house, but it was impossible to arrive at any conclusion due to the distorted condition of that bullet; that said bullet was of the same caliber as the bullets which were taken from the body of the deceased.

A fire arms identification officer testified that he fired a bullet from said revolver; he compared that bullet with the bullets which were taken from the body of the deceased; that in his opinion the bullets which were taken from the body of the deceased were fired from the revolver, Exhibit 12.

Mrs. Zickert testified that she visited the defendant and Mr. Keller at their home in Crestline in 1945; one night there was a disturbance in a nearby cabin and the defendant suggested that they investigate the disturbance. Defendant went into the bedroom and came back with a gun; Mr. Keller asked her where she got the gun, and she replied that she got it from some person, but the witness (Mrs. Zickert) did not remember the name stated by defendant; then defendant, Mr. Keller and the witness went out and made an investigation; when they returned to the house, Mr. Keller asked defendant if the gun was registered and numbered; Mr. Keller took the gun, said the numbers had been scratched off, and asked the witness if she could read any of the numbers. She (the witness) noticed that a number on the barrel had been scratched and was not discernible; and the gun, Exhibit 12, is similar to the gun which she saw at said time.

Mrs. Dorosh, a daughter of defendant, testified that at Christmas about 1939 or 1941 or 1942 the defendant gave a wallet to Mr. Keller, and she also gave a wallet to Mr. Petrichello, who was then the husband of the witness (Mrs. Dorosh); the wallet which defendant gave to Mr. Keller at said time is the same as the wallet, Exhibit 5, herein; that a week before Mr. Keller was killed she saw a wallet in his possession and that wallet was of the same appearance as the wallet (Exhibit 5); that while she was living at the home of defendant and Mr. Keller, from 1935 to 1938, the defendant insisted that a younger sister of the witness wear gloves; that the gloves which the sister wore at that time were similar in appearance to the gloves herein, Exhibit 13.

Mr. Petrichello testified that defendant gave him a wallet at Christmas in 1940 or 1941; and at that time she also gave a wallet, which is Exhibit 5, to Mr. Keller.

Mrs. Zinnen testified that she had not seen the revolver, Exhibit 12, before October, 1948; that, insofar as she knew, the revolver was not in the cabin (Zinnen-McHolland cabin) when she was there about Labor Day in 1948; that her husband did not own the revolver; and she had never seen it in the possession of the McHollands. Mrs. McHolland testified that during 1948 she was at the cabin several times, and the last time she was there in that year was after Labor Day when she was there one week; she was there in May or June, 1948, and at that time she turned the mattresses on the beds, and she did not see a gun under either mattress; she never saw the revolver, Exhibit 12, in the cabin; that, insofar as she knew, the revolver was not in the cabin at any time she was there; that she never saw the gloves, Exhibit 13, prior to the preliminary hearing, and she did not place them in the cabin.

Defendant did not testify or offer any evidence.

[1] Appellant contends, as above stated, that the evidence was insufficient to support the judgment of conviction of murder. She argues to the effect that the evidence does not place her at the Keller house at the time Mr. Keller was killed; that no one saw her at or near the house at that time; that the fact that the revolver, wallet and gloves were in the cabin where she was living did not justify a finding that she was at the scene of the murder; and that other persons had occupied the cabin as recently as September, 1948. She made contradictory statements as to where she was the night Mr. Keller was killed. The revolver with which he was shot was found in the cabin

where she was living, and it was wrapped in gloves which were similar to gloves defendant had possessed several years previously. It could be inferred reasonably that the wallet which was found in the cabin was the wallet which Mr. Keller had in his possession within a few days or hours preceding his death. The notes (Exhibits 24 and 25), found by the defendant in the Keller house and workshop while she purportedly was hunting for notes that might have been left by the deceased, which notes purportedly were written by the deceased to reveal the circumstances confronting him just before his death, were in fact written by the defendant in an attempt to make evidence that would exculpate her. It could also be inferred reasonably that the incident relative to defendant going to the theater in San Bernardino after midnight to get her scarf was designed to create a false impression that she was at the theater at the time Mr. Keller was killed. It is unnecessary to refer specially to other evidence hereinabove detailed. The evidence was ample to support the conviction of murder.

Appellant asserts, as above stated, that in any event the evidence was not sufficient to justify a finding of murder in the first degree. Mr. Keller and appellant had not been living together for many months prior to January 23, 1947. There was ill feeling between them. According to a statement made by defendant to the officers, Mr. Keller had struck her on the legs with a crowbar a few weeks before the murder. The divorce complaint filed by the defendant two days before the murder shows that the deceased and defendant owned property of considerable value and she was claiming that all of the property should be awarded to her. Inferences which could reasonably be drawn from the evidence establish a deliberate and premeditated purpose to kill Mr. Keller. Some of the evidence which is the basis for such inferences is evidence pertaining to: the locked condition of the Keller house; the undisturbed condition of the furniture therein; the receiver off the hook of the extension telephone in the workshop which prevented use of the telephone in the house; the preparation by defendant for asserting as an alibi that she was at a theater; the preparation, "planting," and finding by defendant of the alleged final notes of the deceased; and the many false statements of defendant as to where she was on the day the murder was committed. Furthermore, the defendant did not testify or offer any evidence. The evidence was ample to support the conviction of murder in the first degree.

[2] The purported appeal from the sentence is dismissed. See People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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106 Cal.App.2d 114

PEOPLE v. JACKSON.

Cr. 750.

District Court of Appeal, Fourth District, California.

Aug. 15, 1951.

Hearing Denied Sept. 13, 1951.

Cleveland L. Jackson was convicted in the Superior Court of San Diego County, John A. Hewicker, J., for the unlawful sale of narcotics and the defendant appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Poisons 🔑4

Under statute providing that no "person" shall sell a narcotic except on a written prescription, physicians are not excluded from definition of quoted word. Health and Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Person".

2. Poisons 🔑9

In prosecution for unlawful sale of narcotics, whether act of defendant physician in giving complaining witness a hypodermic injection of morphine was performed in good faith was a question for jury to determine from evidence, including any presumption available to defendant. Health and Safety Code, §§ 11330, 11500.

3. Criminal law ⚷1159(2)
Poisons ⚷4

Provisions of Health and Safety Code regulating sale of narcotics and prohibiting the selling thereof except on a written prescription do not exempt a physician from prosecution for unlawful sale of narcotics and where evidence clearly sustains verdict of a jury, conviction of one who is a physician must be upheld. Health and Safety Code, § 11000 et seq.

4. Poisons ⚷9

Evidence sustained conviction of physician for unlawful sale of narcotics. Health and Safety Code, §§ 11330, 11500.

5. Criminal law ⚷1160

Discrepancies in testimony of witnesses are matters solely for observation and consideration of jury and for consideration of trial court on motion for new trial.

6. Criminal law ⚷1160

District Court of Appeal may not disturb findings of jury and action of trial court in denying motion for new trial where it cannot be said as a matter of law that there is no evidence to support the conviction.

7. Criminal law ⚷338(1), 1170(1)

In prosecution of physician for unlawful sale of narcotics, refusal to permit physician to question complaining witness as to whether witness was married or single, whether she was registered at a certain hotel, whether she was alone when she came to city or was living with someone at a hotel and to show that complaining witness had obtained narcotics from persons other than the defendant, was proper since matters were immaterial and as trial court could confine examination within reasonable limits and to matters which were relevant, no prejudicial error resulted. Health and Safety Code, §§ 11330, 11500.

8. Witnesses ⚷388(8)

Denial of defendant's offer to prove that prosecuting witness made certain statements during preliminary examination when counsel for defendant made no effort to lay necessary foundation for introduction of such statements for purpose of impeachment, was not error. Code Civ.Proc., § 2052.

9. Criminal law ⚷666(1)

Trial court's refusal to call a certain person as a witness which person was called and testified as a witness for defendant, was not error since whether person was called by people, defendant or court was immaterial.

10. Criminal law ⚷730(16)

In prosecution for unlawful sale of narcotics, fact that in his argument to jury prosecutor replied to argument of counsel for defendant with observation that first offenders often get probation which statement was with reference to charge of possession of narcotics by prosecuting witness, did not constitute prejudicial misconduct, particularly since trial court admonished jury to disregard remarks and that punishment to be imposed on witness was no concern of jury and neither was punishment that might be imposed on defendant. Health and Safety Code, § 11000 et seq.

11. Poisons ⚷9

In prosecution of physician for unlawful sale of narcotics, instruction that it was unlawful for any person to furnish a narcotic except on written prescription of a licensed physician, and instruction that a licensed physician may administer a narcotic where such person is actually suffering from or appears to be suffering from a physical condition which would suggest use of narcotics in accordance with good medical practice and instruction, that whether physician acted in regular and legitimate practice of his profession and in good faith was question for jury, properly presented to jury the proof necessary before defendant could be convicted. Health and Safety Code, §§ 11330, 11500.

12. Poisons ⚷9

In prosecution of physician for unlawful sale of narcotics, where defendant physician admitted that a prescription was not furnished, giving of instruction containing statement that burden was on defendant to show that there was a written prescription in existence to justify and excuse his possession of narcotics or his actions and that in absence of such proof of existence of such prescription, jury must find that no such prescription was in existence, was not erroneous as implying that mere possession of narcotics by defendant without a written prescription constituted guilt of offense charged, the sale of a narcotic. Health and Safety Code, §§ 11330, 11500.

13. Criminal law ⚷829(4)

In prosecution of physician for unlawful sale of narcotics, refusal to give defendant's requested instructions relating to good faith treatment by a physician was proper in view of instructions given. Health and Safety Code, §§ 11330, 11500.

14. Criminal law ⚷781(2)

In prosecution of physician for unlawful sale of narcotics, conversation which took place between officers and defendant while he was being searched was sufficient to justify giving of instruction relating to accusatory statements. Health and Safety Code, §§ 11330, 11500.

15. Criminal law ⚷814(8)

In prosecution of physician for unlawful sale of narcotics, where police officers used no more persuasion than was necessary to an ordinary sale and defendant willingly made sale of morphine to prosecuting witness, there was no entrapment and refusal to give an instruction on that subject was not error. Health and Safety Code, §§ 11330, 11500.

16. Criminal law ⚷957(2)

Verdict of jury finding defendant physician guilty of unlawful sale of narcotics could not be impeached by letters obtained from members of jury indicating that some jurors were lead to believe that court had power to grant defendant probation and that they would not have voted for verdict of guilty except for certain instruction. Health and Safety Code, §§ 11330, 11500.

Thomas Whelan, San Diego, Hugh E. Macbeth, Sr. and Curtis C. Taylor, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant, who was a physician licensed to practice medicine in the State of California, was accused of the crime of sale of narcotics, in that on or about the 6th day of July, 1950, he did wilfully, unlawfully and feloniously sell a certain narcotic, to wit, morphine. The information contained a second count in which it was alleged that the defendant was guilty of furnishing narcotic by a physician to one not under treatment for pathology, in that on or about the 6th day of July, 1950, he did wilfully, unlawfully and feloniously and not in the regular practice of his profession as a medical practitioner prescribe, administer and furnish a narcotic, to wit, morphine, to or for a person who was not at said time under his treatment for a pathology or condition other than narcotic addiction.

A jury returned a verdict of guilty as charged in the first count of the information, recommending leniency, and was unable to agree upon a verdict as to the second count. Following the denial of a motion for a new trial, the defendant was given a sentence of imprisonment for a period of six months and this appeal followed.

[1] The first ground of appeal is that the verdict is contrary to the law. The contention is that the provisions of the Health and Safety Code of the State of California, as of July, 1950, did not contemplate the prosecution of a duly and regularly licensed physician and surgeon under the facts and circumstances presented in the case at bar.

Section 11500 of the Health and Safety Code provides as follows: "Possession, etc., of narcotic forbidden. Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State." This statute provides that "no person" shall sell a narcotic except upon a written prescription. Physicians are not excluded from the definition of the word "person" and it is apparent that all persons, including physicians, are thereby forbidden under liability of criminal prosecution to furnish or sell any narcotic except as otherwise provided in the statute.

Section 11330 of the Health and Safety Code, provides that a physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction. The physician shall prescribe, furnish or administer narcotics only when in good faith he believes the disease, ailment, injury or infirmity, requires such treatment.

[2] Defendant argues that when a physician attends a patient it is presumed that whatever treatment he gives is given in good faith; that when a physician administers or dispenses narcotics in good faith in the treatment of a patient there can be no unlawful intention and no crime committed. Evidence was introduced by both the prosecution and defense that the defendant gave the complaining witness a hypodermic injection of morphine. Whether such act was performed in good faith was a question for the jury to determine from the evidence, including any presumption available to the defendant.

The appeal herein is from a judgment rendered on the first count of the information, which charges an unlawful sale of morphine on a specific date. The defendant denied this allegation. His testimony was that he did not furnish, prescribe, administer or sell the two tablets of morphine sold to the complaining witness and found in her possession after such sale.

[3] The applicable provisions of the Health and Safety Code, section 11000 et seq., do not exempt a physician from prosecution for unlawful sale of narcotics and where the evidence fairly sustains the verdict of a jury, the conviction of one who is a physician must be upheld. People v. Kinsley, 118 Cal.App. 593, 601, 5 P.2d 938.

The evidence, briefly summarized, is as follows: The prosecuting witness, Norine Marie Monroe, first met the defendant during the latter part of January or the first part of February, 1950, through a colored porter, one George Brooks. She testified that at that time she bought some small tablets from the defendant at $5 each; that she was not then under treatment for any condition; that she had a sty on her eye and the defendant lanced it; that she saw the defendant on July 3, 1950, in a liquor store in San Diego, at which time and place she purchased 7 pills or tablets at $5 a tablet; that she saw the defendant many times during January of 1950 through July 3rd and that on each occasion she purchased certain pills from him at $5 a pill; that on the 4th of July her brother-in-law in San Diego found narcotics in her handbag which she had purchased from the defendant; that he called the police and she was placed under arrest; that after her arrest, she had a conversation with certain police officers concerning her purchase of narcotics and on July 6th she, in company with two officers, drove within approximately two blocks of the defendant's office; that the officers gave her $20 in the form of $5 bills with which to make a purchase from the defendant; that she entered the defendant's office and purchased 4 tablets from him, two of which were given to her in a hypodermic and the other two to take out; that she paid $5 for each of these tablets; that the defendant obtained the tablets from a brown bottle in his jacket pocket; that she asked the defendant to give her a shot as she was ill and could not make it back to her hotel without some narcotics; that she told him she was having withdrawal symptoms very badly; that he put the 4 tablets on a Kleenex in front of her, took 2 of them into the other room and came back with a prepared hypodermic and gave her an injection in the hip; that during the course of her various visits to defendant she was never treated for any condition other than a sty on the eye and when she was asked if she had ever requested Dr. Jackson to treat her for a particular condition, she replied "The only treatment I asked for was narcotics."

A San Diego police matron testified that on July 6th she examined the prosecuting witness in the city jail about 11:15 A.M.; that she gave her a "skin test", removed her clothing, made a thorough examination of it and of the complaining witness and that she found nothing other than the items of clothing.

W. L. Wilson, a police officer, testified that at about 11:00 o'clock A.M. on July 6th, immediately after the matron had searched the complaining witness, he and officer Keyes gave her four $5 bills; that after taking the numbers from the bills, they drove with the witness to within approximately two blocks of the defendant's office, where they let her out and instructed her to walk to and enter the defendant's office; that they followed and watched her enter; that after about 30 minutes, she came out the front door and handed officer Wilson Kleenex which contained 2 tablets. (These tablets were admitted in evidence as an exhibit for the people and were shown to contain morphine.)

The complaining witness was then placed under arrest. Officers Wilson and Keyes then entered the building and searched the defendant. In the lefthand pocket of his trousers they found a brown bottle containing 4 tablets which contained morphine. The defendant then reached into his pocket and said "Is this what you are looking for?", and brought out four folded $5 bills; that the numbers on the bills taken from the defendant were identical with those on the bills theretofore furnished the complaining witness. Dr. Jackson stated he had received the $5 bills from the girl who was in the office a short while previously; that he did not know the girl's name; that he had given her one-fourth grain of morphine and some adrenalin by hypodermic. He was asked if he had entered this in his date book and he replied that he had not; that he did not know why; that he had given the girl narcotics because she stated she had asthma; that he had opened up the front of her clothes and gone over her chest with a stethescope. Upon being asked what kind of clothes she wore, he replied that he did not know.

The officers further testified that they searched the record books in defendant's office and that the name Norine Monroe was not found, although the search made covered a period from January 1, 1950, to and including the 6th day of July, 1950; that order forms and prescription blanks issued by the State to physicians were examined and the name Norine Monroe was not found therein; that from an examination of the doctor's record books it appeared that there were approximately 200 morphine pills unaccounted for.

The defendant testified that he first saw the complaining witness in the early part of June, 1950; that he was introduced to her by George Brooks; that she gave the name of Clarice Goodall; that she was having difficulty with her respiratory organs and was wheezing when she breathed; that he gave her adrenalin, morphine and atropine to ease her pain and enable her to sleep. He denied that he met or saw her in his liquor store on July 3, 1950. He admitted that he had examined Miss Monroe in his office on July 6th, 1950 and stated that while she was in the room, he obtained from her the information that she was staying at the Pickwick Hotel at that time and her name was Clarice Goodall; that he took a morphine tablet from a bottle, went into the next room to dissolve the tablet in sterile water, added 1 c.c. of adrenalin into the same syringe, went back in the office and gave Miss Monroe an injection in her left arm. He denied giving her any pills containing morphine to take away from his office and stated that the brown bottle containing the tablets was left on the desk when she was alone in the office while he was in the other room preparing the hypodermic; that after giving her the injection, he left the room and upon returning, found that the office was vacant; that Miss Monroe had gone; that he then noticed some money lying on his desk which he put into his pocket and continued with his work;

that he did not count the money at that time; that he had never lanced a sty for Miss Monroe; that he had never knowingly administered a narcotic to an addict; that when the officers arrived they searched him, took the money from his pocket and also took the bottle from which he had secured the morphine used in giving Miss Monroe the injection.

Witnesses were produced by the defense in an attempt to show various discrepancies in the testimony of the complaining witness in that the liquor store referred to was not open on July 3, 1950 and that the doctor had not lanced her eye. In addition, several witnesses were produced who testified as to the reputation of the defendant as a law-abiding citizen and an ethical practitioner.

[4] Defendant argues that the story of Norine Monroe is incredible and should not be believed, and in this connection it was shown that the charge placed against her by the district attorney upon her arrest on July 4th was dismissed after she testified in the instant action. While there is a sharp conflict in the testimony relating to the activities of the defendant and of the complaining witness in many respects, the evidence is quite clear that the complaining witness visited the doctor's office on July 6th and returned from it with 2 morphine tablets wrapped in Kleenex, which were delivered to the police officers; that the "marked" money furnished to the complaining witness was taken from the defendant immediately thereafter. These circumstances, together with the testimony of the complaining witness, furnished substantial evidence supporting the charge of an unlawful sale of narcotics. The defendant, when questioned by the officers, admitted administering narcotics to the complaining witness but could not give her name, despite the fact that he testified that he made out a card in the name of Clarice Goodall, which card contained the notation that the patient complained of asthma; that an examination showed asthmatic wheezing throughout the chest wall, and that morphine was administered to her. He could not remember the manner in which the girl to whom he administered the narcotics was dressed, although it had been only a few minutes since she had left his office. He kept his supply of morphine pills in a brown bottle which he had in his pocket at the time he was searched. He admitted that he did not count the money; that it was merely lying on his table when he picked it up and placed it in his pocket. These circumstances, together with the testimony concerning 200 morphine tablets unaccounted for in the doctor's records, furnish ample evidence to support the verdict and judgment.

[5, 6] The discrepancies in the testimony of the witnesses were matters solely for the observation and consideration of the jury and for the consideration of the trial court on the motion for a new trial. This court may not disturb such findings and the action of the trial court, where, as here, it cannot be said as a matter of law that there is no evidence to support the conviction. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Ohman, 67 Cal.App.2d 467, 475, 476, 154 P.2d 463; People v. Newland, 15 Cal.2d 678, 681, 104 P. 2d 778. As was said in People v. Wissenfeld, 36 Cal.2d 758, 765, 227 P.2d 833, 836: " 'No rule of criminal law and procedure is better established in this state' than that where 'there is substantial evidence tending to support the verdict of the jury, * * * this court cannot as a matter of law, substitute its judgment on the facts for that of the jury.' "

[7] Appellant next argues that the court unduly restricted the right of the defendant to cross examine the complaining witness. He states that the court would not permit the questions as to whether the witness was married or single, whether she was registered at a certain hotel, whether she was alone when she came to San Diego or was living with someone at the San Diego Hotel; that defendant was not permitted to show that the complaining witness had obtained narcotics from persons other than the defendant prior to June 6th. These were immaterial matters and in view of the rule that a trial court may confine an examination within reasonable limits and

may curtail the examination to matters which are relevant, no prejudicial error is shown to have resulted. People v. Serpa, 67 Cal.App.2d 327, 332, 333, 154 P.2d 6; People v. Mangum, 31 Cal.App.2d 374, 379–382, 88 P.2d 207. Appellant cites People v. Flores, 15 Cal.App.2d 385, 401, 405, 59 P.2d 517, and People v. Higgins, 18 Cal.App.2d 595, 599, 64 P.2d 454, as authority for his contention that the cross-examination was unduly restricted. In each of these cases the prosecution depended largely upon the credibility of a single witness and in the Flores case the court remarked that the testimony was such as to challenge one's credulity. In the Higgins case the evidence was such that the inherent incredibility of the testimony of the prosecuting witness presented a debatable question. In the instant case, the testimony of the prosecuting witness is corroborated by the testimony of the police officers and to a large extent by the testimony of the defendant himself. Under such circumstances, we are unable to say that the trial court abused its discretion in curtailing the cross-examination.

[8] Appellent attempts to claim prejudice from the denial of an offer to prove that the prosecuting witness had made certain statements during the preliminary examination. However, counsel for the defendant made no effort to lay the necessary foundation for the introduction of such statements for the purpose of impeachment. Code Civ.Proc., sec. 2052.

[9] Appellant next complains of the trial court's refusal to call the witness George Brooks. We find no abuse of discretion in this refusal. The witness was called and testified as a witness for the defendant. Whether he was called by the People, the defendant or the court is immaterial.

[10] Appellant next argues that the prosecutor was guilty of prejudicial misconduct in that in his argument to the jury he replied to the argument of counsel for the defendant with the observation that first offenders often get probation. This was with reference to the charge of possession of narcotics by the prosecuting witness. The deputy district attorney was replying to an argument advanced by counsel for the defendant. Under such circumstances no prejudicial misconduct appears. People v. Gomez, 209 Cal. 296, 300, 286 P. 998. Moreover, the trial court admonished the jury to disregard the remarks and that the punishment to be imposed upon the witness was no concern of the jury and neither was the punishment that might be imposed upon the defendant. The record indicates that the statement of the deputy district attorney was invited and there was, therefore, no prejudicial misconduct. People v. Rinesmith, 40 Cal.App.2d 786, 792, 105 P.2d 1021; People v. Neal, 91 Cal.App.2d 362, 364, 204 P.2d 895.

[11] Appellant next contends that the court misdirected the jury in matters of law and erred in its failure to give certain instructions requested by the defendant. In this connection he first attempts to predicate error in the giving of an instruction in the following language: "With reference to the first count of the information you are instructed that it is unlawful for any person to sell, furnish, administer, or give away a narcotic except upon the written prescription of a physician, dentist, chiropodist or veterinarian licensed to practice in this State." His contention is that the instruction should have contained the words "except as otherwise provided in this division" and that the jury was told in effect that it was a violation of law for anyone, including the defendant, at any time, to sell, furnish, administer or give away a narcotic without a prescription. An examination of the instructions as a whole discloses that the jury was fully and fairly advised as to the proof necessary before the defendant could be convicted and was instructed as follows:

"You are instructed that in the regular practice of his profession a licensed physician may prescribe for, administer to or furnish to any person who is under his treatment for a 'pathology or condition, except narcotic addiction, a narcotic where such person so under his treatment is actually suffering from or appears to be suffering from a physical condition which would suggest that narcotics might be used in accordance with good medical practice.'

"You are instructed that in a prosecution of a physician for unlawfully furnishing or administering narcotics, the question of whether he acted in the regular and legitimate practice of his profession is one of good faith, to be determined from all the facts and circumstances in the case and his good faith in such a case is a question of fact for the jury."

The exceptions to the provisions of section 11500 relied upon by the defendant in the instant case were properly presented to the jury in the instructions above quoted.

[12] Complaint is made of an instruction containing the statement that the burden was upon the defendant to show that there was a written prescription in existence to justify or excuse his possession of narcotics or his actions and that in the absence of proof of the existence of such prescription, the jury must find that no such prescription was in existence. The defendant admitted that a prescription was not furnished and there is no implication from the instruction that mere possession of narcotics by the defendant without a written prescription constituted guilt of the offense charged, to wit, the sale of a narcotic.

Appellant complains of the refusal of the trial court to give an instruction relating to the sale of narcotics without prescription by jobbers, wholesalers, manufacturers and pharmacists. There was no issue raised as to such sale and the offered instructions relative thereto were properly refused.

[13] Appellant contends that certain instructions offered by him relating to good faith treatment by a doctor should have been given by the trial court. However, an examination of the record shows that the jury was sufficiently instructed on this subject.

[14] Appellant claims an instruction given by the court relating to accusatory statements was improper. The argument is that there was nothing in the evidence indicating an accusatory statement or admission. However, a conversation which took place between the officers and the defendant while he was being searched was sufficient to justify the instruction given.

[15] Appellant next urges that the trial court was guilty of error in refusing to give an instruction on entrapment. Where, as here, the officers used no more persuasion than was necessary to an ordinary sale and the defendant willingly made the sale, there is no entrapment. People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114. There was no error in refusing to give an instruction on the subject under the circumstances disclosed by the record.

[16] Finally, the defendant claims that the jury was guilty of misconduct and that the verdict was decided by lot. This argument is based on the theory that the jury disregarded the instruction of the court relative to a discussion or consideration by them of the penalty or punishment which might be inflicted on the defendant. Several letters were obtained from members of the jury which indicated that some jurors were lead to believe that the court had the power to grant the defendant probation, and that they would not have voted for a verdict of guilty except for a certain instruction. The verdict of the jury cannot be impeached in this manner and no grounds were presented which would permit the impeachment of the verdict. People v. Reid, 195 Cal. 249, 261, 232 P. 457, 36 A.L.R. 1435; People v. Smith, 206 Cal. 235, 239, 273 P. 789; People v. Kromphold, 172 Cal. 512, 524, 157 P. 599; Code Civ.Proc., sec. 657(2); Penal Code, sec. 1181(4).

We have examined the entire record in this matter and conclude that the evidence sustains the verdict of the jury and that there were no prejudicial errors in the rulings of the court.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

106 Cal.App.2d 198

MORRELL et al. v. CLARK et al.

DICKER v. CLARK et al.

Civ. 18204.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

L. Simon Morrell, and others, brought an action against Irving T. Clark, and others, to recover money paid to the named plaintiff for dealer's contract which gave to plaintiff the exclusive right to sell a certain small automobile not yet in production. L. D. Dicker, etc., assignee of persons who had entered into similar contracts with defendant, brought an action against the same defendant to recover money paid to defendant by such plaintiff's assignors. The actions were consolidated for trial. The Superior Court of Los Angeles County, Arthur Crum, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that allegations did not sufficiently plead fraud upon part of defendant and that evidence did not establish fraud on part of defendant, but that allegations and evidence stated and proved a good cause of action for money had and received.

Judgment affirmed.

1. Appeal and error ⟹760(2)

Where appellant's opening brief stated that findings of fact and conclusions of law were not supported by evidence, but appellant's brief did not contain statement of evidence bearing upon such findings, nor analysis of same in development of claim of insufficiency, District Court of Appeal was not required to make a critical examination of record.

2. Money received ⟹17(1)

In action to recover money paid by plaintiff for dealer's contract which gave to plaintiff exclusive right to sell a certain make of automobile in specified territory, allegations that defendant, who had exclusive right to sell such automobile in state, had falsely represented that a demonstrator could be delivered within 60 to 90 days, that more automobiles could be expected within 120 days, and that automobile had been sufficiently designed and tested to go into production, but not alleging that representations were known to be false by defendant or that defendant did not have reason to believe them to be true, did not sufficiently plead fraud on part of defendant.

3. Money received ⟹18(3)

In action to recover money paid by plaintiff for dealer's contract which gave to plaintiff exclusive right to sell specified territory a certain make of automobile not yet in production, which action was brought against defendant who had exclusive right to sell such automobiles in state and who allegedly had falsely represented that a demonstrator could be delivered within 60 to 90 days, and that more automobiles could be expected within 120 days, and that automobile had been sufficiently designed and tested to go into production, evidence did not establish fraud on part of defendant.

4. Money received ⟹17(1), 18(3)

In action to recover money paid by plaintiff for dealer's contract which gave to plaintiff exclusive right to sell a certain make of automobile in specified territory, brought against a defendant who had exclusive right to sell such automobiles in state, allegations and evidence that defendant contracted to deliver automobiles, took money, and delivered nothing, stated and proved good cause of action for money had and received.

5. Sales ⟹418(14)

Where defendant who had exclusive right to sell certain make of automobile in state contracted to deliver automobiles to plaintiff who had been granted, for a consideration, an exclusive agency in specified territory, and defendant took money and delivered nothing, and plaintiff had made expenditures in maintaining business headquarters, plaintiff was properly awarded special damages in amount expended to maintain such headquarters.

6. Money received ⟹6(4)

Where defendant, who had exclusive right to sell certain make of automobile in state, sold franchise to other persons to sell such automobiles in specified territories, and some money paid to defendant represented deposits on automobiles which would be delivered later, and there was total failure of consideration in that no automobiles were delivered, assignee of such other persons was entitled to recover from defendant total amount paid to defendant by assignors with interest from respective dates of payment.

7. Action ⟹57(2)

An action to recover money paid by plaintiff for dealer's contract which gave to plaintiff exclusive right to sell a certain make of automobile in specified territory, which action was brought against defendant who sold such franchise to plaintiff, was not improperly consolidated with an action brought against same defendant by assignee of other persons who had paid money to such defendant for franchises to sell such automobile in other territories.

◆

Leslie E. Hubbard and Frank L. Stearns, Los Angeles, for appellant.

A. W. Brunton, Los Angeles, for respondent L. Simon Morrell.

Wm. B. Magid, Los Angeles, for respondent L. D. Dicker.

SHINN, Presiding Justice.

Jose D. Carter conceived the plan of manufacturing a little automobile to be sold to the public for $595 each. He took as a name for his parent company, International Motor Car Company, and for a subsidiary under which he would market his cars, International Motor Car Sales Company, and he named the little creation the "Towne Shopper." He also adopted the unoriginal plan of obtaining finances by selling distributorships, and through the distributors, dealerships, authorizing the holders of exclusive territorial rights to sell the vehicles if and when they should become a reality. Mr. Carter operated out of San Diego under the names above stated and later as Carter Motor Car Corporation, successor to his other corporations. Defendant Irving T. Clark acquired, for a substantial consideration, the exclusive right and privilege of selling any and all the "Towne Shoppers" and their parts in the State of California. He was authorized to appoint dealers and to sell them exclusive territorial rights. Plaintiff L. Simon Morrell, of Santa Monica, became interested and entered into a dealer's contract which gave him the exclusive right to sell the "Towne Shopper" within the City of Santa Monica. He paid Clark $2,000 for the privilege. Henry H. Haddon acquired a dealership, paying Clark $1,500 for a franchise and $500 as a deposit on five cars. Alfred A. Ruffalo, Michael Parisi and Rudolph O. Penn each paid the same amount for a "franchise." Some of the money paid represented deposits on cars to be delivered later. Morrell sued Clark for the return of his money and for certain other sums as damages; Haddon, Ruffalo, Parisi and Penn assigned their claims against the defendants to L. D. Dicker. Dicker sued for the return of the money paid by his assignors. The two actions were consolidated for trial and judgment was rendered in favor of the plaintiffs. The defendants, other than Clark, defaulted. Clark appeals. The theory of the actions is for money had and received, based upon alleged fraud and failure of consideration.

[1] In the opening brief of appellant it is said: "The findings of fact and conclusions of law are not supported by the evidence, oral or documentary, adduced at the time of trial." This statement is repeated as to finding No. IV and as to findings Nos. V and VI. Nowhere do we find in the briefs of appellant a statement of the evidence bearing upon these findings, nor any analysis of the same in the development of the claim of insufficiency. We are not called upon to make a critical examination of the record under such a presentation of the claim of insufficiency of the evidence. People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P.2d 447; Wieczorek v. The Texas Co., 45 Cal.App.2d 450, 114 P.2d 377; California Prune, etc., Ass'n v. H. R. Nicholson Co., 69 Cal.App.2d 207, 158 P.2d 764; Goldring v. Goldring, 94 Cal.App.2d 643, 211 P.2d 342. We have nevertheless familiarized ourselves with the record.

Finding No. IV is that all the allegations of the Dicker complaint are true. Findings Nos. V and VI are that when the so-called dealers acquired their franchises and made their deposits, the "Towne Shopper" was, and at the time of trial still remained, in an experimental stage.

[2, 3] The complaint in the Morrell case alleged that Clark represented to plaintiffs that a demonstrator could be delivered within 60 to 90 days, that more cars could be expected within 120 days, and that the "Towne Shopper" had been sufficiently designed and tested to go into production. It was alleged that the representations were false, but it was not alleged they were known to be false or that Clark did not have reason to believe they were true. The evidence was no stronger than the averments of the complaint. In the several causes of action in the Dicker case it was alleged that when the various agreements were made defendants "well knew that there were no automobiles, motor cars or parts manufactured or being manufactured or to be manufactured by said International Motor Car Company, but nevertheless said defendants did fraudulently induce plaintiffs' assignor to pay to and deliver to said defendants the sum of $2,000." The only representations made appear to have consisted of promises that a demonstrator would be delivered in 30 or 60 days and more cars within 120 to 150 days after they should be ordered. Defendant Clark made the objection that the complaints failed to state a cause of action for fraud and the objection was overruled. We do not regard the pleadings or proof of fraud to be sufficient in either case. There was an implied representation that the car had been successfully designed but all the evidence tended to prove that Clark had faith in Carter's ability to turn out a successful car in quantities. He had paid a large sum for his distributorship and advanced some $10,000 to Carter to be used in the business. It is clear from the record that he was just as credulous and as disappointed as his dealers were.

[4] But aside from the fraud issue, total failure of consideration was pleaded. Clark contracted to deliver cars, took the money of his dealers and delivered nothing. As to each of the dealers a good cause of action for money had and received was pleaded and proved.

[5] Before he brought suit Morrell gave notice of rescission and demanded the return of his money. He also alleged breach of contract and failure of consideration. He alleged that in reliance upon his agreement with Clark he had procured a place of business in Santa Monica and that in maintaining the same and preparing to enter the automobile business he expended the sum of approximately $600 before he learned of the inability of the defendants to develop and manufacture a small automobile. By the judgment Morrell was awarded $2,000, with interest thereon, as the amount paid for his franchise and $315.81 as special damages consisting of his expenditures in maintaining business headquarters. Nowhere in the briefs of appellant do we find the contention advanced that there was not a total failure of consideration. The evidence would admit of no other conclusion. Morrell was therefore entitled to the return of his money. A large part of appellant's argument is devoted to a discussion of the special damages awarded Morrell. There was evidence to support the finding as to the amount of his damage. His complaint alleged not only failure of consideration but breach of contract on the part of Clark. It is true that rescission by Morrell was alleged but this was unnecessary since there was total failure of consideration, and it was also unnecessary for the court to declare a rescission. There can be no doubt that Morrell's necessary expenditures were made in reliance upon Clark's promise to deliver cars and that the amount thereof constituted damage proximately caused by Clark's total failure to make delivery. It was proper for the court to award any relief that was within the issues pleaded and tried and which was justified by the evidence. The breach of the contract by Clark was complete and it was well pleaded. The judgment in favor of Morrell properly included the amount awarded as special damages.

[6] In the Dicker case the judgment was for the total of the several amounts paid Clark by Dicker's assignors with interest from the respective dates of payment.

These amounts plus interest were properly awarded under the pleadings and upon proof of total failure of consideration consisting of the failure of Clark to furnish any cars to the dealers. In such cases recovery may always be had of the consideration paid. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39.

[7] We find no merit in the contention that the two actions were improperly consolidated. About one-half of the testimony in the case was given by Clark, most of it being applicable to each case. This would appear to have been to the advantage rather than disadvantage of the parties and certainly saved much of the time and expense that would have been wasted in separate trials.

There are no other points which require discussion. The case was fairly tried and justly decided.

The judgment is affirmed.

PARKER WOOD, and VALLÉE, JJ., concur.

WESTERN STATES CONST. CO. v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14681.

District Court of Appeal, First District,
Division 1, California.

Aug. 14, 1951.

Hearing Granted Oct. 11, 1951.*

Mandamus proceeding by Western States Construction Co., a copartnership composed of Victor Morao and Ray E. Anderson against the Municipal Court of the City and County of San Francisco, State of California, and others, to compel the municipal court to settle plaintiff's statement of oral proceedings at trial which was proposed to be used on appeal from a judgment. The Superior Court, in and for the City and County of San Francisco, Lile T. Jacks, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Bray, J., held that where settled statement was contemplated as record on appeal, and it appeared that plaintiff's attorney was dead, and there was no attorney to assist trial judge, and practically the entire labor was thrust on trial judge to determine if proposed statement was accurate and sufficient and to propose amendments, and trial judge could not remember all of the proceedings, action of trial judge in requiring the reporter's transcript of trial proceedings as record on appeal was not arbitrary.

Judgment affirmed.

1. Appeal and error ⇨607(1)

When appeal is taken pursuant to rule authorizing appellant to proceed by settled statement in lieu of a reporter's transcript, plenary power over such a record is reposed in trial judge, subject only to limitation that he does not act arbitrarily. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

2. Appeal and error ⇨607(1)

Although trial judge has undisputed power to settle as the record anything he wants therein under rule authorizing appellant to proceed by settled statement in lieu of a reporter's transcript, trial judge cannot arbitrarily refuse to settle record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

3. Appeal and error ⇨607(1)

Trial judge should not refuse to settle a statement proposed by appellant in lieu of reporter's transcript, merely to enable his reporter to be employed to prepare a transcript since purpose of settled statement method of appeal is to save litigants, if possible, expense of a transcript, and trial judge should not act arbitrarily but should reasonably attempt, with assistance of counsel and with intent of saving expense for litigants, where possible, to arrive at a fair statement of such of the trial proceedings as are necessary to the appeal. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

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* Subsequent opinion 238 P.2d 562.

4. Appeal and error ⚷607(1)

In ordering amendments to settled statement proposed by appellant in lieu of reporter's transcript, trial judge should resort to suggestions of the counsel, his own memory, notes made by him during trial, and right to have reporter reread such of his notes as may prove helpful. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

5. Appeal and error ⚷607(1)

The preparation of a settled statement is primarily the duty of counsel in case and labor of proposed amendments should not be thrown upon judge. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

6. Appeal and error ⚷985

When appellant cannot or does not want to avail himself of a reporter's transcript of record on appeal, either because a reporter was not present at proceedings or for other reasons, and when he fails to convince the trial judge that his statement accurately reflects proceedings in question, the action of the trial judge, who heard and tried the case must be regarded as final. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

7. Appeal and error ⚷985

Where settled statement was proposed as record on appeal, but it appeared that plaintiff's attorney was dead, and there was no attorney to assist trial judge, and practically entire labor was thrust on trial judge to determine if proposed statement was accurate and sufficient and to propose amendments, and trial judge could not remember all of the proceedings, action of trial judge in requiring reporter's transcript of trial proceedings as record on appeal was not arbitrary. Rules on appeal from Municipal Courts in Civil Cases, rule 7.

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A. Don Duncan, San Francisco, for appellant.

Dion R. Holm, City Atty., Louis T. Kruger, Deputy City Atty., San Francisco, for respondents.

BRAY, Justice.

Appellants appeal from a judgment of the superior court denying their petition for a writ of mandate to compel the municipal court to settle "Appellants' Statement of Oral Proceedings at Trial, Proposed to be Used on Appeal, From Judgment."

Question Presented.

Can a judge who tried and decided an action be compelled, without a transcript, to settle a statement to be used on appeal where the respondent is without adequate representation due to the death of the attorney representing respondent at the trial?

Facts.

There was tried before the Honorable Joseph M. Golden, Judge of the San Francisco Municipal Court, an action entitled Ana Perez, plaintiff, v. Western States Construction Co., a partnership, etc., defendants. Judgment in the sum of $725 was entered in favor of said Ana Perez, plaintiff, and against said defendants. After denial of motion for new trial defendants appealed to the San Francisco Superior Court, Appellate Department. Thereafter appellants served on the attorneys for plaintiff Perez a notice that the record on appeal would be by settled statement, and also served a copy of the proposed statement. Rule 7, Rules on Appeal from Municipal Courts in Civil Cases. No proposed amendments to said statement were filed and on notice a hearing was had before the trial judge. No record of what happened at this hearing is presented. In the petition for the writ of mandate it is averred that attorney Sholars, one of the then attorneys of record for plaintiff Perez, stated that the case had been mostly tried by his associate, attorney A. L. Crawford, who was now deceased, and that Sholars could not propose amendments. Thereupon the judge entered his order refusing to settle said statement, extended appellants' time to file a reporter's transcript, "and orally advised counsel for appellants at said hearing that appellants would have to prepare their record on appeal by an entire reporter's transcript of the trial proceedings, for the alleged reasons as expressed orally by said Honorable trial judge at said hearing, that Mr. Crawford was dead, and that there were no proposed amendments to said Statement, and that there was 'nothing to settle', and that he could not remember all of the proceedings; * * *"

Appellants thereupon filed in the superior court a petition for a writ of mandate to compel Judge Golden to settle said statement, setting forth in addition to the above, that the trial took five days and that a transcript would cost about $300; that appellants are without means of paying for it, and that they are informed that plaintiff Perez (respondent therein) is insolvent and could not pay a judgment for costs of said transcript. Attorney Sholars withdrew as counsel for plaintiff Perez. His formal withdrawal was filed after the hearing on the statement although the withdrawal states that prior thereto he had notified plaintiff Perez he was withdrawing as her counsel, if he had ever been such. The City Attorney of San Francisco represented the respondent municipal court on the hearing in the superior court and represents it in this court. The answer of the respondent municipal court was withdrawn at the hearing in the superior court in order to have the matter determined on legal issues alone. The superior court denied the petition for the writ of mandate.

Should the Judge Have Settled the Statement?

The exact question presented here has not been passed upon in this state. However, there seems to be confusion in the authorities as to the situation where both sides are represented and the court refuses to settle the statement. In Cripe v. Unangst, 20 Cal.App. 75, 128 P. 345, the appellant submitted to the trial judge a proposed statement on appeal. The respondent, by way of purported amendment, moved to strike the entire statement and asked for an order that the reporter's transcript be used instead. The trial judge refused to settle the statement and granted respondent's motion concerning the transcript. On application to this court, a writ of mandate was issued requiring the judge to settle the transcript. The court said, 20 Cal.App. at page 78, 128 P. at page 347: "If, as alleged by respondent in his affidavit, he has forgotten by reason of the lapse of time many important matters, that difficulty can be obviated by having the reporter read to him the notes taken at the trial, from which the judge may intelligently and properly direct appellant as to the manner and character of the statement which should be prepared and which only he is willing to settle" and quoted from Vatcher v. Wilbur, 144 Cal. 536, 538, 78 P. 14, the following: "'* * * under the circumstances of this case, it was not a proper exercise of the discretion vested in the respondent judge to require a transcription of the full reporter's notes as a condition for settling said statement * * *.'" In Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119, the court in relieving appellants of default in not giving timely notice of election to proceed by way of settled statement stated that if the judge deemed it necessary in order to pass upon the sufficiency or accuracy of the proposed statement he could require appellants to furnish a reporter's transcript. The case, however, is of no value here for the reason that due to the fact that the judge who tried the case was away in the army, the settlement of the statement had to be made by a judge entirely unfamiliar with the case.

[1, 2] In Lande v. Southern California Freight Lines, 78 Cal.App.2d 417, 177 P.2d 936, appellant presented his proposed statement on appeal. Respondent moved to strike it on the ground that it was wholly inadequate. Respondent filed an affidavit stating that the trial had lasted 42 days; that the testimony covered some 2,000 pages of reporter's transcript; that the proposed statement consisted of only 76 pages; that to have an adequate statement it would be necessary to include partly in narrative form and partly by question and answer, testimony of some 18 or 20 witnesses which was not included in the proposed statement, and that the cost of transcribing that testimony would be approximately $1,250. After a hearing the trial judge ordered that there be incorporated in the statement in narrative form the testimony of 19 witnesses and portions of the testimony in

question and answer form, of several other witnesses as proposed amendments. Appellant appealed from this order. "Appellant contends that the court exceeded its jurisdiction in ordering the incorporation of a transcript of the entire oral proceedings as to the 19 witnesses. The contention appears to be that if an appellant proposes to proceed by settled statement in lieu of a reporter's transcript, the trial judge must settle the statement without the use of a transcript. The rule is to the contrary. A judge is not required to act upon his own recollection in such matters, and of course should not do so unless he is satisfied that his recollection is so clear and complete as to make an examination of a transcript unnecessary. It appears clearly from the record that the trial judge was convinced of his inability to settle a satisfactory statement without the benefit of a transcript." 78 Cal.App.2d at page 420, 177 P.2d at page 938. Then came Keller v. Superior Court, 100 Cal.App.2d 231, 223 P.2d 309. There appellant filed his proposed statement. Respondents filed a proposed amendment consisting of a revised narrative recital of the proceedings at the trial. Appellant did not object to this revision except that he suggested certain additions thereto. The trial judge made an order declining to settle the statement giving as his principal reasons (1) that it did not contain the conclusions of law and judgment made by the court (respondent had proposed no amendments as to this and apparently was satisfied with appellant's proposed statement); (2) that the judge did not think the proposed statement contained all the evidence material to the various "points on appeal." Thereupon the judge refused to settle the statement "in the absence of a reporter's transcript or a genuine effort to furnish a substantial substitute therefor." In granting appellants' petition for a writ of mandate to compel the trial judge to settle the statement, the court said, 100 Cal.App.2d at page 234, 223 P.2d at page 311: "The rule now appears to be well settled in this state that when an appeal is taken pursuant to Rule 7 of Rules on Appeal, full and plenary powers over such a record is reposed in the trial judge, subject only to the limitation that he *does not act arbitrarily.* [Citations.]" The court was there referring to Rule 7 of Rules on Appeal which is substantially the same as Rule 7 Rules on Appeal from Municipal Courts in Civil Cases. "The question presented to us is whether in refusing to settle the statement on appeal under Rule 7 of Rules on Appeal, the trial judge acted in an arbitrary fashion. We are persuaded that he did. * * * While stating in his order that neither the statement proposed by petitioner nor the amendments offered by respondents Ravenscroft and Hiers 'contained all the evidence material to the various "points on appeal"', nowhere does the respondent judge point out or specify any deficiencies, such as were carefully listed by the judge in the case of Dainty Pretzel Co. v. Superior Court, 7 Cal.App.2d 437, 439, 45 P.2d 817. * * * Before a litigant can be compelled to expend the sum of $325 for a complete reporter's transcript surely the trial judge, in the interests of justice, should specify wherein the statement as offered and amended is deficient. While a trial judge has undisputed power to settle as the record anything he wants therein, he cannot arbitrarily refuse to settle the record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. Under the facts here present, the respondent judge should either have allowed the amendments and ordered the statement prepared accordingly, or required such other changes as would make it conform to the facts. In ordering amendments to the statement on appeal the trial judge has available (1) the suggestions of the respondents on appeal; (2) the judge's own memory, Vatcher v. Wilbur, 144 Cal. 536, 78 P. 14; (3) notes made by the judge during the trial, 4 Corpus Juris 257, 4 C.J.S., Appeal and Error § 846; and (4) the right to recall a witness to repeat testimony, 4 Corpus Juris 257, 4. C.J.S., Appeal and Error § 846; and (5) the right to have the reporter reread such of his notes as may prove helpful. If the foregoing prove insufficient, then it should be made to clearly appear from the record, and reasons given therefor, why the trial judge was convinced of his inability to settle a satisfactory statement, agreed to by both appellant and respondents on appeal, without the benefit of a complete reporter's transcript." 100 Cal. App.2d at pages 234–235, 223 P.2d at page 311. There appears to be a conflict between the Lande case, supra, where the court stated "A judge is not required to act upon his own recollection in such matters" and the foregoing extracts from the Keller case. However, the conflict is probably more apparent than real. In the Keller case, the parties were satisfied with the proposed statement with its proposed amendments. The judge arbitrarily insisted upon a reporter's transcript. In the Lande case the statement was not satisfactory. Moreover, the judge did not insist upon a transcript; he merely required the incorporation in narrative form of the testimony of the 19 witnesses omitted from the proposed statement, and portions in question and answer form as the same were set forth in plaintiff's proposed amendments.

[3–5] A fair statement of the rule that governs the settlement of statements is this: The trial judge should not refuse to settle a statement merely to enable his reporter to be employed to prepare a transcript. The very purpose of the settled statement method of appeal is to save the litigants, if possible, the expense of a transcript. He should not act arbitrarily. He should reasonably attempt, with the assistance of counsel and with the intent of saving expense for the litigants, where possible, to arrive at a fair statement of such of the trial proceedings as are necessary to the appeal. To this end he should, where practical, resort, as said in the Keller case, to (1) the suggestions of the counsel; (2) his own memory; (3) notes made by him during the trial; (4) the right to have the reporter reread such of his notes as may prove helpful. The Keller case suggests additionally that he can recall a witness to repeat testimony. This does not seem to be a very practical suggestion. If recalled it would be very difficult for a witness to repeat his testimony exactly as previously given. Also such procedure might result in protracted examination and cross-examination. The preparation of a settled statement is primarily the duty of the counsel in the case and the labor of the proposed amendments should not be thrown upon the judge.

[6, 7] Applying these rules to the situation in the case at bar, we find that because there was no attorney representing respondent to help him, practically the entire labor was thrust on the judge to (1) determine if the proposed statement was accurate and sufficient, and (2) propose amendments, if necessary. Moreover, the entire responsibility of protecting respondent's rights was forced upon the judge, and to do it properly he must become almost her advocate. No judge should be placed in this position. Again, the judge indicated that he could not remember all of the proceedings. We must assume that he made the statement in good faith. It is not surprising that a trial judge of a busy court cannot recall all of the proceedings of a five day trial occurring some four months prior. Requiring a reporter's transcript practically eliminates the advantages of proceeding by settled statement. This is unfortunate, but under the peculiar circumstances of the case due to the death of respondent's attorney, it cannot be avoided. The language of Burns v. Brown, 27 Cal.2d 631, 166 P.2d 1, applies here: "When appellant cannot or does not want to avail himself of this method of preparing the record on appeal, either because a reporter was not present at the proceedings *or for other reasons,* and when he fails to convince the trial judge that his statement accurately reflects the proceedings in question, *the action of the trial judge, who heard and tried the case, must be regarded as final.*" 27 Cal.2d at page 636, 166 P.2d at page 4 emphasis added. As long as the trial judge does not act in an arbitrary fashion, the rules on appeal confer on him full power over the settlement of the statement. St. George v. Superior Court, 93 Cal.App.2d 815, 209 P.2d 823. We cannot say that under the peculiar circumstances of this case, the trial judge acted arbitrarily.

Appellants contend that the record shows that the deceased attorney Crawford did not try the case solely; that he tried "most of the case" only and that attorney Sholars who appeared at the first hearing on the statement had tried part of the case. It is apparent that whatever the situation may have been in this respect, the trial judge felt that the burden was being cast upon him to perform the labor of determining the correctness of the proposed statement.

Our decision must not be considered as a precedent in cases where the assistance of counsel on both sides is available to the court. There, the court should make every reasonable effort to settle the statement without the expense of a transcript.

Neither party has raised the question as to whether this court has jurisdiction of an appeal from a judgment of the superior court in a mandamus proceeding to compel a judge of the municipal court to settle a statement on an appeal from the latter court to the appellate division of the superior court, the decision of which court on that appeal would be final and not reviewable here. As we hold that the lower court correctly refused on the merits to issue a writ of mandate, we express no opinion on the subject.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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106 Cal.App.2d 189

MORGAN v. MORGAN.

Civ. 18184.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

Hearing Denied Oct. 18, 1951.

Action of divorce by Cecil B. Morgan against Virginia B. Morgan wherein plaintiff alleged that parties had no community property, having by written property settlement divided and converted such community property as they had had. The defendant filed cross-complaint alleging community property to be in cross-defendant's possession, and sought temporary and permanent support. The Superior Court, Los Angeles County, Arthur Crum, J., granted wife alimony and decreed that property settlement agreement had been voided by subsequent reconciliation of parties. The plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence supported finding that property settlement had been cancelled by consent of parties.

Judgment affirmed.

Vallée, J., dissented.

1. Husband and wife 🔑279(3)

Whether property settlement agreement does or does not continue in force after reconcilation of husband and wife depends upon the mutual intentions and understandings of the parties, and will be determined by the court as a question of fact upon indirect evidence in the absence of direct evidence.

2. Husband and wife 🔑279(2)

Property settlements entered into by spouses should be set aside in cases where the acts, conduct and relations of the parties thereafter are of such a character as to justify the conclusion that they intended and agreed orally to abrogate the agreement.

3. Husband and wife 🔑279(3)

Cancellation of property settlement, agreement, at least as to executory provisions thereof, will be inferred and former rights will be restored by reconciliation and resumption of marital relations.

4. Husband and wife 🔑279(3)

In divorce action by husband against wife, in which husband alleged that parties had no common property, having by written property settlement divided and converted community property into separate property, evidence supported implied findings that parties understood that husband by joining in reconciliation and resumption of marital relations abandoned his contractual right of freedom from obligation of support and assumed anew the legal obligations of a husband, and that wife abandoned her rights under separation agreement to live separate from husband.

5. Husband and wife 🔑279(3)

Where husband and wife entered into property settlement agreement but subsequently reconciled and lived together as husband and wife, in absence of any evidence of an express agreement continuing the freedom of the husband from liability for support under agreement, it was reasonable to infer that the parties intended to resume a normal married life and the legal obligations that went with it, and finding that property settlement agreement was cancelled by consent of the parties would not be disturbed.

6. Divorce ⚷249(2)

Where property settlement agreement was cancelled by reconciliation, the wife when later sued for divorce could question validity of agreement without having theretofore sought rescission.

7. Husband and wife ⚷279(3)

Where property settlement agreement disposing of all community property had been cancelled by mutual consent of the parties upon their reconciliation, without any demand on part of husband that he be reimbursed in any manner for property which passed thereunder, husband waived right to restoration.

◆

J. Thomas Russell, Los Angeles (Robert E. Ford, Los Angeles, of counsel), for appellant.

Pollock & Pollock, Edward I. Pollock and David Pollock, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Cecil B. Morgan instituted this action for divorce. His complaint alleged that the parties had no community property, having by written property settlement divided and converted into separate property such community property as they had at the time. The complaint alleged that the parties separated May 18, 1946. Defendant wife answered, alleging that the separation took place on the 30th of September, 1947, and denying the allegations with respect to the property settlement agreement and the alleged grounds for divorce. She also filed a cross-complaint alleging cross-defendant to be possessed of automobiles and other personal property which was community property. By her cross-complaint under appropriate allegations she sought temporary and permanent support. The action was tried, findings were waived, and by the decree defendant was granted support of $100 a month until the further order of the court, attorney's fees and costs. The decree also adjudged that the property settlement agreement of the parties under date of June 5, 1946, was voided and annulled by reconciliation of the parties during the month of September, 1947. Plaintiff husband appeals.

The sole contention on the appeal is that the property settlement was valid, was not cancelled or annulled by the reconciliation of the parties, and that plaintiff had received by way of support everything she is entitled to receive, presently or in the future.

The parties married September 2, 1939. On and prior to June 5, 1946, they were living apart. On that date they executed a property settlement agreement, by the terms of which the husband agreed to pay the wife $1,200, in installments of $100 per month. He also transferred and set over to the wife all his interest in any community property other than household furniture. In 1940 a home had been acquired in the name of the wife. The husband executed a quitclaim deed in favor of the wife in May of 1946, following a visit of the parties to a lawyer to arrange for the institution of a divorce suit by the wife. The property settlement agreement recited that the parties were living apart, and provided for the payment of fees to the wife's attorney, $50 forthwith, $50 upon the signing of the agreement, and $100 if and when the wife obtained an interlocutory decree of divorce. In consideration of the benefits to be derived under the agreement the wife waived all right to further support and there were the usual mutual releases of claims, past, present and future.

Mrs. Morgan sued for divorce in June, 1946. Although Mr. Morgan defaulted, the case was not tried until September 4, 1947, when Mrs. Morgan received an interlocutory decree. By the decree the court approved the property settlement agreement. Mr. Morgan was staying at the house occupied by his wife in the months of July and August, 1947, but the parties were not living together. At her home, in the evening of September 4, 1947, Mrs. Morgan informed her husband that she had obtained her decree. Mr. Morgan said he did not want a divorce and, "let's forget the whole thing * * * it is never final until you sign it. Forget the whole thing and we will start over." Plaintiff and defendant then lived together as husband and wife for the remainder of the month of September, during which time they conducted themselves, at home and elsewhere, alone and with friends, as married people usually would do. At the end of September Mr. Morgan left and did not return. Mrs. Morgan did not consent to the separation. On October 18, 1947, Mrs. Morgan filed in the divorce action an affidavit stating that she and Mr. Morgan had become reconciled and had lived and cohabited together. On November 15, 1947, Mr. and Mrs. Morgan executed a dismissal of the divorce action, which was duly filed. The present action was begun by Mr. Morgan January 7, 1948.

The only references in the pleadings to the property settlement agreement are the allegation in the complaint that such an agreement was executed, dividing the community property of the parties, a denial of those allegations in the answer, and the allegation in Mrs. Morgan's cross-complaint that her action for divorce in which she had been granted an interlocutory decree had been dismissed by mutual consent "for the reason that a reconciliation was effected between the parties hereto during the month of September, 1947; and the parties hereto resumed their marital rights, duties and obligations as husband and wife." In his answer to the cross-complaint Mr. Morgan did not set out the agreement as a defense to the claim for support.

In order to properly place in issue the question whether a cancellation of the agreement was effected, in whole or in part, through the reconciliation, the pleadings of Mrs. Morgan should have alleged an agreement of the parties to cancel it, and the pleadings of Mr. Morgan should have contained a denial. Although the issue was not clearly pleaded, it nevertheless was present by reason of Mrs. Morgan's claim for separate maintenance and attorney's fees. The agreement was placed in evidence by plaintiff early in the trial, and it is clear that the action was tried upon the theory that the validity of the agreement was in question insofar as it provided that the payment by Mr. Morgan of $1,200 would forever release him from his obligation to support his wife.

[1-3] Whether, in such a case, the agreement does or does not continue in force, depends upon the mutual intentions and understanding of the parties. It is to be determined by the court as a question of fact, and upon indirect evidence in the absence of direct evidence. As said in Estate of Boeson, 201 Cal. 36, 42, 255 P. 800, 802: "Property settlements entered into by the spouses, it is true, should be set aside in cases where the acts, conduct and relations of the parties thereafter are of such a character as to justify the conclusion that they intended and agreed orally to abrogate the same [citing cases]." It has frequently been held, at least as to executory provisions of a property settlement agreement, that cancellation will be inferred and former rights will be restored by reconciliation and resumption of marital relations. Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal. App.2d 416, 95 P.2d 966; Wells v. Stout, 9 Cal. 479; Sargent v. Sargent, 106 Cal. 541, 39 P. 931; Lloyd Corp., Ltd. v. Ind. Acc. Comm., 61 Cal.App.2d. 275, 142 P.2d 754; Gregg v. Manufacturers Bldg. Corp., 134 Cal.App. 147, 25 P.2d 1014. See also, 30 C.J. 1065, 1066, 42 C.J.S., Husand and Wife, § 601; Nelson on Divorce, Vol. 1, p. 495, sec. 13.14.

Each case is to be decided on its own facts. It is unnecessary to distinguish the cases relied upon by appellant which hold only that the evidence was sufficient to support findings contrary to the claim that the several property settlement agreements were abrogated by subsequent oral agreements.

[4, 5] The crucial question was whether the agreement should be given prospective effect as concerned the claim and the right of Mrs. Morgan to receive support. That

is the question involved on the appeal. Findings were waived. The decree, insofar as it cancels the agreement, rests upon implied findings that the parties understood that Mr. Morgan, in joining in the reconciliation and resumption of marital relations, abandoned his contractual right of freedom from the obligation of support, and assumed anew the legal obligations of a husband; also that Mrs. Morgan abandoned her right, which was expressly given by the agreement, to live separate and apart from her husband, and assumed and was restored to the customary obligations and rights of a wife. There was ample evidence to sustain such findings. Mrs. Morgan testified she believed the reconciliation to be permanent. Mr. Morgan's declarations and conduct certainly indicated that he shared that belief. Good faith of the parties was to be presumed. It is scarcely conceivable that a reconciliation with resumption of marital relations such as the one in evidence would have been entered upon under circumstances that would have enabled the husband to refuse to support his wife and to leave her without cause at any time, and without liability or obligation to her as long as the marriage existed, or after it should be terminated by divorce. In the absence of any evidence of an express agreement continuing the freedom of the husband from liability for support it was reasonable to infer that the parties intended to resume a normal married life and the legal obligations that go with it. We may not disturb the finding that the property settlement agreement was cancelled by consent of the parties.

[6, 7] It was not necessary for Mrs. Morgan to rescind the agreement before questioning its continuing force. There are situations in which a party to a property settlement agreement should not be allowed to seek its annulment otherwise than through the remedy of rescission, but we do not regard the present case as one where rescission was required. It was not shown that Mr. Morgan had a community interest in the real property and, as we have said, that property was not a subject of the property settlement agreement. So far as the $1,200 was concerned, we must presume that Mr. Morgan could have been required to support his wife during the year following the date of the property settlement if he had not agreed to do so. If there was household furniture at the time of the agreement, there is nothing in the record to show that it had sufficient value to justify any further litigation concerning Mr. Morgan's possible right therein. But regardless of these considerations, the agreement was cancelled by mutual consent, without any demand by Mr. Morgan that he be reimbursed in any manner. If he had been entitled to demand restoration he waived his right.

The judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., dissents.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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105 Cal.App.2d Supp. 851

PEOPLE v. SAAD.

Cr. A. No. 2768.

Appellate Department, Superior Court,
Los Angeles County, California.
Aug. 8, 1951.

Peter Saad, alias Jockey John Owens, was convicted in the Arcadia City Court, Monrovia Township, David T. Sweet, J., for refusing to leave a race track, and defendant appealed. The Appellate Department of the Superior Court, County of Los Angeles, Per Curiam, held that the provision of the Penal Code making it a misdemeanor for refusing to leave a race track after person had been ejected from a race track for touting or practices inimical to the public interest is void for uncertainty.

Judgment reversed with directions.

1. Criminal law ⚷1023(10)

There can be no appeal from a verdict in a criminal case. Pen.Code, § 1466.

2. Criminal law ⚷1081

Notices on appeal should not be construed more strictly in criminal cases than they are in civil cases, where rule is that notices of appeal are liberally construed to preserve right of review unless it appears that respondent has been misled by misdescription.

3. Criminal law ⚷1081

Where defendant in criminal prosecution filed a notice that he appealed from verdict and conviction and from denial of his motion for new trial, upon showing that state had not been misled by description, notice of appeal would be considered as one from judgment of conviction. Pen. Code, §§ 1237, 1466.

4. Criminal law ⚷1134(3)

Upon appeal from a judgment of conviction, the Appellate Department of the Superior Court may consider whether or not complaint upon which conviction is based states a public offense.

5. Constitutional law ⚷258
Theaters and shows ⚷2

The provision of Penal Code making it a misdemeanor for anyone who has been ejected from a race track for touting or other practices inimical to the public interest to refuse to leave a race track is void for uncertainty and violative of due process provision of Fourteenth Amendment. Pen.Code, § 337.5; U.S.C.A.Const. Amend. 14.

6. Criminal law ⚷13

No one may be required at peril of life, liberty or property to speculate as to meaning of penal statutes, since all are entitled to be informed as to what the state commands or forbids.

7. Constitutional law ⚷258

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates first essential of due process of law.

J. T. Forno, Los Angeles, for appellant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Ralph Bagley, Deputy Dist. Attys., Los Angeles, for respondent.

PER CURIAM.

[1–3] On the same day that he was sentenced to serve ten days in the county jail and to pay a fine of $300, the defendant, appearing in propria persona, filed a notice that he appealed "from the verdict and conviction and from the denial of defendant's motion for a new trial made this 23d day of April, 1951." There is, of course, no appeal from the verdict. See Penal Code section 1466, which lists the judgments and orders from which defendants may appeal in criminal cases in the inferior courts and does not include the verdict, and People v. Ormes, 1948, 88 Cal. App.2d 353, 354, 198 P.2d 690, 691, which gives the same effect to identical language appearing in section 1237 in relation to appeals from superior courts. Nor does section 1466, Penal Code, include in the list a "conviction." Provision is made, however, for an appeal from the "judgment of conviction." It is not far-fetched to conclude that by "conviction" in his notice of appeal, the defendant meant to point to the "judgment of conviction." As we said in People v. Lopez, 1941, 43 Cal.App.2dSupp. 854, 867, 110 P.2d 140, 147, where we held an appeal from a "sentence" to be an appeal from a "judgment of conviction": "Notices on appeal should not be construed more strictly in criminal cases than they are in civil cases, where the rule is that 'notices of appeal are liberally construed to preserve the right of review unless it appears that the respondent has been misled by the misdescription.'" Not only does it not appear that the respondent has been misled, in this case, but we find counsel for the People magnanimously supplying these cases in support of the thesis that we should interpret the notice of appeal as being one from the judgment of conviction: People v. Yates, 1931, 114 Cal.App.Supp. 782, 790, 298 P. 961, 964; People v. Hawthorne, 1944, 63 Cal.App.2d 262, 264, 146 P. 2d 517, 518; People v. Aresen, 1949, 91 Cal.App.2d 26, 28, 204 P.2d 389, 390, 957;

Holden v. Calif. Emp. etc. Com., 1950, 101 Cal.App.2d 427, 430–431, 225 P.2d 634, 636. We so interpret it.

[4, 5] On such an appeal we may, of course, consider whether or not the complaint, upon which the conviction is based, states a public offense. It seems plain to us that no public offense was stated, in this case, for the charge is limited to those provisions of section 337.5, Penal Code, which are void because, in their uncertainty, they violate the due process provision of the Fourteenth Amendment.

Section 337.5 reads as follows: "Any person who has been convicted of touting, and the record of whose conviction on such charge is on file in the office of the California Horse Racing Board or in the Criminal Record Bureau of the State or of the Federal Bureau of Investigation, or any person who has been ejected from any race track of this or any other State for touting or *practices inimical to the public interest* shall be excluded from all race tracks in this State. Any such person who refuses to leave such track when ordered to do so by inspectors of the California Horse Racing Board, or by any peace officer, or by an accredited attache of a race track or association is guilty of a misdemeanor." Of the defendant it was charged that he refused to leave Santa Anita Race Track when told to do so by an accredited attache, he being known to have been ejected from this and other race tracks in California, said ejections "having been for *practices inimical to the public interest.*" It was not alleged that he had been convicted of touting or that he had ever been ejected for touting.

The words we have italicized are, obviously, the crux of the charge. It is not a misdemeanor for everyone told to do so to refuse to leave a race track, but only those offend who have heretofore been ejected and only then if the ejectment was because of *practices inimical to the public interest.* The words italicized are an essential element of the particular crime the legislature attempted to create and of which the complaint attempted to charge the defendant. But those words are too indefinite in their import to serve in a definition of criminal conduct.

[6, 7] As stated in Lanzetta v. New Jersey, 1938, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 891: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 [328]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

The principle was applied in Re Peppers, 1922, 189 Cal. 682, 685–688, 209 P. 896, 897, where condemnation fell upon this expression: "Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped." See also Orloff v. Los Angeles Turf Club, 1951, 36 Cal. 2d 734, 739–740, 227 P.2d 449, 453, and cases cited, where the word "immoral" was the indefinite touchstone.

We deem it unnecessary to bolster with argument our conclusion that there is no ascertainable standard of guilt in "practices inimical to the public interest." It takes no vivid imagination to conjure up the puzzles that an attempt to apply the words might raise, puzzles to the solution of which the legislature has not provided a single direction or hint.

For the reasons given, the appeal from the verdict is dismissed, as is also the appeal from the order denying a new trial, which becomes moot as we reverse the judgment with directions to the trial court to dismiss the action.

37 Cal.2d 711

DE LAO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 21937.

Supreme Court of California, in Bank.

Aug. 28, 1951.

Original proceedings in certiorari by David Daniel De Lao against the Superior Court of the State of California, in and for the County of Los Angeles to annul a judgment, an order setting aside such judgment and a new judgment thereafter entered against petitioner in a negligence action in the Superior Court, Los Angeles County, J. A. Smith, J. On respondent's demurrer to the petition, the Supreme Court, Gibson, C. J., held that appeal from judgment based on findings and conclusions and entered after vacation of judgment previously entered reciting a waiver of findings afforded a plain, speedy and adequate remedy to review both judgments and the order of vacation of first judgment and hence certiorari would not lie.

Demurrer sustained and proceeding dismissed.

Prior opinion 227 P.2d 24.

1. Certiorari ⚿4

To be entitled to a writ of certiorari, petitioner must establish that inferior tribunal has exceeded its jurisdiction and that there is no appeal or other plain, speedy and adequate remedy. Code Civ. Proc. § 1068.

2. Certiorari ⚿5(1)

Where the ruling or decision sought to be reviewed is not appealable, certiorari will not lie if petitioner has an adequate remedy by appeal from a subsequent order or judgment. Code Civ.Proc. § 1068.

3. Appeal and error ⚿112

A judgment which recites a waiver of findings would ordinarily be considered appealable, and an order vacating such judgment would be appealable as a special order after final judgment even if void.

4. Appeal and error ⚿112, 872

A judgment based on findings and conclusions and entered in action tried without a jury after vacation of previous judgment reciting a waiver of findings was appealable, regardless of its propriety or validity, and previous judgment and order vacating such judgment were reviewable on such appeal regardless of whether such judgment and order were themselves appealable in absence of waiver of findings.

5. Certiorari ⚿5(1)

Appeal from judgment based on findings and conclusions and entered in action tried without a jury after vacation of previous judgment reciting a waiver of findings afforded a plain, speedy and adequate remedy to review both judgments and the order of vacation, regardless of whether first judgment and order of vacation were themselves appealable in absence of waiver of findings, and hence certiorari would not lie to annul the judgments and order of vacation. Code Civ. Proc. § 1068.

◆

David G. Kling, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

GIBSON, Chief Justice.

Petitioner, defendant in a negligence action, seeks certiorari to annul (1) a judgment, (2) an order setting aside that judgment and (3) a new judgment thereafter entered. Respondent has filed a general demurrer to the petition.

The action was tried without a jury, and after submission the trial court announced that judgment would be rendered for plaintiff and directed that findings be prepared. Thereafter, upon the representation of plaintiff's attorney that findings had been waived, the court signed a judgment which recited such a wiaver. Defendant then moved for a new trial on most of the grounds specified in section 657 of the Code of Civil Procedure, and he also denied that findings had been waived. At the hearing the court ordered the new trial motion off calendar and granted plaintiff's request to vacate the judgment and for leave to prepare findings and a new judgment. The court then made findings and signed a second judgment whch was substantially the same as the first except for a recital that findings and conclusions had been made. A second motion for a new trial was subsequently made and denied. Petitioner concedes that he has filed timely notices of appeal from the order of vacation and from both judgments, and the question is whether under these circumstances he is entitled to the remedy of certiorari.

[1,2] To be entitled to a writ of certiorari, the petitioner must not only establish that the inferior tribunal has exceeded its jurisdiction, but he must also show that there is no appeal or other plain, speedy and adequate remedy. Code Civ. Proc. § 1068; Howard v. Superior Court, 25 Cal.2d 784, 787, 154 P.2d 849; Redlands, etc., School Dist. v. Superior Court, 20 Cal. 2d 348, 350, 125 P.2d 490. Where the ruling or decision sought to be reviewed is not appealable, certiorari will not lie if petitioner has an adequate remedy by appeal from a subsequent order or judgment. Howard v. Superior Court, supra; Bank of America Nat. Trust & Savings Ass'n v. Superior Court, 20 Cal.2d 697, 703, 128 P.2d 357.

[3–5] In the present case, the first judgment, which recited a waiver of findings, would normally be considered appealable, and the order vacating that judgment would be appealable as a special order after final judgment even if void. See Phelan v. Superior Court, 35 Cal.2d 363, 370, 217 P.2d 951. Defendant, however, contends that the first judgment was not appealable because there was in fact no waiver of findings and hence no final judgment, and that the order of vacation was not appealable unless there was a final judgment to be vacated. We need not pass on this contention because, if we assume its correctness for the purpose of argument, it is clear that the second judgment, being based on findings and conclusions, is appealable regardless of its propriety or validity, and that the first judgment and order are reviewable on that appeal. As we have seen, an appeal has been taken from the second judgment, and it affords petitioner a plain, speedy and adequate remedy. Certiorari, therefore, will not lie.

The demurrer is sustained, and the proceeding is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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37 Cal.2d 672

In re DABNEY'S ESTATE.

DABNEY et al. v. PHILLEO.

L. A. 21768.

Supreme Court of California, in Bank.

Aug. 22, 1951.

Rehearing Denied Sept. 20, 1951.

In the matter of the estate of Louise E. Dabney, deceased. From three orders of ratable distribution by the Superior Court, Los Angeles County, Roy L. Herndon, J., and orders striking objections to two of the petitions for distributions on a motion by Milton H. Philleo, as executor of deceased's last will, Clifford R. Dabney and wife appealed. The Supreme Court, Schauer, J., held that appellants, as adverse claimants of properties inventoried as estate assets, were not "persons interested in the estate" within the Probate Code sections authorizing such persons to resist applications for ratable distribution and requiring order of ratable distribution, if no injury will result to estate or any person interested therein, and hence were not entitled to appeal from such orders.

Appeal dismissed.

See also 232 P.2d 481.

1. Executors and administrators 🔑314(12)

Orders striking objections to petitions for distribution of decedent's estate are not appealable, and attempted appeal therefrom must be dismissed. Probate Code, §§ 1240, 1242, subd. 2.

2. Executors and administrators 🔑314(6)

Adverse claimants of properties inventoried as assets of testratrix' estate have no right to appear in probate proceedings and apply directly to probate court to delay further ratable distributions of estate pending final outcome of pending equity suit by such claimants for establishment of constructive and resulting trusts in properties, quieting of claims adverse to their asserted title, accounting, and injunction.

3. Courts 🔑200½

The probate court has no jurisdiction to determine adverse claims to properties of estate in course of administration before such court, when asserted by stranger to estate, or to try question of title to property as between representative of estate and strangers thereto.

4. Executors and administrators 🔑315(6)

One claiming adversely to testatrix' estate properties included therein is not bound by probate court's order of distribution.

5. Executors and administrators 🔑224

One claiming as his own, adversely to decedent's estate, specific property held and claimed by estate, is not a "creditor of estate" within probate law.

See publication Words and Phrases, for other judicial constructions and definitions of "Creditor of Estate".

6. Executors and administrators 🔑224

One seeking to recover from representatives of decedent's estate specific property alleged to have been held in trust by decedent at time of his death is not seeking payment of claim from estate's assets and hence is not a "creditor of estate" required to present claim as such.

7. Executors and administrators 🔑314(5)

Distribution of decedents' estates cannot be delayed to await determination of prospective litigation by adverse claimants of estate's properties or any portion thereof, when estate is otherwise ready for distribution.

8. Executors and administrators 🔑314(5)

Where all debts and charges against decedent's estate have been fully paid and ascertained balance of assets subject to distribution is in executor's hands, estate is ready for distribution, which cannot be delayed, but where there is no such ascertained balance of assets or assets are merely claimed to exist and right thereto is involved in litigation, estate is not ready for distribution and probate court, in exercise of judicial discretion, may delay distribution of estate until right to assets is judicially determined and balance thereof for distribution ascertained.

9. Executors and administrators 🔑314(5)

Where adverse claims to properties inventoried as assets of testatrix' estate extended to only 25 to 50% of such assets, all claims of creditors of estate were paid, and there was no suggestion that distributions of assets would endanger estate's ability to pay administration expenses, probate court did not exceed its judicial discretion in refusing to delay ratable distributions pending adjudication on merits of claimants' equity suit against executor and others for declaratory relief, establishment of constructive and resulting trusts in properties, quieting of claims adverse to claimants' asserted title thereto, accounting, and injunction.

10. Executors and administrators 🔑314(6, 12)

Persons claiming adversely to testatrix' estate equitable ownership of properties inventoried as estate assets, as alleged in their equity suit for declaratory relief, establishment of constructive and resulting trusts in properties, quieting of claims adverse to their asserted title thereto, accounting, and injunction, were not "persons interested in estate" within Probate Code sections authorizing such persons to resist applications for ratable distributions and requiring orders therefor if no injury will result to estate or any person interested therein, and hence were not entitled to appeal from orders of ratable distribution. Code Civ.Proc. § 938; Probate Code, §§ 1010, 1011, 1233.

See publication Words and Phrases for other judicial constructions and definitions of "Persons Interested in Estate".

11. Equity 🔑22

Equity courts will interfere in administration of decedent's estates, where probate courts' powers and modes of procedure preclude them from doing complete justice, but only for purpose of rendering indispensable aid to probate courts, to which equity courts' decrees will be remitted to be carried into effect.

12. Executors and administrators ⚿314(6)

On appeal from orders of ratable distribution, entered in testatrix' estate over objections of appellants claiming interest adverse to estate in properties inventoried as assets thereof and asserting such interest in separate equity suit for injunction and other relief, appellate court will not extend meaning of phrase, "persons interested in the estate," in statute authorizing such persons to resist applications for ratable distribution, so as to include appellants, in order that they shall not be deprived of effectual judicial aid, but must presume that equity court can afford appellants any relief to which they show themselves entitled and has acted or will act in conformity with law and equity on showing made. Probate Code, §§ 1010, 1011.

◆

C. Paul Du Bois and John E. Sisson, Los Angeles, for appellants.

Dolley, Knight, Woods & Hightower, Roy P. Dolley, Franklin L. Knox and Vinton T. Woods, Los Angeles, for respondent.

SCHAUER, Justice.

Clifford R. Dabney and Alice M. Dabney, husband and wife, appeal from three separate orders of ratable distribution[1] entered in the above named estate over the written objections of appellants to the petitions for such distributions.

[1] The decedent, Louise E. Dabney, died testate, respondent Philleo is the executor of her will, and appellant Clifford Dabney (except as his interest may have been divested by assignment) is one of the heirs of her estate. As hereinafter appears in more detail, however, it is not as an heir entitled to succeed to any portion of the estate but, rather, as a claimant of property rights adverse to the estate that Clifford urges his objections. The controlling question presented is whether he and his wife are, as such adverse claimants, "persons interested in the estate" within the meaning of sections[2] 1010 and 1011 of the Probate Code. We have concluded that the answer should be negative, that the orders of distribution were properly made, and that the appeal herein should be dismissed.[3]

As grounds for objecting to the three petitions for ratable distribution appellants allege that the proposed distributions were not for the best interest of the estate in that on February 1, 1950, appellants instituted an equity suit (numbered 569707) in the superior court against numerous defendants, including respondent Milton H. Philleo both individually and as personal representative of the estates of both Louise E. Dabney and her predeceased husband, Joseph B. Dabney. In such suit appellants prayed for declaratory relief, the establishment of constructive and resulting trusts, the quieting of adverse claims to their asserted title, an accounting, an injunction, and other relief, all based upon allegations of their equitable ownership in properties which are inventoried as assets of this estate. Appellants further allege that the proposed ratable distributions could not be made "without danger to the estate and its representative," and request that if distribution be ordered over appellants' objections, the court "impose an equitable charge in such order" of distribution "whereby the distributee as to these contestants [appellants] is designated a trustee."

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[1] Two of such orders, for $150,000 each, were entered August 22, 1950; the third order, for $300,000, was entered September 26, 1950. The funds are distributed among more than one hundred persons.

[2] Section 1010: "* * * Any person interested in the estate * * * may resist the application" for ratable distribution.

Section 1011: "If, at the hearing, it appears that * * * no injury will result to the estate or any person interested therein, the court shall make an order" of ratable distribution.

[3] Appellants have also noticed an appeal from orders striking objections to two petitions for distributions. Although such orders striking objections could be reviewed on the appeal from the distribution orders if such appeal were itself maintainable, the orders striking the objections are not in any event themselves appealable and the attempted appeal therefrom must on that account be dismissed. (Prob.Code, §§ 1240, 1242, subd. 2; see Estate of Baldwin (1943), 21 Cal. 2d 586, 590, 134 P.2d 259.)

Following the hearing upon the first petition for distribution (filed April 26, 1950) and appellants' objections thereto, the court made written findings and conclusions, in which it is stated, among other things, that Clifford had assigned to others (in fractional shares of ¼, ½ and ¼) his entire interest as an heir in this estate, that despite the filing of the equity suit by appellants the distribution sought could be made without injury to the estate or danger to the estate and the executor, and that an equitable charge would not be decreed by that court in its order of distribution. An order for ratable distribution of $150,000 was made and entered accordingly.

The other two orders for distribution recite, among other things, that hearings were had upon the respective petitions and that appellants' "objections having been ordered stricken pursuant to a motion therefor made by petitioner [executor] through his counsel; and * * * It further appearing that it will not cause any harm to said estate and is for the best interests of said estate and those interested therein," the distributions would be granted. As to the nature of the relief sought on this appeal appellants state that they "desire, in so far as any distribution presently ordered or hereafter sought, that the properties in the estate be retained in the possession of the legal representative for purposes of administration pending the adjudication on the merits [apparently of the equity suit], that respondent executor be directed to restore to said estate for such purpose any distributed properties together with any damage to the estate by reason of distributions, that the several probate Orders of Distribution be reversed and vacated * * * Further, that appellants' position as interested persons be established as to permit them to continue their participation in the estate proceedings and that respondents' motions to strike appellants' objections and the court's striking said objections be, in this fashion, foreclosed."

In support of the three ratable distribution orders appealed from, respondent executor first urges that inasmuch as Clifford has, as found by the court and not disputed by him, assigned to others his entire interest as an heir in this estate, he is not a "person interested in the estate" who may, under the terms of section 1010 of the Probate Code, resist an application for ratable distribution or who will, under section 1011, be injured by such distribution. Although this argument may well dispose of any claim of interest which Clifford might make as an heir entitled to distribution of an heir's share of the estate, it is not in reliance upon his position as an heir that he and his wife object to the petitions for distribution, but rather upon their claims of adverse equitable ownership of certain of the properties inventoried as assets of the estate, and to the income therefrom, as sought to be established in the equity suit.

[2] Respondent next urges, and this is the crucial issue to be determined, that appellants' suit (action 569707) does not establish them as persons "interested in the estate" and entitled to appear in the probate proceedings and therein directly object to ratable distributions. Both respondent and appellants confess themselves unable to find any case which "has ever decided this point." However, we are convinced that related legal precedent in this state and sound public policy unite to impel a holding that appellants do not have the right, which they seek to establish, of appearing in the probate proceedings and applying directly to the probate court to delay further distributions of the estate pending final outcome of their equity suit (action 569707).

[3, 4] It is established law "That the probate court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate. * * * [Citations]" (Estate of King (1926), 199 Cal. 113, 117, 248 P. 519), or "to try the question of title to property as between a representative of the estate and strangers to the estate." (Guardianship of Vucinich (1935), 3 Cal.2d 235, 243, 44 P.2d 567; see also Wilkerson v. Seib (1942), 20

Cal.2d 556, 562, 127 P.2d 904; Stratton v. Superior Court (1948), 87 Cal.App.2d 809, 811, 197 P.2d 821.) Nor is one who is claiming adversely to an estate properties which have been included in the estate bound by the probate court's order of distribution. (See Texas Co. v. Bank of America etc. Assn. (1935), 5 Cal.2d 35, 46, 53 P.2d 127; Shaw v. Palmer (1924), 65 Cal. App. 441, 446–449, 224 P. 106, and cases there cited.)

The same general principle—that one over whose claims the probate court has no jurisdiction is not bound by that court's adjudications—has also found expression in cases dealing with rights to estate properties based on asserted contracts by the decedent to make a particular testamentary disposition. (See Estate of Cropper (1947), 83 Cal.App.2d 105, 108, 187 P.2d 780; Estate of Harris (1937), 9 Cal.2d 649, 664–665, 72 P.2d 873; Fuller v. Nelle (1936), 12 Cal. App.2d 576, 580, 55 P.2d 1248.) In Estate of Cropper an appeal from an order of partial distribution, taken by one who had instituted an independent suit in equity to enforce a trust upon estate properties based upon an alleged contract by decedent to leave a will in appellant's favor, was dismissed on the ground that since appellant "was not a party to the proceeding * * * for partial distribution and her rights are in no manner affected thereby, she is not aggrieved by the order and has no right to appeal therefrom." Appellant's rights were characterized by the court as being asserted "adversely to the estate." (Pages 107, 108, of 83 Cal.App.2d, page 782 of 187 P.2d.

[5, 6] In Estate of Dutard (1905), 147 Cal. 253, 254, 256, 81 P. 519, the probate court decreed a partial distribution, over written objections by appellants sought to be maintained on the ground that in legal theory they were creditors, or entitled to the procedural rights of creditors, whose claims had been rejected by the executors and who had thereupon commenced actions thereon which were still pending. The probate court, however, found that "none of the appellants is a creditor of the estate * * * or has any claim against the same * * * but that they simply claim certain property described in the inventory adversely to the estate." At that time partial distribution was permitted, under Code of Civil Procedure, section 1661, if "it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate." This court, in affirming the distribution decree, pointed out: "The claimants did not [in fact] assume to stand in the character of creditors of the decedent, seeking to enforce a debt of the decedent against his property, but purely in the attitude of persons seeking to recover from the representatives of the estate specially described property, upon the ground that it did not belong to the estate, but was in fact their own property. * * * It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate within the meaning of the probate law. The decisions are clear and conclusive upon the proposition that where one seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not a 'creditor of the estate.'" Although the court does not discuss the point, it may be noted that at the time of the Dutard decision (1905) persons "interested in the estate" were permitted to "resist the application" for partial or for ratable distribution. (Former §§ 1660, 1663, Code Civ.Proc.)

[7] In Estate of King (1926), supra, 199 Cal. 113, 118–119, 248 P. 519, an appeal from a decree of distribution was taken by one "who claims to be a surviving partner of the decedent and who sought to assert her right as such in the course of the proceedings in the probate court for the administration of said estate, and by seeking to have set aside to her therein and upon the distribution thereof the entire property of said estate." In affirming the decree, this court stated, "With respect to the * * * contention of the appellant * * * that she was entitled upon her ap-

plication therefor, made upon the day set for the hearing upon the petition for distribution, to have the distribution of said estate delayed until such time as she might require to have litigated and determined her adverse claim as surviving partner of said decedent, we find no semblance of merit in said contention. If said appellant had or has any right as surviving partner of said decedent to receive and administer the properties of said estate as the assets of said alleged partnership, it was clearly her duty long prior to the time for the proper distribution of said estate to have instituted an action in a court of law or equity for the determination of her said claims, and doubtless upon the institution of such action and upon a proper showing made therein she would have been accorded the right to have the distribution of the properties of the estate of her deceased partner reasonably delayed in order that her aforesaid claims might in a proper forum be determined. The appellant, however, herein has made no showing of this sort, and it has been fully determined that the distribution of estates cannot be delayed in order to await the determination of prospective litigation by adverse claimants to the properties or any portion thereof of an estate when the same is otherwise ready for distribution. (Estate of Ross, 180 Cal. 643 [182 P. 755].)"

And in Texas Co. v. Bank of America etc. Assn. (1935), supra, 5 Cal.2d 35, 46, 53 P.2d 127, in which plaintiff-respondent sued to recover from a special administrator money paid to the latter as consideration for the execution of an oil lease, it was contended that plaintiff was bound by an order settling and approving an administrator's account which included such money. The court stated, "Since respondent was not a person interested in the estate, it could not contest the account nor was it bound by the order of settlement. The probate court in the settlement of an account has no jurisdiction to determine the rights of those claiming adversely to the estate. * * *" (See also Estate of Spreckels (1913), 165 Cal. 597, 604, 133 P. 289.)

Despite the language of the above-cited decisions indicating that one claiming adversely to an estate is not included within the phrase "person interested in the estate" as used in the applicable sections of the Probate Code, appellants urge that in Estate of Baldwin (1943), supra, 21 Cal.2d 586, 590–594, 134 P.2d 259, and Dabney v. Dabney (1942), 54 Cal.App.2d 695, 700–702, 129 P.2d 470, a disposition towards enlargement of the included class appears. Any such tendency does not appear to extend so far as to avail appellants here. The receiver who was held to be a "person interested" in the Estate of Baldwin was claiming the share of one of the heirs, and although his claims might well be characterized as adverse to such heir, they were in no sense adverse to the estate itself. (Cf. Estate of Crooks (1899), 125 Cal. 459, 462, 58 P. 89.) And in Dabney v. Dabney the plaintiff who was held to be a "person interested in the estate" was a creditor who had recovered judgment upon a claim which had been rejected by the administrators. Based on the provisions of section 953 of the Probate Code[4] a creditor who has sued on a rejected claim has been squarely held by this court to be a "person interested" and a "party aggrieved" by an order of distribution made without provision for the payment of such claim. (Estate of Mailhebuau (1933), 218 Cal. 202, 205, 22 P.2d 514; see also Estate of Wilcox (1945), 68 Cal.App.2d 780, 787, 158 P.2d 32.) Significant, therefore, is the holding of Estate of Dutard (1905), supra, 147 Cal. 253, 256, 81 P. 519, that "one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate within the meaning of the probate law. The decisions are clear and conclusive * * *." (See also Porter v. Van Denburgh (1940), 15 Cal.2d 173, 177, 99 P.2d 265.)

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[4] Section 953: "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. * * *"

[8] Appellants also rely upon Estate of Ricaud (1881), 57 Cal. 421, 422, in which the decedent's widow petitioned the probate court for an order authorizing the executors to sell "so much of the real property of the estate as the Court might judge necessary and beneficial for the purpose of paying to her a legacy of $5,000 bequeathed to her by the will of the decedent." The petition was opposed (by whom, does not appear) and following a hearing the court found, among other things, that sale of the real estate was necessary to pay the various legacies under the will, "but all of the real estate claimed to be assets was involved in litigation by an action of ejectment, which had been commenced against the decedent in his lifetime, and had been pending against the executors since his death, and was still undisposed of; therefore the Court held, the estate was not ready for distribution, * * * and a sale of the property should be delayed until the litigation concerning it was ended." Upon appeal by the widow, this court, in affirming the order stated, "If all debts and charges against the estate * * * have been fully paid, and there is in the hands of the executor * * * an ascertained balance of assets subject to distribution, the estate is ready for distribution, and distribution cannot be delayed. * * * [Page 423 of 57 Cal.] But where there is not an ascertained balance of assets * * * in the hands of the executor * * * or if the assets are merely claimed to exist, and the right to them is involved in litigation, either by an action brought by the executor * * * to recover them *for* the estate, or by an action against the executor * * * to recover them *from* the estate, then the estate is not ready for distribution. The very existence of the property as assets is uncertain, and contingent upon the determination of the suits. It may or may not belong to the estate. Under such circumstances an estate would not be ready for distribution, and the Probate Court would have power, *in the exercise of judicial discretion* [italics added], to delay the distribution of the estate until the right to the assets be judicially determined, and the balance of assets for distribution be ascertained." (See also Estate of Colton (1912), 164 Cal. 1, 4, 127 P. 643; Estate of Wenks (1915), 171 Cal. 607, 609, 154 P. 24 (adverse claimant filed no independent suit; objection in probate court to distribution rejected); In re Burdick (1896), 112 Cal. 387, 391, 44 P. 734, in which the court remarks, "Still, since the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate, if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum"; Plass v. Plass (1898), 121 Cal. 131, 135, 53 P. 448; In re Painter (1897), 115 Cal. 635, 641, 47 P. 700.)

[9] In the present case it is not the entire assets or (as in Ricaud) "all of the real estate" which is involved in appellants' suit 569707, but only a portion thereof. Although the record is not specific on the point, it appears that appellants' claims extend to only some twenty-five to fifty per cent of the assets of the estate; moreover, all creditors' claims have been paid and there is no suggestion that the distributions here ordered would endanger the ability of the estate to pay the expenses of administration. There is thus not here present the situation envisioned by Chief Justice Beatty when, in his concurring opinion in Estate of Dutard (1905), supra, 147 Cal. 253, 259, 81 P. 519, he commented that "It would not always follow that a probate court in passing upon an application for partial distribution would be warranted in disregarding [adverse] claims like those of appellants, simply because they did not constitute an indebtedness of the estate in a technical sense. The pendency of a suit to recover valuable estate inventoried as property of a decedent upon the ground that he held it as trustee, or upon any tenable ground, and the possible success of such suit would be an important consideration in any case where the loss of the prop-

erty in litigation might result in a deficiency of assets to pay debts and expenses of administration." Therefore it does not appear, even assuming that appellants are entitled to have the question considered on this appeal, that the court below transgressed the limits of judicial discretion in refusing to delay the ratable distributions sought.

[10] We hold that appellants are not "persons interested in the estate" within the meaning of sections 1010 and 1011 of the Probate Code and that they are not entitled to maintain this appeal. (See Code Civ.Proc., § 938; Prob.Code, § 1233; Estate of Cropper (1947), supra, 83 Cal. App.2d 105, 108, 187 P.2d 780.)

[11, 12] In respect to the argument of appellants that we should in the interests of justice give extended inclusion to the phrase "persons interested in the estate." to the end that persons situtated like appellants shall not be deprived of effectual judicial aid, we point out that from our holding it does not follow that appellants are left without adequate remedy. While they are not "persons interested in the estate" as such, they do claim an interest *in the assets* inventoried by the estate. They are asserting that interest in their suit in equity seeking, among other remedies, injunctive relief. It has been said "Courts of equity will interfere in the administration of estates where the powers of the courts of probate and their modes of procedure preclude them from doing complete justice and then only for the purpose of rendering indispensable aid to courts of probate, remitting their decrees to that court to be carried into effect." (Estate of Rolls (1924), 193 Cal. 594, 599, 226 P. 608; see also Brown v. Superior Court (1949), 34 Cal.2d 559, 565, 212 P.2d 878.) It is not proper on this appeal to consider what form the equitable relief, if any be merited, could or should take. We must here presume that the equity court could afford appellants any relief to which they showed themselves entitled and that it has acted, or will act, in conformity with law and equity on the showing made. Furthermore, the record on the distribution hearings indicates that the probate court was mindful of the equity suit (including the request for injunctive relief) pending in the superior court which might, if the latter court acting lawfully and within its jurisdiction so determined, require postponement of the distributions.

The appeal in its entirety, including the attempted appeal from orders striking objections to two of the distribution petitions, is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

37 Cal.2d 713

STOUMEN v. REILLY et al.

S. F. 18310.

Supreme Court of California, in Bank.

Aug. 28, 1951.

Rehearing Denied Sept. 24, 1951.

Mandamus proceeding by Sol M. Stoumen to compel the California Board of Equalization to annul an order suspending for an indefinite period the general on-sale liquor license of Sol M. Stoumen. From an order of the Superior Court, County of San Francisco, Robert L. McWilliams, J., denying the writ, petitioner appealed. The Supreme Court, Gibson, C. J., held that the evidence did not sustain the Board's finding that Stoumen kept a disorderly house.

Reversed with instructions.

Prior opinion 222 P.2d 678.

1. Intoxicating liquors 🔑236(9)

Under statute making it a misdemeanor for liquor licensee to permit his establishment to be used as disorderly house or a place to which people resort for purposes injurious to public morals, evidence of patronage by a particular class of persons without regard to conduct on the premises is insufficient to establish violation. Gen. Laws, Act 3796, § 58.

2. Civil rights 🔑5

A proprietor of a restaurant and bar has no right to exclude or eject a person without good cause. Civ.Code, §§ 51, 52.

3. Intoxicating liquors ⚷106(1)

The Board of Equalization's power to revoke liquor licenses for good cause is not absolute and its decisions must be based on sufficient evidence and must not be arbitrary. Const. art. 20, § 22; Gen.Laws, Act 3796, § 40, subd. 1.

4. Intoxicating liquors ⚷106(2)

That a restaurant was allegedly used as a meeting place for homosexuals was insufficient to justify suspension of on-sale liquor license. Gen.Laws, Act 3796, § 58.

5. Mandamus ⚷168(4)

In action to compel Board of Equalization to reinstate on-sale liquor license, evidence sustained finding that plaintiff unlawfully sold to minor. Gen.Laws, Act 3796, § 61(a).

6. Mandamus ⚷187(10)

Where Board of Equalization suspended on-sale liquor license for maintaining disorderly house and unlawful sale to minor and evidence did not sustain finding of maintaining disorderly house and separate penalties were not imposed for each violation, the court on appeal from judgment refusing to compel reinstatement would remand the matter to the Board of Equalization. Gen.Laws, Act 3796, §§ 58, 61(a).

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Morris Lowenthal, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

GIBSON, Chief Justice.

The State Board of Equalization suspended, for an indefinite period, plaintiff's general on-sale license to sell alcoholic beverages at the Black Cat Restaurant, and this appeal is taken from a judgment denying a writ of mandate to compel the board to annul its order and reinstate the license.

The accusation filed against plaintiff was in two counts and alleged violations of sections 58 and 61(a) of the Alcoholic Beverage Control Act.[1] 2 Deering's Gen.Laws, 1944, Act 3796. Count one charged that plaintiff permitted his premises to be used as a disorderly house for purposes injurious to public morals. Count two charged that one of plaintiff's employees sold beer to a person under the age of 21 years.

The hearing officer of the board, who received the evidence, found that plaintiff "kept and permitted his licensed premises to be used as a disorderly house in that * * persons of known homosexual tendencies patronized said premises and used said premises as a meeting place," and that beer was sold to a minor as alleged. He concluded that plaintiff had violated sections 58 and 61(a) and recommended "indefinite suspension" of the license. The findings and recommendation were adopted by the board as its decision. Thereafter the superior court denied a writ of mandate after reviewing the matter on the record before the board. See Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545.

[1] The principal question with respect to count one is whether the evidence is sufficient to warrant suspension of plaintiff's license. Several police officers testified that many of the patrons of the Black Cat were homosexuals and that it was reputed to be a "hangout" for such persons. A number of people were arrested there, some for vagrancy and some because they "demonstrated homosexual actions", but there was no showing that any of those arrested were convicted. There was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restau-

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[1] Section 58 provides: "Every licensee or agent or employee of any licensee who keeps or permits to be used or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety shall be guilty of a misdemeanor."

Section 61(a) provides: "Every person who sells, furnishes, gives, or causes to be sold, furnished or given away any alcoholic beverage to any person under the age of twenty-one years shall be guilty of a misdemeanor."

rant for purposes injurious to public morals.

[2] Section 58 of the act makes it a misdemeanor for a licensee to permit his restaurant and bar to be used as a disorderly house or place "to which people resort for purposes which are injurious to the public morals." The terms of the section refer to conduct on the premises or resort thereto for improper purposes, and it is clear that it would be necessary to read something into that section before it could be construed as an attempt to regulate mere patronage by any particular class of persons without regard to their conduct on the premises. Cf. Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 227 P.2d 449. Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron "except for good cause," and if he does so without good cause he is liable in damages. See Civ.Code, §§ 51, 52. In analogous cases it has been held that a liquor license could not be revoked on the ground that prostitutes had dined in the licensee's restaurant, In re Farley 217 N.Y. 105, 111 N.E. 479, and that a conviction of maintaining a bawdy house was not supported by evidence that women of loose or immoral character had obtained lodging in defendant's hotel. Patterson v. State, 9 Okl.Cr. 564, 132 P. 693, 695. In the Patterson case the court pointed out that such women are human beings entitled to shelter and that it is not a crime to give them lodging unless it is done for immoral purposes. The same reasoning applies to the patronage of a public restaurant and bar by homosexuals, and mere proof of patronage, without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes, is not sufficient to show a violation of section 58.

The fact that the Black Cat was reputed to be a "hangout" for homosexuals indicates merely that it was a meeting place for such persons. See Webster's New Internat. Dict. Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed. Code Civ.Proc. § 1963, subds. 1, 33.

[3, 4] Defendants contend that even though the evidence is insufficient to show a violation of section 58, the license could be suspended under section 22 of article XX of the Constitution which provides that the board "shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." See also § 40, subd. 1, of the act, which contains a similar provision. The board's discretion under section 22, however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke a license "for good cause" necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals. See Covert v. State Board of Equalization, 29 Cal.2d 125, 131–132, 173 P.2d 545. In order to establish "good cause" for suspension of plaintiff's license, something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place.

[5, 6] As to count two of the accusation, the record shows that a young man who was under age visited the Black Cat with an adult companion and purchased and consumed beer on the premises, and there is sufficient support for the finding that plaintiff's employee sold beer to a minor in violation of section 61(a) of the act. A separate penalty was not assessed for this offense; the order of indefinite suspension being based upon the finding that plaintiff had violated both sections 58 and 61(a). No prior disciplinary action had ever been tak-

en against plaintiff, and there was evidence that the minor, who was nearly twenty years of age, looked to be twenty-one. It appears that the usual punishment imposed under such circumstances varies from a reprimand to a limited suspension of not more than thirty days. Since it does not seem likely that plaintiff's license would have been suspended for an indefinite period on this charge alone, the matter should be remanded to the board.

We find it unnecessary to pass upon other contentions made by the plaintiff with respect to the propriety of the board's action.

The judgment is reversed with instructions to the trial court to grant a peremptory writ of mandate directing the board to set aside its order of suspension and to take such further action as may be proper.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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37 Cal.2d 683

SAN DIEGO COUNTY v. McCLURKEN et al.

L. A. 21701.

Supreme Court of California, in Bank.
Aug. 24, 1951.

The County of San Diego sued J. A. McClurken and others to compel removal of gasoline storage tanks erected on defendants' land in alleged violation of a county zoning ordinance. From a judgment of the Superior Court, San Diego County, C. M. Monroe, J., for defendants, plaintiff appealed. The Supreme Court, Traynor, J., held that permanent erection of the tanks was not a mere continuance of a non-conforming use of the land for intermittent storage of lumber, scrap metal and steel beams or movement of tanks from place to place thereon, but constituted unwarranted enlargement of such use, even if new tanks were used to supply power for original industrial use of property, and that they involved a new nonconforming use.

Judgment reversed.

Schauer, Shenk and Carter, JJ., dissented.

Prior opinion, 222 P.2d 688.

1. Counties ⚷21½

A provision of zoning ordinance that existing lawful non-conforming use of land at time of passage of ordinance may be continued is valid.

2. Counties ⚷21½

The courts generally follow strict policy against extension or enlargement of land uses not in conformity with zoning ordinances.

3. Counties ⚷21½

Erection on land of four new permanent gasoline storage tanks of double the size of largest of three old movable tanks, used on land by owners before passage of county zoning ordinance placing land in residential district, did not constitute mere continuance of previous nonconforming industrial use of land for intermittent storage of lumber, scrap metal and steel beams or use of such movable tanks, but constituted unwarranted enlargement of such use, even if new tanks were used to supply power for original industrial use.

4. Counties ⚷21½

Erection of new permanent gasoline storage tanks on land placed by county zoning ordinance in residential district for use as incident to use of service station on adjoining land zoned for retail business constituted not merely expansion of nonconforming use of land in residential district for storage of fuels to be consumed in supplying power as incident to industrial use thereof at time of passage of ordinance, but a new nonconforming use, where owners never conducted service station on premises until after adoption of ordinance.

5. Counties ⚷21½

Continuance of existing nonconforming use of land at time of passage of zoning ordinance, as authorized thereby, is continuance of same use, not some other kind of use.

6. Counties 🔑21½

Provisions of county zoning ordinance that lawful use of building existing at time of passage of ordinance may be continued, though not in conformity with ordinance, and extended throughout building, if no structural alterations, except those required by law or ordinance, are made, prohibited construction of new permanent gasoline storage tanks on land placed in residential district by ordinance for use in connection with service station on adjacent land in retail district, even if tanks did not involve new nonconforming use of land on which erected.

7. Counties 🔑21½

Permanent new gasoline storage tanks, erected on land placed in residential district by county zoning ordinance, authorizing continuance of existing lawful use of building at time of passage of ordinance, though not in conformity with its provisions, and extension of such use throughout building, if no structural alterations, except those required by law or ordinance, are made therein, were "buildings" within ordinance.

See publication Words and Phrases, for other judicial constructions and definitions of "Building".

8. Counties 🔑21½

A provision of county zoning ordinance that existing lawful use of building at time of passage of ordinance may be extended throughout building, if no structural alterations, except those required by law or ordinance, are made therein, does not preclude ordinary routine repair and maintenance of existing buildings, but precludes erection of new buildings.

9. Counties 🔑21½

A landowner's purpose in purchasing land must yield to public interest in enforcement of comprehensive zoning plan.

10. Counties 🔑21½

A landowner's intention to expand business conducted by him on land gives him no right to expand use thereof not in conformity with zoning ordinance.

11. Counties 🔑21½

The fact that owner of land in area zoned by ordinance for residential purposes contemplated maximum commercial use of land before passage of ordinance is immaterial in determining whether he may make such use of land after adoption of ordinance.

12. Counties 🔑21½

An existing lawful use of land when zoning ordinance becomes effective cannot be prohibited thereby, if such use is not a public nuisance.

13. Counties 🔑21½

A landowner legally undertaking construction of building on land before effective date of zoning ordinance may complete building and use it for purpose designed after such date.

14. Counties 🔑21½

A landowner, expending substantial sum under permit to construct building on land for certain use, cannot be deprived of right to complete construction thereof and make authorized use of premises by subsequent zoning ordinance.

15. Counties 🔑21½

The fact that county zoning authorities granted some landowners and denied others variances from requirements of county zoning ordinance does not establish unreasonable discrimination.

16. Counties 🔑21½

The granting or denial of variances from requirements of zoning ordinances rests largely in discretion of body designated by ordinance for such purpose, and such body's denial of variance will not be disturbed by court, in absence of clear showing of abuse of discretion.

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James Don Keller, Dist. Atty., Bertram McLees, Jr., and Duane J. Carnes, Deputy Dist. Attys., San Diego, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, amicus curiæ for appellant.

Bertrand L. Comparet, San Diego, for respondents.

TRAYNOR, Justice.

The County of San Diego brought this action to compel the removal of four gasoline storage tanks allegedly erected in violation of a county zoning ordinance. Judgment was entered for defendants, and the County appeals.

Defendants' property is about a mile from the center of Lemon Grove, a suburban area whose center is approximately 8 miles northeast of the business center of the City of San Diego. At the time of the filing of this action this area was predominantly residential with some local business and industry centered around the intersection of Broadway, the principal east-west arterial, and Imperial Boulevard, the principal north-south arterial. Business establishments were located east and west from this intersection along both sides of Broadway and were spottily distributed elsewhere throughout the area. Defendants' land is on the southwest corner of the intersection of Broadway and Massachusetts Avenue, north-south arterial approximately one mile from Imperial Boulevard. The land is rectangular in shape and extends 660 feet south from Broadway and 1,760 feet west from Massachusetts Avenue.

The trial court found that continuously since 1938 defendants have used their property, with the exception of a small part not material to this action, for heavy industrial purposes, including above-ground storage of gasoline and other fuels, storage of paint for industrial painting, wholesale storage and sale of lumber, storage of steel beams and parts of machinery for heavy manufacturing, storage of rock, sand, and gravel, storage of junk and old iron, manufacture of acetylene gas and metal bearings, automobile and truck wrecking, building and rebuilding of heavy machinery, boiler repair shop, commercial planing mill, sand blasting, welding, heavy manufacturing processes using up to 2,000 horsepower in the operation of machines, and general heavy construction contracting business. The court also found that defendants have used the entire premises as a unit in carrying out such uses, and that the part of defendants' land where the tanks in question are situated has been used for the foregoing industrial purposes. When defendants undertook this use of their land, the neighboring area was nearly all undeveloped, with virtually no residences.

In 1942 the County adopted Ordinance No. 268 (New Series) as part of a comprehensive zoning plan for the Lemon Grove area. This ordinance divided defendants' property into three districts. A retail business district, C–1, included the area extending south for 150 feet from the south property line on Broadway, thence from Massachusetts to the west edge of defendants' land; a wholesale business section, C–2, included approximately the west two-thirds of defendants' land, running south from the C–1 zone for an additional 330 feet; and a residential district, R–2–A, extending south from the C–1 zone, which included one-third of defendants' land.

In 1948 defendants erected a retail gasoline station near the intersection of Broadway and Massachusetts Avenue. The service station was within the area zoned for retail business, which permitted that use. Defendants also erected four tanks to provide storage facilities for the service station. Although the tanks are near the service station, they extend approximately fifty feet within the area zoned for residences. Before 1942 steel beams and trusses had been stored on this corner and there was a preliminary leveling of the land and a service road made thereon. There is no disagreement among any of the witnesses, however, that until the tanks in question were erected there were no permanent structures of any kind on this corner before or after 1942.

The trial court concluded that the tanks were permitted under a provision of the ordinance exempting nonconforming uses existing at the time of its adoption.

[1] Section 17 of ordinance 371, incorporated by reference in ordinance 268 (New Series) provides: "The lawful use of land existing at the time of the passage of this ordinance, although such use does not conform to the provisions hereof, may be continued; if such non-conforming use is discontinued any future use of said land shall be in conformity with the provisions of this ordinance."

Such a provision is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. See Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14. "The object of such provision is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements, and it has been frequently upheld by the courts." Rehfeld v. City & County of San Francisco, 218 Cal. 83, 84, 21 P.2d 419, 420. There is a growing tendency to guard against the indefinite continuance of nonconforming uses by providing for their liquidation within a prescribed period. See, 35 Va.L.Rev. 348, 356; Standard Oil Co. v. City of Talahassee, 5 Cir., 183 F.2d 410, 413, certiorari denied, 340 U.S. 892, 71 S.Ct. 208; State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, certiorari denied 280 U.S. 556, 50 S.Ct. 16, 74 L.Ed. 612; State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314.

[2] Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement.[1]

[3] The evidence most favorable to defendants is that in their nonconforming use they utilized fuel tanks that were moved on heavy skid timbers from place to place as they were needed. One tank had a capacity of 1,200 gallons, another 2,300 gallons, and the largest a capacity of 6,000 gallons. Now, however, they have four new tanks with a capacity of 12,000 gallons each, that are 32 feet high and 8 feet in diameter and are permanently located upon a rectangular concrete base 10 feet wide and 54 feet long. In erecting four new tanks double the size of the largest of the old, defendants have not only increased their fuel storage capacity more than five times but have permanently affixed the tanks within the area zoned for residences. Such a formidable expansion can hardly be viewed as a mere continuance of the nonconforming use consisting of the intermittent storage of lumber and scrap metal, preliminary grading, steel beam stor-

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[1] Rehfeld v. City & County of San Francisco, 218 Cal. 83, 85, 21 P.2d 419; Burke v. City of Los Angeles, 68 Cal. App.2d 189, 191, 156 P.2d 28; City of Yuba City v. Cherniavsky, 117 Cal.App. 568, 573, 4 P.2d 299; Wilson v. Edgar, 64 Cal.App. 654, 657, 222 P. 623; De Felice v. Zoning Board of Appeals of Town of East Haven, 130 Conn. 156, 32 A.2d 635, 147 A.L.R. 161; Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615, 617; Thayer v. Board of Appeals, 114 Conn. 15, 157 A. 273, 276; Ware v. City of Wichita, 118 Kan. 265, 234 P. 978; Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625, 627; Dorman v. Mayor & City Council of Baltimore, 187 Md. 678, 51 A.2d 658, 661; Colati v. Jirout, 186 Md. 652, 47 A.2d 613, 615–616; Beyer v. Mayor and City of Baltimore, 182 Md. 444, 34 A.2d 765, 769; Connors v. Town of Burlington, 1950, 325 Mass. 494, 91 N.E.2d 212, 213; Inspector of Buildings of Burlington v. Murphy, 320 Mass. 207, 68 N.E.2d 918, 919; Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E. 2d 243, 247, 168 A.L.R. 1181; Town of Marblehead v. Rosenthal, 316 Mass. 124, 55 N.E.2d 13; Town of Lexington v. Bean, 272 Mass. 547, 172 N.E. 867, 870; Cole v. City of Battle Creek, 298 Mich. 98, 298 N.W. 466, 468; Austin v. Older, 283 Mich. 667, 278 N.W. 727, 729; Women's Christian Ass'n of Kansas City v. Brown, 354 Mo. 700, 190 S.W.2d 900, 906; In re Botz, 236 Mo.App. 566, 159 S.W.2d 367, 371–373; Lynch v. Borough of Hillsdale, 136 N.J.L. 129, 54 A.2d 723, 725–726; Albright v. Johnson, 135 N.J. L. 70, 50 A.2d 399; Burmore Co. v. Smith, 124 N.J.L. 541, 12 A.2d 353, 356; Home Fuel Oil Co. v. Borough of Glen Rock, 118 N.J.L. 340, 192 A. 516, 518; De Vito v. Pearsall, 115 N.J.L. 323, 180 A. 202; Conaway v. Atlantic City, 107 N.J.L. 404, 154 A. 6; President & Trustees of Village of Ossining v. Meredith, 190 Misc. 142, 73 N.Y.S.2d 897; People v. Giorgi, Co.Ct., 16 N.Y.S.2d 923; Pisicchio v. Board of Appeals, 165 Misc. 156, 300 N.Y.S. 368, 369; State ex rel. City Ice & Fuel Co. v. Stegner, 120 Ohio St. 418, 166 N.E. 226, 227, 64 A.L.R. 916; Appeal of Kiddy, 294 Pa. 209, 143 A. 909; Appeal of Yocom, 142 Pa.Super. 165, 15 A.2d 687, 689–690; Meserole v. Board of Adjustment, City of Dallas, Tex.Civ.App., 172 S.W.2d 528, 530–531; Benjamin v. Lietz, Utah, 211 P.2d 449, 451; see, 147 A.L.R. 167; 8 McQuillin, Municipal Corporations, 3d ed. 1950, § 25.183, pp. 366–367.

age, or even the use of movable tanks "all over the property, first one spot and then another" that may have occurred in the area in question. Even if the new tanks were used to supply power for the original industrial use, they would constitute an unwarranted enlargement of that nonconforming use. See Rehfeld v. City & County of San Francisco; City of Yuba City v. Cherniavsky; Piccolo v. Town of West Haven; De Felice v. Zoning Board of Appeals of Town of East Haven; Thayer v. Board of Appeals; Ware v. City of Wichita; Colati v. Jirout; Inspector of Buildings of Burlington v. Murphy; Town of Marblehead v. Rosenthal; Town of Burlington v. Dunn; Austin v. Older; Women's Christian Ass'n of Kansas City v. Brown; In re Botz; Home Fuel Oil Co. v. Borough of Glen Rock; De Vito v. Pearsall; Pisicchio v. Board of Appeals; People v. Giorgi; State ex rel. City Ice & Fuel Co. v. Stegner; Appeal of Yocom; supra, note 1.

[4, 5] The new tanks involve not merely an expansion of a nonconforming use but a new nonconforming use. The permitted use was for the storage of fuels to be consumed in supplying power as an incident to the industrial use; the new tanks are used as an incident to the service station use. The continuance of a nonconforming use "is a continuance of the same use and not of some other kind of use." Kensington Realty Holding Corp. v. Jersey City, 118 N.J.L. 114, 191 A. 787, 788; Simone v. Peters, 135 N.J.L. 495, 53 A.2d 315; Home Fuel Oil Co. v. Borough of Glen Rock; Town of Lexington v. Bean; In re Botz; Women's Christian Ass'n of Kansas City v. Brown; Appeal of Yocom; supra, note 1. Defendants never conducted a service station on their premises until 1948, six years after the adoption of the ordinance. Although the service station is permitted in its location, the tanks are not permitted in the residence zone where defendants erected them. No one may erect such tanks in this residential district, and it would be an unwarranted discrimination in favor of defendants to hold that they may do so. Rehfeld v. City & Council of San Francisco, supra, 218 Cal. 83, 85, 21 P.2d 419; Pisicchio v. Bd. of Appeals, 165 Misc. 156, 300 N.Y.S. 368, 369–370.

[6] Even if it be assumed that the tanks did not involve a new nonconforming use of the land, their construction was prohibited by the second paragraph of section 17 of Ordinance 371, which provides: "The lawful use of a building existing at the time of the passage of this ordinance may be continued, although such use does not conform with the provisions hereof; such use may be extended throughout the building provided no structural alterations, except those required by law or ordinance, are made therein. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or more restricted classifications."

[7, 8] A "building" is defined in section 1 of ordinance 371 as "a structure having a roof supported by columns or walls." "Structure" is defined as "anything constructed or erected and use of which requires more or less permanent location on the ground or attachment to something having a permanent location on the ground." It has been held that "building" includes a water tank, State v. Ornelas, 42 N.M. 17, 74 P.2d 723, 725; a dugout or artificial cave, State v. Clark, 221 Mo.App. 893, 288 S.W. 77; a silo, Bush v. Norman, Mo.App., 199 S.W. 721; a 35-foot steel tower and 60-barrel steel storage tank supported thereby, Griffin v. Holland, 191 Okl. 417, 131 P.2d 113; an iron fence, Swasey v. County of Shasta, 141 Cal. 392, 394, 74 P. 1031; a sand-hopper, Wilbur v. City of Newton, 302 Mass. 38, 18 N.E.2d 365, 368; a billboard, Goodrich v. Selligman, supra, note 1; for numerous other illustrations see 12 C.J.S., Building, p. 382. Thus, there can be no doubt that the four new tanks are "buildings" within the meaning of the ordinance. Although the prohibition of structural alterations does not preclude ordinary routine repair and maintenance of existing buildings, see 58 Am.Jur.Zoning, sec. 156, p. 1026, it does preclude the erection of new buildings. If an old building cannot be enlarged, a fortiori a new building cannot be built. Rehfeld v. City & County of San

Francisco; City of Yuba City v. Cherniavsky; Piccolo v. Town of West Haven; Goodrich v. Selligman; Colati v. Jirout; Connors v. Town of Burlington; Inspector of Buildings of Burlington v. Murphy; Cole v. City of Battle Creek; Women's Christian Ass'n of Kansas City v. Brown; De Vito v. Pearsall; Benjamin v. Lietz; supra, note 1; see, 8 McQuillin, Municipal Corporations, 3rd Ed. 1950, § 25.205, p. 393.

[9–11] Defendants contend that they would have constructed all necessary facilities at the beginning to complete the full industrial development of their property had they had capital enough and that since they "had to finish the plant as they could earn it, one building at a time," they gained a vested right to continue the development of their land until its full industrial use had been reached. The purpose of the landowner in purchasing the property must yield to the public interest in the enforcement of a comprehensive zoning plan. Wilkins v. City of San Bernardino, 29 Cal.2d 332, 337, 175 P.2d 542; Acker v. Baldwin, 18 Cal.2d 341, 344, 115 P.2d 455; Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 93–94, 33 P.2d 672; cf. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 215, 93 P.2d 93. The intention to expand the business in the future does not give defendants the right to expand a nonconforming use. Town of Ballerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235, 236; Chayt v. Board of Zoning Appeals of Baltimore City, 177 Md. 426, 9 A.2d 747, 750; Appeal of Kiddy, supra note 1. The ordinance has made allowance for the continuance of nonconforming uses existent in 1942; it does not permit the enlargement of such uses as the owners find expansion desirable. It is immaterial that a property owner in an area zoned for residential purposes contemplated the maximum commercial utilization of his property previous to the zoning ordinance. Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 95, 33 P.2d 672; O'Rourke v. Teeters, 63 Cal.App.2d 349, 352, 146 P.2d 983; Marblehead Land Co. v. City of Los Angeles, D.C., 36 F.2d 242, 244; Id., 9 Cir., 47 F.2d 528, 534, certiorari denied 284 U.S. 634, 52 S.Ct. 18, 76 L.Ed. 540; Ware v. City of Wichita, 113 Kan. 153, 214 P. 99; Spector v. Building Inspector of Milton, 250 Mass. 63, 145 N.E. 265; Chayt v. Board of Zoning Appeals of Baltimore City, supra. Although defendants are confined in their nonconforming use to the activities carried on at the time their property was zoned, they enjoy a favored position compared to those who purchased property for a nonconforming use and were prevented from using it at all for that purpose because their property was zoned before they could establish such a use.

[12–14] Defendants rely on In re Smith, 143 Cal. 368, 77 P. 180, and Dobbins v. City of Los Angeles, 195 U.S. 223, 224, 25 S.Ct. 18, 49 L.Ed. 169. In the Smith case the gas works had been erected before the passage of the ordinance. It exemplifies the rule that a lawful use existing at the time a zoning ordinance becomes effective cannot be prohibited when it is not a public nuisance. In the Dobbins case the owner undertook construction of a gas works in a permitted area and expended some $2,500 in erecting the foundation before a zoning ordinance was passed prohibiting gas works in that district. If an owner has legally undertaken the construction of a building before the effective date of a zoning ordinance, he may complete the building and use it for the purpose designed after the effective date of the ordinance. City of Coldwater v. Williams Oil Co., 288 Mich. 140, 284 N.W. 675; Best & Co. v. Incorporated Village of Garden City, 247 App.Div. 893, 286 N.Y.S. 980, affirmed 273 N.Y. 564, 7 N.E.2d 694. Protection of an undertaking involving the investment of capital, the purchase of equipment, and the employment of workers, is akin to protection of a nonconforming use existing at the time that zoning restrictions become effective. The same principle underlies the rule that a permittee who has expended substantial sums under a permit cannot be deprived by a subsequent zoning ordinance of the right to complete construction and to use the premises as authorized by the permit. Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 194 P.2d 148;

Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707; Atlantic Broadcasting Co. v. Wayne Tp., 109 N.J.L. 442, 162 A. 631; Nassau-Fulton Realty Corp. v. Schlimm, Sup., 67 N.Y.S.2d 501; People ex rel. Ortenberg v. Bales, 224 App.Div. 87, 229 N.Y.S. 550.

[15, 16] Defendants contend that they are being discriminated against on the ground that neighboring owners were granted variances and that over half the lands within a radius of the intersection of Broadway and Massachusetts Avenue were being used for heavy industrial purposes. There was a sharp conflict in the evidence as to the extent and nature of the other nonconforming uses in this area. The trial court made no finding on this issue, and the evidence does not establish unjust discrimination as a matter of law. No zoning ordinance can classify districts with perfect justice. Since cases of unusual hardship may require variances, zoning authorities are usually given power to grant them. The fact that variances may have been granted to some owners and denied to others, however, does not establish unreasonable discrimination. The granting or denial of variances rests largely in the discretion of the body designated by the zoning ordinance for that purpose, and a denial of a variance will not be disturbed in the absence of a clear showing of abuse of discretion. Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041; Otis v. City of Los Angeles, 52 Cal. App.2d 605, 613, 126 P.2d 954; Larkin Co., Inc., v. Schwab, 242 N.Y. 330, 336, 151 N.E. 637, 639. As to the degree of discretion vested in such bodies, see Lockard v. City of Los Angeles, 33 Cal.2d 453, 461, 202 P.2d 38, 7 A.L.R.2d 990; Acker v. Baldwin, 18 Cal.2d 341, 344, 115 P.2d 455.

Judgment reversed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. The factual issues in this case, upon substantially conflicting evidence, were resolved adversely to the plaintiff by the trial court. Instead of viewing the case favorably to sustaining the judgment on contested issues of fact, the majority apply a directly contrary view. It is further my view that the opinion of the District Court of Appeal, Fourth Appellate District, prepared by Presiding Justice Barnard, with Justice Griffin concurring (reported in Cal.App., 222 P.2d 688), correctly and soundly disposes of the issues presented.

For the reasons stated I would affirm the judgment of the trial court.

SHENK, J., concurs.

CARTER, Justice.

I dissent.

The majority opinion overrides the findings of the trial court based on conflicting evidence and thus arrives at the conclusion that defendants were not continuing the non-conforming use of their property after the passage of the zoning ordinance.

The trial court found that in 1938, before any zoning ordinance was applicable to defendants' property they used it "for heavy industrial purposes, including, among others, the following: automobile and motor-truck wrecking and rebuilding; heavy machinery wrecking and rebuilding; boiler shops; *gasoline and oil storage, above ground*; junk yards; lumber storage and wood-working, such storage being carried on in the open and without enclosure by walls; the manufacture, storage and use of acetylene gas; sandblasting; both gas and electric welding; storage of explosives; storage, and use in manufacturing processes, of paints, oil and shellac the operation of a planing mill; storage of rock, sand and gravel; storage of old iron in large quantities; operation of large machine shops, using heavy machinery; storage and repair of heavy construction machinery; sale of machinery of various kinds. That said Defendants have made use of *all* of the land so owned by them * * * as a unit, to be used in its entirety for the convenient and efficient operation thereon of the said heavy industrial purposes and uses." (Emphasis added.) It was specifically found, with reference to the four storage tanks here involved, that:

"the portion of said Defendants' said land upon which said tanks for the storage of gasoline and other fuels were erected and are now situated is *within the portion of* said lands which said Defendants have, continuously since the year 1938, used for heavy industrial purposes, as aforesaid." (Emphasis added.)

The evidence adequately supports those findings, establishing that prior to 1942, and before the enactment of the zoning ordinance, defendants conducted an extensive industrial business on *all* their property, manufacturing heavy machinery, constructing heavy equipment, storing, selling and using explosives, gasoline, butane, lumber, machinery, etc. For illustration, J. A. McClurken, one of the defendants, testified:

"Q. Now, in this matter of the storage of fuel and lumber and paint and explosives and so on, was that restricted strictly to any one particular portion of the premises? A. It was spread over the entire property. That is what the property was purchased for and that is what it was used for constantly from that day till this. * * *

"Q. Now, with regard to the fuel storage there for the use of gasoline or Diesel or butane operated engines, during what portion of the time did you have an above-ground fuel storage? Was that prior to 1942? A. Oh, yes, we have always had our fuel above ground. * * *

"Q. When you say tanks off of trucks do you mean the little 15 or 20 gallon tanks that the trucks, in the engine, gets its fuel from? A. No, we have one tank that holds 1200 gallons; another one that holds 2300 gallons; another one I think holds 6,000 gallons. They have not all been full as a rule, at one time, but we have used them according to the volume of work and according to the needs of the equipment, or according to our gasoline usage. Sometimes they would all be full; sometimes one of them would be full, and it would vary according to the actual gallonage that we were using. * * *

"Q. Now, what part of the premises did you have above-ground fuel storage on? Was it limited permanently and definitely to just one tank, or where? A. Oh, no, we had it all over the property; first one spot and then another; wherever it was most convenient to have it." With reference to any change in the use of the property he said:

"Q. Now, getting back to the various types of manufacturing and storage work conducted on your premises, has there been an(y) substantial change in the nature of the use of your premises from what it was before 1942, as you have described it, down to the present time? Have you changed your use? A. No, sir, *our operations are identical.*" (Emphasis added.) In other words, defendants were engaged in a highly diversified business which embraced selling, manufacturing, storing and repairing a wide variety of things, and to conduct that business, maintained all sorts of equipment, huge buildings and tanks. That business is the same now as it was prior to 1942. The trial court, taking all of these factors into consideration, concluded that the use of the gasoline tanks here involved did not constitute a substantial change in the use of the property. Certainly that cannot be said to be an *unreasonable* conclusion, yet the majority states that it is. By a picayunish selection of trivialities, it asserts there was a change of use because the tanks are larger than those used formerly and that the fuels stored are to be used for sale instead of defendants' use in manufacturing. There is evidence that fuel was sold before 1942, but, in any event, the change is not substantial considering the extensive and diversified character of defendants' operations. The ordinance exempts *uses* existing at the time of its passage. Here the evidence shows that the *use* of defendants' property is the same. They are still operating the same business as before the adoption of the ordinance.

There is no sound basis for distinction between this case and Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, where the court held invalid an ordinance barring gas works where the property owner had *partially* erected the plant when the ordinance was passed. The court there said, 195 U.S. at page 239, 25 S.Ct. at page 21, 49 L.Ed. 169: "Being the owner of the land, and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." If the right to complete a *partially* built structure is protected, certainly there is a constitutionally protected right to continue to operate the business exactly the same as before (as the evidence shows). Fuel storage tanks were previously maintained on the property. There is no more reason for preventing their enlargement than there would be for stopping the completion of a gas plant. In fact, this is a stronger case, for here the industrial business operations are being continued. The true test has been stated: "The fact that improved or more efficient instrumentalities are utilized in pursuit of the use does not exclude it from the category of an 'existing use' within a town zoning ordinance permitting the continuance of non-conforming existing uses, provided the instrumentalities are ordinarily and reasonably adapted to make the use available to the owner and the *original nature and purpose of the undertaking remain unchanged.* * * * It is a definitely settled proposition of law that the 'continuance of a non-conforming use' existing at the time of the adoption of the zoning ordinance is a continuance of the same use and not some other kind of use. In determining whether a non-conforming use was the same before and after passage of a zoning ordinance, so as to be permissible, each case must stand on its own facts. * * In a recent New York case where a lot in an area zoned for residential purposes was subject to a non-conforming use of storage of poles, cable and pipe, the non-conforming use related to storage and the storage of any other object was a valid continuation of such non-conforming use unless the thing stored was vastly different and in itself created new problems, in which case it could be considered a change of use." (Emphasis added.) (Yokley, Zoning Law & Practice, p. 254.) See also, Royal Baking Co. v. Oklahoma City, 182 Okl. 45, 75 P.2d 1105; Borough of Cheswick v. Bechman, 352 Pa. 79, 42 A.2d 60; President & Trustees of Ossining v. Meredith, 190 Misc. 142, 73 N.Y.S.2d 897; McIvor v. Mercer-Fraser Co., 76 Cal.App.2d 247, 172 P.2d 758.

Reference is made to the portion of the ordinance prohibiting structural changes in pre-existing buildings. Plainly, that provision deals with the change in use of the property which would follow from a structural alteration, that is, for example, if a residence was so changed that it could be used as a factory. The essential factor is still the nature of the use of the property. Has that been so altered or extended that the exemption for non-conforming uses does not apply? If not, as is the case here, there is no violation of the zoning law.

Finally, it is said that the evidence is highly conflicting on whether the ordinance discriminates against defendants, but that there is no finding on the subject, and, therefore, defendants cannot prevail. There is ample evidence that the immediate neighborhood around defendants' property is thickly sprinkled with heavy industry and businesses such as the storage and sale of fuel. The findings must be liberally construed to support the judgment. So construed, there is a sufficient finding on the subject. Defendants, in their answer, denied that they had violated the ordinance and that the ordinance applied to their property. That denial was found to be true. They alleged that their use was "in keeping with permits" granted by the county. That was found to be true. It may be at least implied from such findings that the ordinance unlawfully discriminates against them, and the judgment might well be upheld on this ground. However, there is no need of even considering the question of discrimination in the enforcement of the ordinance, as the evidence overwhelmingly supports the finding that defendants' so-called non-conforming uses are a mere continuation of the uses to which their property had been devoted before the adoption of the ordinance and are therefore exempted by its provisions.

I am in full accord with the views expressed in the opinion prepared by Mr.

Presiding Justice Barnard of the District Court of Appeal, Fourth Appellate District, which affirmed the judgment in this case. See Cal.App., 222 P.2d 688.

I would therefore affirm the judgment.

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37 Cal.2d 634

BOREN v. STATE PERSONNEL BOARD et al.

L. A. 21390.

Supreme Court of California, in Bank.

Aug. 10, 1951.

Rehearing Denied Sept. 7, 1951.

Ralph Clinton Boren brought an action against the State Personnel Board of the State of California, and others, members, and The Department of Employment of the State of California, and others, to annul an order of defendant Board dismissing plaintiff from his civil service position as assistant medical director in the State Department of Employment, and for judgment awarding plaintiff salary accruing thereto from the date of his suspension. The Superior Court, Los Angeles County, William B. McKesson, J., dismissed the action and plaintiff appealed. The Supreme Court, Traynor, J., held, inter alia, that plaintiff failed to state a cause of action for relief by writ of mandamus and failed to state a cause of action in certiorari.

Judgment affirmed.

Prior opinion 227 P.2d 292.

1. Mandamus ⇨3(4)
Officers ⇨72(2)

Where plaintiff sought to annul order of State Personnel Board dismissing plaintiff from his civil service position as assistant medical director in State Department of Employment, and sought judgment awarding plaintiff salary accruing thereto from date of his suspension, an ordinary civil action was inappropriate and writ of mandamus and writ of certiorari would lie to review decision of Board. Code Civ.Proc. § 1094.5; Government Code, § 19570 et seq.; Const. art. 24, § 3(a).

2. Mandamus ⇨81

The writ of mandamus is appropriate to inquire into validity of any final administrative order or decision made as result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in determination of facts is vested in inferior tribunal, corporation, board or officer.

3. Administrative law and procedure ⇨303
Officers ⇨69.3

The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Constitution. Const. art. 24, § 3(a).

4. Mandamus ⇨154(2)
Officers ⇨72(2)

Where plaintiff sought to annul order of State Personnel Board dismissing plaintiff from his civil service position as assistant medical director in State Department of Employment, and sought judgment awarding plaintiff salary accruing thereto from date of his suspension, and complaint in form was simply a complaint in civil action although ordinary civil action was inappropriate and writ of mandamus and writ of certiorari would lie to review decision of Board, that plaintiff's pleading was not in form a petition for mandamus or certiorari was unimportant as against general demurrer, and all that was required was that plaintiff state facts entitling him to some type of relief. Code Civ.Proc. §§ 1068, 1074, 1094.5; Government Code, § 19570; Const. art. 24, § 3(a).

5. Mandamus ⇨172

Review of administrative order by means of mandamus is governed by section of Code of Civil Procedure providing that inquiry in such case shall extend to questions whether respondent has proceeded without, or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Code Civ.Proc. § 1094.5.

6. Officers ⇨69.3

Fact that State Personnel Board was a party to contract of employment of plaintiff as assistant medical director in State Department of Employment, did not render

Board an improper tribunal to dismiss plaintiff. Code Civ.Proc. § 1094.5.

7. Pleading ⇨214(1)

A demurrer assumes truth of facts alleged in complaint.

8. Contracts ⇨333(5)

A contract may ordinarily be pleaded by its legal effect.

9. Evidence ⇨28, 29

The Constitution and the Civil Service Act are subject of judicial notice. Government Code, § 18500 et seq.

10. Mandamus ⇨163

Whether State Personnel Board in employing plaintiff in civil service position as assistant medical director in State Department of Employment had authority to promise on behalf of state that defendant would not be required to serve elsewhere than in Southern California was question of law and could properly be considered on demurrer to petition of plaintiff who sought to annul order of State Personnel Board dismissing plaintiff from his position, and who sought judgment awarding plaintiff salary accruing thereto from date of plaintiff's suspension. Government Code § 19570 et seq.; Const. art. 24, § 1 et seq.

11. Officers ⇨69.1

The terms and conditions of civil service employment are fixed by statute and not by contract.

12. Officers ⇨69.1

The statutory provisions controlling terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith.

13. Officers ⇨69.13

Under statutory provision that an appointing power may at any time transfer any employee under his jurisdiction from one position to another in same class or in another class having substantially similar duties, responsibilities, and qualifications, and substantially same salary range, a plaintiff who held civil service position of assistant medical director in State Department of Employment could be transferred from one geographical location in state to another, and State Personnel Board which employed plaintiff did not have authority to make a contract limiting geographical area of plaintiff's service. Government Code, §§ 18006, 18500, 19360, 19361; Const. art. 24, § 1 et seq.

14. Estoppel ⇨62(1)

The authority of a public officer cannot be expanded by estoppel.

15. Principal and agent ⇨14(1), 25(1)

In the field of private contracts the doctrines of ostensible agency or agency by estoppel are not based upon representations of agent but upon representations of principal.

16. Mandamus ⇨154(5)
Officers ⇨72(2)

A plaintiff who sought to annul order of State Personnel Board dismissing plaintiff from his civil service position as assistant medical director in State Department of Employment, and who sought judgment awarding plaintiff salary accruing thereto from date of his suspension, failed to state a cause of action for relief by writ of mandamus and failed to state cause of action in certiorari. Code Civ.Proc. § 1094.5; Const. art. 24, § 3(a).

George E. Cryer and R. Alston Jones, Los Angeles, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Howard S. Goldin and Bayard Rhone, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

This appeal is on the judgment roll from a judgment of dismissal entered on an order sustaining a demurrer to plaintiff's second amended complaint without leave to amend.

[1–4] The complaint in form is simply a complaint in a civil action. Plaintiff seeks to annul an order of defendant State Personnel Board dismissing him from his civil service position and also seeks a judgment awarding him the salary accruing thereto from the date of his suspension. For this relief, an ordinary civil action is inappropriate. See Tenth Biennial Report of the Judicial Council of California, 133–145. Since the enactment of section

1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer * * *." The proceedings of the State Personnel Board in connection with plaintiff's dismissal were clearly of the type envisioned by section 1094.5, see, Gov.Code, § 19570 et seq., and the writ of mandamus will therefor lie to review the Board's decision. Since the jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from the Constitution, Article XXIV, § 3(a); cf. Covert v. State Board of Equalization, 29 Cal.2d 125, 131–132, 173 P.2d 545, the writ of certiorari is also available to review the Board's decisions. O'Brien v. Olson, 42 Cal.App.2d 449, 453–457, 460, 109 P.2d 8; Code Civ.Proc. §§ 1068, 1074. As against a general demurrer, however, it is unimportant that plaintiff's pleading was not in form a petition for mandamus or certiorari. All that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled. Grain v. Aldrich, 38 Cal. 514, 520; Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 188, 190 P. 797; Estate of Brown, 196 Cal. 114, 125–126, 236 P. 144; In re City and County of San Francisco, 195 Cal. 426, 429, 233 P. 965; In re California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 309, 298 P. 485; Board of Trustees v. State Board of Equalization, 1 Cal. 2d 784, 787, 37 P.2d 84, 96 A.L.R. 775; Traders' Credit Corp. v. Superior Court, 111 Cal.App. 663, 667, 296 P. 99; Husband v. Superior Court, 128 Cal.App. 444, 448, 17 P.2d 764; Code Civ.Proc. §§ 452, 580, 1109.

Even if the second amended complaint is regarded as a petition for a writ of mandamus or certiorari, it fails to allege any facts that would justify granting the relief sought.

[5] Review of an admininstrative order by means of mandamus is governed by section 1094.5 of the Code of Civil Procedure, which provides: "* * * (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Plaintiff has failed to allege facts that establish any lack or excess of jurisdiction. Sections 2(c), 3(a), and 5(a), of Article XXIV of the Constitution vest the State Personnel Board with jurisdiction over all dismissals, demotions, and suspensions in the state civil service. See also Government Code, § 19570 et seq. The order dismissing plaintiff from his civil service position was therefore within the jurisdiction of the Board.

[6] With respect to the requirement that he be accorded a fair trial, plaintiff contends that the State Personnel Board was a party to his contract of employment and is therefore unable to render an unprejudiced decision concerning it. The very nature of a contract with the state, however, makes impossible an interpretation or enforcement of it that is, in the strictest sense, "disinterested"—some officer, agency, or court of the state itself must ultimately decide what are the state's rights and obligations. Protection to those who deal with the state is provided, not by referring controversies to third parties, but by electing and appointing conscientious officials and judges. To obtain responsible control over state employment the civil service system was established by the people. Const. Art. XXIV. The power to discipline employees was largely transferred from various officials and departments to the State Personnel Board. It was contemplated, furthermore, that civil service should

be under the Board's supervision, to the end that all personnel matters be expertly and uniformly administered. There is no unfairness, therefore, in the fact that plaintiff's rights have been decided in the first instance by the same public agency with which he dealt at the time of his appointment. The position of the State Personnel Board in this respect is not unlike that of the Board of Medical Examiners and other licensing agencies that supervise the granting of licenses, the scope of the activities permitted thereunder, and, when necessary, the disciplining of licensees. See, Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992; Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; O'Brien v. Olson, 42 Cal.App.2d 449, 109 P.2d 8. Moreover, state employment is accepted subject to statutory provisions regulating such matters as salary, working conditions, and tenure, State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 232 P.2d 857; Risley v. Board of Civil Service Commissioners, 60 Cal.App.2d 32, 36–39 and plaintiff is presumed to have known when he joined the civil service that the State Personnel Board is charged by law with deciding all questions of dismissal. Const. Art. XXIV; Govt.Code, § 19570 et seq. The State Personnel Board was therefore a proper tribunal, and, since there is no claim that any member of the Board was prejudiced against plaintiff, it must be concluded that he has failed to allege facts that would establish the denial of a fair trial.

Although the complaint does not expressly allege an abuse of discretion within the meaning of section 1094.5, plaintiff's principal contention is to that effect.

It is alleged, in substance, that by reason of the representations of the State Personnel Board and the terms of plaintiff's acceptance of the offer of employment, it was a condition of his contract that he would not be required to serve outside the Southern California area; that he was ordered by his superior to report for duty at Sacramento, which is not in Southern California; that he refused to obey this order on the ground that it was contrary to his contract; that the charges before the State Personnel Board were based on this refusal; that his answer to the charges set up this condition of his contract; that the State Personnel Board "made no findings as to the location at which plaintiff had been appointed to serve, or as to the condition upon which he had accepted appointment to his position, * * * and said State Personnel Board declined to attach any significance to the conditional nature of plaintiff's employment; and said board entirely ignored plaintiff's defense that his contract of employment * * * justified his failure to obey the order of his superior to report for duty at Sacramento."

[7–10] Under certain conditions, the failure of the Board to consider a proper defense set up by the party charged or to make findings thereon might constitute a failure to proceed "in the manner required by law" and therefore an abuse of discretion under section 1094.5. See Govt. Code, §§ 19578, 19582; cf. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 543, 110 P.2d 992. In this case, however, even had the Board made findings in accord with plaintiff's allegations of fact, such findings would not support the conclusion that his employment was conditional in nature and that the condition justified his refusal to report for duty at Sacramento. It is true that a demurrer assumes the truth of the facts alleged in the complaint, and it is also true that a contract may ordinarily be pleaded by its legal effect. Implicit in plaintiff's allegations, however, is the claim that the State Personnel Board had authority to promise on behalf of the state that plaintiff would not be required to serve elsewhere than in Southern California. Since the Board's authority is governed by the Constitution and by the Civil Service Act. Govt.Code, § 18500 et seq., both of which are the subject of judicial notice, Code of Civil Procedure, § 1875(2) (3), the scope of that authority is a question of law and may properly be considered on demurrer. Branham v. Mayor etc. of City of San Jose, 24 Cal. 585, 602;

see also, Ohm v. City and County of San Francisco, 92 Cal. 437, 449–450, 28 P. 580; Callahan v. Broderick, 124 Cal. 80, 83, 56 P. 782.

[11, 12] The terms and conditions of civil service employment are fixed by statute and not by contract. State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 232 P.2d 857; Risley v. Board of Civil Service Commissioners, 60 Cal.App.2d 32, 36, 140 P.2d 167; Nutter v. City of Santa Monica, 74 Cal.App. 2d 292, 298, 168 P.2d 741; City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36, 44, 210 P.2d 305; see, Neuwald v. Brock, 12 Cal.2d 662, 668, 86 P. 2d 1047; 14 Cal.L.Rev. 326. "When an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and, indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission." Raymond v. Christian, 24 Cal.App.2d 92, 100, 74 P.2d 536, 541; see also, Stephens v. Clark, 16 Cal.2d 490, 493, 106 P.2d 874. The statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith. It is therefore unnecessary to determine whether the postal card questionnaire filled out by plaintiff when he applied for state employment set forth the conditions of a contract, as he contends, or was merely a request for information, as defendants contend. The controlling question is whether the statutory provisions governing employment in the state civil service gave to plaintiff's superior the authority to transfer him from Los Angeles to Sacramento.

Section 19360 of the Government Code provides: "An appointing power may at any time transfer any employee under his jurisdiction from one position to another in the same class or in another class having substantially similar duties, responsibilities, and qualifications, and substantially the same salary range. In every such case the appointing power shall give written notice of his action to the board, according to board rule."

[13] Plaintiff contends that this section does not authorize the transfer of an employee, over his objection, to a place not contemplated in the contract of employment and that the word "position" in the section refers to the kind of work and not to a geographical position or place. Even if it is conceded that "position" is equivalent to employment for particular work, no geographical limitation is placed upon the broad power granted to transfer an employee from one job in the state to another. See Spaletta v. Kelly, 30 Cal.App. 2d 656, 659–660, 86 P.2d 1074; cf. Mitchell v. Board of Trustees of Visalia Union High School Dist., 5 Cal.App.2d 64, 69, 42 P.2d 397. Had the Legislature intended such a limitation, it could easily have been provided for, just as limitations as to duties, responsibilities, qualifications, and salary range were provided for. Moreover, the statute expressly applies to *any* employee and makes no exception of employees claiming under special contracts such as that alleged here.

The conclusion that section 19360 granted to plaintiff's superior the authority to transfer him to Sacramento is reinforced by the interpretation that the Legislature itself has given the statute. The section immediately following, § 19361, provides: "If a transfer is protested to the board by an employee as made for the purpose of harassing or disciplining him, the appointing power may require the employee to transfer pending approval or disapproval of the transfer by the board. If the board disapproves the transfer, the employee shall be returned to his former position, shall be paid the regular travel allowance for the period of time he was away from his original headquarters, and his moving costs both from and back to the original headquarters shall be paid in accordance with Board of Control rules." "[A] transfer" in section 19361 obviously refers to a transfer pursuant to section 19360, and section 19361 clearly recognizes that such a transfer may involve a change from one geographical location to another. Further evidence of the Legislature's purpose may be found in section 18006 of the Government Code (formerly Pol.Code § 352.5); that statute provides: "Whenever a state officer, agent or employee is required by the appointing power to change his place of residence necessitating the moving of his household effects, such officer, agent or employee shall receive his actual moving expenses not to exceed four hundred dollars ($400), and the Board of Control may adopt general rules and regulations covering the payment of such expenses." The implication is obvious that a geographical transfer may be required.

It should be observed that there is no allegation by plaintiff that the order that he report for duty at Sacramento was made to harass or discipline him. The present case is therefore to be distinguished from the recent decision of this court in Buckman v. Board of Supervisors, 37 Cal.2d 305, 231 P.2d 496.

[14, 15] Plaintiff contends that even if the State Personnel Board was without authority to make a contract limiting the geographical area of plaintiff's service, the state is nevertheless estopped by the Board's representations. To invoke estoppel in cases like the present would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so. It is accordingly held that the authority of a public officer cannot be expanded by estoppel. County of San Diego v. California Water etc. Co., 30 Cal.2d 817, 825–830, 186 P.2d 124, 175 A.L.R. 747; Wheeler v. City of Santa Ana, 81 Cal.App.2d 811, 817, 185 P.2d 373; Branham v. Mayor etc. of City of San Jose, 24 Cal. 585, 604; Raisch v. City and County of San Francisco, 80 Cal. 1, 6, 22 P. 22; Gardella v. County of Amador, 164 Cal. 555, 564, 129 P. 933; Foxen v. City of Santa Barbara, 166 Cal. 77, 81–83, 134 P. 1142; Von Schmidt v. Widber, 105 Cal. 151, 157, 38 P. 682; Sacramento and San Joaquin Drainage Dist. v. Riley, 194 Cal. 624, 638, 229 P. 957; see also 10 Cal.Jur. § 28, p. 652; 7 A.L.R. 1248, 1249; cf. Lukens v. Nye, 156 Cal. 498, 505–506, 105 P. 593, 36 L.R.A.,N.S., 244; City of Arcata v. Green, 156 Cal. 759, 764–765, 106 P. 86. Even in the field of private contracts, the doctrines of ostensible agency or agency by estoppel are not based upon the representations of the agent but upon the representations of the principal. Earnst v. Searle, 218 Cal. 233, 237, 22 P. 2d 715; Hill v. Citizens National Trust & Savings Bank, 9 Cal.2d 172, 176, 69 P.2d 853; Civil Code, § 2317; see also Hobart v. Hobart Estate Co., 26 Cal.2d 412, 452, 159 P.2d 958; Pacific Ready-Cut Homes v. Seeber, 205 Cal. 690, 694, 272 P. 579; Harris v. San Diego Flume Co., 87 Cal. 526, 528, 25 P. 758; 1 Cal.Jur. §§ 33–45, pp. 731–747 [especially §§ 39, 41]. Here the state, as principal, did not represent that the Board could limit plaintiff's service to Southern California, but on the contrary enacted and published section 19360 of the Government Code, which gives the power of transfer to plaintiff's superior.

It must be concluded that no abuse of discretion is indicated by the allegation that the Board ignored plaintiff's claimed contractual defense and made no findings thereon. Moreover, the complaint states that the Board did make findings, although they are not set forth, even in substance. Under these circumstances, it must be assumed, in the absence of a contrary allegation, that the decision is supported by the findings and that the findings are supported by the evidence.

[16] Having failed to bring his allegations within the provisions of section 1094.5 of the Code of Civil Procedure, plaintiff has failed to state a cause of action for relief by writ of mandamus. Inasmuch as the scope of review by certiorari is at least as limited as that by mandamus, see Code Civ. Proc. § 1074, it follows that plaintiff has likewise failed to state a cause of action in certiorari.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

106 Cal.App.2d 168

PATTEN v. STATE PERSONNEL BOARD et al.

Civ. 7900.

District Court of Appeal, Third District, California.

Aug. 17, 1951.

Proceeding by Lloyd H. Patten against the California State Personnel Board and the California Employment Stabilization Commission for a peremptory writ of mandamus to compel defendants to employ petitioner as a permanent civil service employee. The Superior Court, Sacramento County, Malcolm C. Glenn, J., denied the writ of mandamus and the petitioner appealed. The District Court of Appeal, Third District, Schottky, J., pro tem., held that the petitioner did not receive a civil service appointment on a regular or permanent basis.

Judgment affirmed.

1. Estoppel ⚷62(1)
Officers ⚷103

All persons dealing with public officers or agents are bound to ascertain the limits of their authority or power as fixed by the statutory or organic law and are chargeable with knowledge of such limits, and no estoppel can be created by the acts of such agents or officers in excess of their statutory or constitutional powers.

2. Estoppel ⚷62(1)

Neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.

3. Officers ⚷69.7
States ⚷57

Salary and conduct of employee of state under civil service are subject to law governing such matters as set forth in the statute and rules and regulations of commission.

4. Officers ⚷69.1

Terms and conditions of civil service employment are fixed by statute and cannot be circumvented by purported contracts in conflict therewith.

5. Estoppel ⚷62(1)

The authority of a public officer cannot be expanded by estoppel.

6. Estoppel ⚷62(2)
Officers ⚷11.6

Where representative of state employment stabilization commission and employee, in negotiations for filling of position in department of employment, acted under an honest mistake of fact in that both supposed the position to be "permanent" rather than merely for the "duration", appointment was only for "duration" and state was not estopped to deny permanency.

◆

Fabian D. Brown, San Francisco, for appellant.

Wilmer W. Morse, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment denying a peremptory writ of mandamus to compel the California State Personnel Board and California Employment Stabilization Commission to employ petitioner in the Department of Employment as a permanent civil service employee in the class of Unemployment Insurance Examiner, Grade 3.

The sole question involved in this appeal is whether the petitioner in July of 1945 received a civil service appointment on a "regular" or "permanent" basis, as he contends, or on a "duration" basis, as contended by respondents.

The facts are not substantially in dispute and will be set forth in the course of this opinion. The facts upon which petitioner and appellant relies are stated by him as follows: "On July 5, 1945 Mr. Cameron, the representative of the respondent California Employment Stabilization Commission called at the place of business of the appellant and stated that the position was *permanent* and requested appellant to accept it (Transcript p. 36, lines 19 and 20). Appellant accepted the position on a permanent basis. Thereafter there was presented to appellant a form of oath of office for his execution, which oath described the office as 'Unemployment Insurance Examiner, Grade 3', with nothing to indicate that it was not on a permanent basis, and which was altered somewhere by the California Employment Stabilization Commission, the appointing power, without the knowledge or consent of the petitioner (Transcript p. 38, line 14 to p. 39, lines 1 to 13), and appellant accepted said position upon that basis, went to work and continued to work without any knowledge of the alteration of the documents or the limitation upon his employment. Appellant received his performance report about December 5, 1945 (Transcript p. 39, lines 21 to 26), after which, shown the limitation for the first time, he protested the situation and thereupon discussed the matter with Mr. Cameron, the department's representative, who made the original offer, and was advised to file a written protest with the appointing power, which was done accordingly (Transcript p. 40, line 9 to p. 41, lines 1 to 6)."

The record also shows that on July 3, 1945, the respondent California Employment Stabilization Commission requested the respondent State Personnel Board to certify eligibles to it for appointment to the position of Unemployment Insurance Examiner, Grade 3; that the request was that the certification be made on a "duration" basis, that is to say, to fill a position for the duration of the war or the existence of any emergency in preparing for the national defense found and proclaimed by the Governor under the provisions of Section 152.6 of the State Civil Service Act, Stats. 1943, Ch. 736, Gen.Laws, Act 1404; that on July 16, 1945, the State Personnel Board certified petitioner's name from the appropriate list for appointment to this position on a *duration* basis; that on that date petitioner was fourth highest on the list among those who had indicated willingness to accept a regular permanent appointment, but was third highest for a duration appointment; that petitioner was No. 3 for a duration appointment because one Rutledge, who was second highest on the list, had already accepted a duration appointment; that Rutledge was still eligible for certification to a regular permanent position, however, because Rule 307 of the State Personnel Board provided that "The acceptance or declination of a duration appointment from a regular employment list shall not affect the rights of an eligible to certification for a regular permanent appointment."

At the time petitioner's name was certified on the duration basis and at the time he was appointed he was not working for the state but was employed by the Ford Motor Company in a key war job at a plant in Richmond. He had, prior to taking the war job, worked in the Department of Employment in a similar position for five years.

It is apparent from the record that both Mr. Cameron, the representative of the California Employment Stabilization Commission, and petitioner, in the negotiations for the filling of the position, were acting under an honest mistake of fact with respect to the nature of the certification, both supposing that the position was to be filled on a permanent as distinguished from a duration basis. The request for certification was prepared in the personnel section of the Department of Employment, and it appears that in the right half of the column headed "Estimated Duration of Employment" is the word "perm" in typewriting, and beneath it the word "Dur." in handwriting. The record shows that after petitioner had signed the oath of office attached to the request for certification, and before the request was transmitted to the State Personnel Board, the employee who supervised the appointment of individuals in the Department of Employment observed that the word "Dur." had been omitted from the regular form and added it in order that the appointment form should conform to the certification. It also appears that the State Personnel Board was unaware of the change and also that petitioner was not informed of it.

Petitioner argues that under the undisputed facts he is entitled to the appointment on a permanent basis because, as he contends, the facts that he was on a valid list at the time of his appointment and the power to appoint on a permanent, temporary or durational basis existed, and he was deceived and led astray to his financial and other losses, make applicable the doctrine of estoppel which applies to the state and its political subdivisions with the same force and vigor as it does to individuals.

In ruling against this contention of petitioner the learned trial judge in his memorandum opinion said, in part:

"Petitioner cites a number of cases which no doubt state the correct rule, but in each of these cases the agency by whose conduct estoppel was established was the agency that had the authority to act; hence, to hold that there was no estoppel would amount to bad faith, if not actual fraud. In the instant case, the facts are entirely different. In the first place Cameron, an employee of the said Department of Employment, was not authorized to make representations, so far as appears from the record, either for or on behalf of the Department of Employment, or the State Personnel Board. Also it appears from the record that L. B. Steedman, Personnel Officer of the Department of Employment, had no authority to make representations with regard to promising a position to petitioner. As a matter of fact, as already pointed out, (defendant's Exhibit D) the request from that said Department to the State Personnel Department was for a duration appointment only. Hence, it will be seen that not only the appointing power, but also the State Personnel Board had limited any appointment to be made (and none could be made until the State Personnel Board had forwarded the three highest available names from the proper eligible list for selection to fill the position by the one designated by the appointing power) to such position for the duration. Turning to respondent's Exhibit 'C' it will be seen that this is a Certificate of Eligibles sent to the appointing authority, issued by the State Personnel Board. It bears the name H. F. Freeman, with the initial (P) and under the caption 'Period of Appointment' is the word in capital letters 'Duration.'

* * * * * *

"Section 19057 of the Government Code, provides for the certification of the three persons standing highest on the employment list for the class in which the position belongs and who have indicated their willingness to accept employment under the conditions of employment specified. The Certificate of Eligibles states: 'It is your responsibility to communicate with eligibles in the order listed. After making the number of appointments authorized, enter on this form the names of those appointed and other information requested.' Also the following notation: 'This supplemental is issued in lieu of Florence Somers, who was appointed elsewhere, and in accordance with your request to increase this certification.' There is no evidence contradicting the testimony of said witness last above referred to. A number of rules of the State Personnel Board were adopted pursuant to the Act of 1943. These rules cover various phases of a duration appointment. Among the rules is one which states: (i) '"Permanent duration appointment" means a duration appointment form a duration or regular appointment list to a position which it is believed will last longer than the probationary period.' This was the position to which petitioner was appointed. Respondent quotes rule 75, which was amended to provide power to making written requests for certification should state 'whether he desires to make a regular or duration appointment.' Whether this rule was in force at the time the Department of Employment made the request does not appear, but it is a fact, as already pointed out above, that such was the request from said Department.

"The first point made by respondent against the claim of estoppel is to the effect that if estoppel be allowed it will result in a man who was number four on the list of eligibles being appointed to a permanent position at the expense of the three men higher on the list who were willing to accept appointment. The point is well taken. In the case of County of San Diego v. California Water & Tel. Co. 30 Cal.2d 817, [186 P.2d 124, 175 A.L.R. 747] it is held that neither the doctrine of estoppel nor any other equitable principle may be invoked against the Governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.

"Irrespective of the above principle, in the instant case there are no facts set forth which can be successfully urged against the State Personnel Board, or any of its members. The Board was free from any act done by it which could in any way be said to have offered an inducement to the petitioner to accept any other appointment than one for duration. This was the only position for which the request by the Department of Employment was made, and it was the only position which the State Personnel Board provided to be filled, and which, when filled, was to be held under the provisions of the amendment of 1943 and the rules of the State Personnel Board applicable thereto.

"Section [Vol.] 31 C.J.S., Estoppel, § 142, p. 423, states: 'Where a matter is committed to one officer by statute other officers may not by their conduct estop the municipality in respect to such matter.'"

[1] We agree with this analysis of the facts and of the legal and equitable principles involved. It is, of course, unfortunate that Cameron and petitioner mistakenly believed that the appointment was to be made on a permanent basis, but it is clear from the record that Cameron was not authorized to make such representations either on behalf of the Department of Employment or the State Personnel Board. It is also true that petitioner had spent a number of years as a civil service employee and was generally familiar with civil service rules and regulations, and he could easily have ascertained the facts relative to the proposed appointment by inquiry at the State Personnel Board. And as stated in State ex rel. Tharel v. Board of County Commissioners, 188 Okl. 184, 107 P.2d 542, at page 551: "* * * 'All persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by the statutory or organic law and are chargeable with knowledge of such limits. No estoppel can be created by the acts of such agent or officers in excess of their statutory or constitutional powers. [Authorities cited.]'"

[2] In County of San Diego v. California Water & Tel. Co., 30 Cal.2d 817, at page 826, 186 P.2d 124, at page 130, 175 A.L.R. 747, the court said:

"* * * It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against the governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. * * *

"There is nothing inconsistent with this view in Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, and the cases there cited which hold that in some instances a governmental body may be estopped by the conduct of its officers. In those cases the facts clearly established that a great injustice would be done if estoppel were not applied, and it did not appear that use of the doctrine would defeat any strong public policy or result in the indirect enforcement of an illegal contract."

In English v. City of Long Beach, 77 Cal.App.2d 894, 176 P.2d 940, a patrolman sought to return to duty after a long illness and leave of absence without taking a physical examination as required by a rule of the Civil Service Board. English sought to show that Captain Faulkner advised him he could return at any time within six months of his leave of absence without taking a physical examination. English contended that the city was estopped by Captain Faulkner's advice, which was in violation of the rule. The trial court ruled against his contention, and upon appeal the court said, 77 Cal.App.2d at pages 900–901, 176 P.2d at page 944: "* * * The same may be said in respect to appellant's assignment that the trial court erred in rejecting evidence to the effect that Captain Faulkner had advised Patrolman English that the latter could return at any time within the six months' leave of absence without taking a physical examination. Neither on the theory of establishing an estoppel upon the part of the City, nor to show an alleged contemporaneous construction of the rules, was this evidence admissible. It cannot be seriously contended that Captain Faulkner's statements could change the explicit provisions of the rule; nor should such statements be considered either as effecting an estoppel, or as establishing contemporaneous construction of a provision which, by reason of its clarity, needed no construction."

[3, 4] Authorities could be multiplied in support of the trial court's ruling, but we believe that the question of estoppel as involved in the instant case may be considered as settled by the very recent unanimous opinion of our Supreme Court in Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981. In that case plaintiff contended that by reason of the representations of the State Personnel Board and the terms of his acceptance of the offer of employment, it was a condition of his contract that he would not be required to serve outside of the southern California area and that his dismissal for failure to obey an order by his superior to report for duty at Sacramento was illegal. The trial court ruled against his contention, and in affirming the judgment the Supreme Court said: "The terms and conditions of civil service employment are fixed by statute and not by contract. State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 232 P.2d 857 [859]; Risley v. Board of Civil Service Commissioners, 60 Cal.App.2d 32, 36, 140 P.2d 167; Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 298, 168 P.2d 741; City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36, 44, 210 P.2d 305; see, Neuwald v. Brock, 12 Cal.2d 662, 668, 86 P.2d 1047; 14 Cal.L.Rev. 326. 'When an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and, indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission.' Raymond v. Christian, 24 Cal.App.2d 92, 100, 74 P.2d 536, 541; see also, Stephens v. Clark, 16 Cal.2d 490, 493, 106 P.2d 874. The statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith. It is therefore unnecessary to determine whether the postal card questionnaire filled out by plaintiff when he applied for state employment set forth the conditions of a contract, as he contends, or was merely a request for information, as defendants contend. The controlling question is whether the statutory provisions governing employment in the state civil service gave to plaintiff's superior the authority to transfer him from Los Angeles to Sacramento."

[5] The court then went on to hold that under applicable statutes plaintiff's superior had authority to transfer him to Sacramento, and then stated with reference to plaintiff's claim of estoppel: "plaintiff contends that even if the State Personnel Board was without authority to make a contract limiting the geographical area of plaintiff's service, the state is nevertheless estopped by the Board's representations. To invoke estoppel in cases like the present would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so. It is accordingly held that the authority of a public officer cannot be expanded by estoppel. [Citing cases.]"

No other points raised require discussion.

[6] In view of the foregoing we conclude that the record and the authorities support the decision of the trial court that petitioner did not receive a civil service appointment as Unemployment Insurance Examiner, Grade 3, on a permanent basis, and that the judgment should be, and the same is, hereby affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

106 Cal.App.2d 312

PEOPLE v. KNIGHT.

Cr. 758.

District Court of Appeal, Fourth District, California.

Aug. 27, 1951

William H. Knight had entered guilty plea to charge of issuing checks without funds and had been sentenced and two years later defendant petitioned for writ of coram nobis alleging that he had been coerced into pleading guilty by promise of a lighter sentence. The Superior Court, San Diego County, William A. Glen, J., denied the petition and defendant appealed. The Court of Appeals, Mussell, J., held that evidence supported finding of trial court that defendant had not been coerced as alleged.

Order affirmed.

1. Courts ⚷495
Criminal law ⚷93

Superior court had jurisdiction to try, convict and sentence one arrested on charge of issuing a check without funds, and did not lose jurisdiction to impose sentence after plea of guilty because defendant had been turned over to federal authorities after arrest and had been sentenced to federal prison. Pen.Code, § 476a; Const. art. 6, § 5.

2. Courts ⚷495

Where state acquired jurisdiction over one accused of issuing a check without funds, state was authorized to insist upon its jurisdiction and to procure defendant from possession of federal authorities for purpose of trial. Pen.Code, § 476a; Const. art. 6, § 5.

3. Criminal law ⚷99

Although after defendant had been sentenced by federal court, state court could not have assumed control over his body, without consent of the United States, until the end of defendant's term and discharge, court had jurisdiction of his person, where he was produced in state court, and had opportunity to defend.

4 Criminal law ⚷997

Court was justified in not believing assertions of petitioner for writ of coram nobis that he was coerced into pleading guilty to charge of issuing check without funds by deputy district attorney's promise of lighter sentence, in view of defendant's conduct and statements made in court at time of sentence to effect that defendant knew that he would get a lengthy sentence, and in view of defendant's previous convictions on felony charges.

5. Criminal law ⚷641(1)

The right of one charged with crime to be represented by counsel may be surrendered or waived.

6. Criminal law ⚷997

A showing of diligence is prerequisite to the availability of relief by petition for a writ of error coram nobis.

7. Criminal law ⚷997

Where petition for writ of error coram nobis was filed two years after sentence, and no reason was given for delay, petitioner did not act with due diligence and petition was denied.

◆

William H. Knight, in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was arrested by the police officers of San Diego and charged with the crime of issuing a check without funds. On March 22, 1949, he was duly arraigned in the superior court in San Diego and entered a plea of guilty. On March 28th, the time fixed for pronouncement of judgment, appellant was again informed of the nature of the charge against him and of his plea of guilty thereto and was asked by the court if he had any legal cause to show why judgment should not be pronounced against him. When he replied he had none, the court sentenced him to the state prison for the term prescribed by law. Execution of the commitment was stayed until March 30, 1949, on which day the "stay was terminated" and the sheriff was ordered to carry out the terms of the commitment.

On March 29th, appellant, at his request, was taken before the District Court of the United States in San Diego and there informed that an indictment had been filed in that court charging him with a violation of the laws of the United States. Appellant thereupon entered a plea of guilty to the charge, was given a sentence of four years in a federal institution, committed to the custody of the Attorney General of the United States and in due time was incarcerated in the United States penitentiary at McNeil's Island, Washington.

On January 22, 1951, appellant filed in the superior court a "motion to vacate sentence". This motion was denied and in March, 1951, appellant filed a petition for a writ of error coram nobis in the said superior court. After a hearing was had thereon, the petition was denied and this appeal followed. Appellant's verified petition, which was the only evidence presented by him at the time of the hearing, contains allegations that petitioner, after his arrest on the check charge, was visited by a deputy district attorney "for the purpose of arranging a deal, i. e., if petitioner would not retain counsel to defend himself, a light sentence was in the offing"; that petitioner, relying upon the advice of the prosecutor, waived counsel and entered a plea of guilty on March 23, 1949; that five days thereafter the court pronounced sentence upon petitioner but ordered a two day "stay of execution"; that pursuant to the two day stay of execution, petitioner was taken to the United States District Court where he entered a plea of guilty to a federal offense and was sentenced to a period of four years therefor; that on March 30th he was brought back before the superior court and advised that the court had no other alternative than to impose the maximum sentence provided by law for violation of section 476a of the Penal Code; that petitioner was subsequently taken by the United States Marshal and placed in the federal penitentiary to serve the aforementioned four year sentence.

Appellant's contentions are that the superior court lost jurisdiction to impose sentence upon him; that he was "coerced" by the prosecutor to plead guilty; that he was not represented by counsel; and that he did not realize the significance of entering a plea of guilty to the check charge.

[1-3] The contention that the superior court lost jurisdiction to impose sentence is apparently based on the theory that since the defendant was first arrested by the sheriff of San Diego county and then turned over to the federal authorities, the state lost jurisdiction to proceed in the matter. This contention is without merit. The crime with which the appellant was charged was violation of section 476a of the Penal Code, a felony. The superior court in San Diego county had jurisdiction to try, convict and sentence the appellant for the commission of this offense. Calif.Const., art. VI, sec. 5. The record shows that at the time of his arraignment in the state court, the appellant was in the custody of the United States Marshal. It is not clear whether such was true at the time sentence was imposed. However, the state was authorized to insist upon its jurisdiction and to procure the appellant from the possession of the federal authorities for the purpose of trial. In re Gibson, 78 Cal.App. 794, 799, 248 P. 1046. Under the facts presented by the record, we must assume that the appellant was in the state court with the consent of the proper federal authorities. There is no merit in the claim that the state court did not acquire jurisdiction of appellant's person. While it may be true that after appellant's sentence by the federal court and until the end of his term and discharge no state court could assume control over his body without the consent of the United States, where, as here, he was produced in the state court and was personally present there, with full opportunity to make his defense, jurisdiction of his person was had by the superior court exactly as if he had been brought before that court by its own officer. People v. Sichofsky, 58 Cal.App. 257, 261, 262, 208 P. 340.

The trial court apparently gave no credence to appellant's allegations that he had been told by a deputy district attorney that if he would not retain counsel to defend himself, a light sentence would be given to him, and that relying upon such advice of the deputy district attorney, he waived his right to counsel and pleaded guilty to the charge. The trial court was not bound to believe these allegations. People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976; People v. Bailey, 105 Cal.App.2d 150, 232 P.2d 518; People v. Curtis, 104 Cal.App.2d 219, 230 P.2d 877; Lohman v. Lohman, 29 Cal. 2d 144, 149, 173 P.2d 657. At the time the appellant was in the state court for pronouncement of judgment he made the following statement to the court: "That is why I came over to plead guilty. I have been here a month. They will take you here and take you there. I said I would plead guilty if you tried me and sentenced me. That is the only reason. I didn't plead guilty to lie around in the County Jail. If I had to do that, I would have stood trial. I don't appreciate lying over in that jail day after day. I will plead guilty to the Federal charge if they will just take me up and let me plead."

After appellant had been sentenced, and after he had pleaded guilty in the federal court to another crime and been sentenced there, he made the following statement in the superior court in San Diego: "* * * I figured I would get some break if I came up here and pleaded guilty. I wanted to cause the state the least amount of expense I could. I didn't want to plead guilty and now when I go up to Quentin I am going to have to do eighteen months. I am a loser. You can't hit that Parole Board before eighteen months."

[4] It is apparent that the trial court was fully justified in not believing the assertions of appellant in view of his statements and conduct in court at the time sentence was pronounced and in view of his previous convictions of felony charges. People v. Kirk, 76 Cal.App.2d 496, 499, 173 P.2d 367.

From the transcript of the proceedings had in the United States court and attached to appellant's opening brief, it appears that appellant realized that he might be imprisoned as an habitual criminal, and realized that he would be compelled to serve "a bunch of time" in some institution. Apparently he preferred to be incarcerated in a federal institution as is evidenced by the following statement: "The defendant: Well, I don't know. I know I am going to do a bunch of time out of it and I am trying to get the least amount possible. Now, if this Court sentences me to some institution—I think the Attorney General is the one that sentences me to some institution—if I get a sentence from you and the State, why, I will let you fight it out. I would just as soon do it for the Government as for the State."

[5] The record amply supports the position of the trial court that the defendant fully realized the significance of entering a plea of guilty to the information and that he was in no wise coerced to enter such plea. The right to be represented by counsel may be surrendered or waived. People v. Jewett, 84 Cal.App.2d 276, 280, 190 P.2d 330; In re Jingles, 27 Cal.2d 496, 498, 499, 165 P.2d 12. Appellant does not contend that he was not advised of his right to counsel by the committing magistrate nor that he did not waive his right thereto and no record of the proceeding before that judge has been included in the record before us. Appellant does not assert that he requested or was denied counsel.

[6, 7] A showing of diligence is prerequisite to the availability of relief by petition for a writ of error coram nobis. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330; People v. Krout, 90 Cal.App.2d 205, 209, 202 P.2d 635. The judgment in the state court was entered March 28, 1949, and the application for the writ was filed in the superior court March 16, 1951, and no reason is given for the delay in filing such application.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

106 Cal.App.2d 232

MADISON et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14410.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1951.

Hearing Denied Oct. 19, 1951.*

Action by Willie S. L. Madison, and Sandra L. Madison and Walter L. Madison, infants, by Willie S. L. Madison, their guardian ad litem, against the City and County of San Francisco, and others, for damages for the death of the adult plaintiff's wife while a patient in a hospital operated by the named defendant. The Superior Court, City and County of San Francisco, Honorable Franklin A. Griffin, J., gave judgment for the defendants and the plaintiffs appealed. The District Court of Appeal, First Appellate District, held that named defendant operated the hospital in a governmental capacity and was not liable for the injury caused by the negligent acts of a hospital employee.

Judgment affirmed.

1. Municipal corporations 🔑39

Functions performed in particular case determine whether San Francisco is to be viewed as a city or a county.

2. Hospitals 🔑2

Grant of power by charter to board of supervisors to establish, maintain and regulate city and county hospitals, and to department of public health to manage and control city and county hospitals, had reference solely to conduct of such hospitals as governmental institutions, and did not confer authority to establish or maintain them as a business enterprise. St. 1899, p. 249, art. 2, c. 2, § 1, subd. 11; p. 343, art. 10, § 3.

3. Hospitals 🔑2

Under amendment to charter board of supervisors had power to provide for maintenance of hospital as business enterprise in competition with private hospitals, and to ascertain legal sanctions under which hospital operated the court would look to ordinances adopted by board of supervisors and not to regulations promulgated by director of public health. St. 1899, p. 248, art. 2, c. 2, § 1, subd. 44, as added by St. 1925, p. 1165.

4. Evidence 🔑32
Hospitals 🔑5
Municipal corporations 🔑122(2)

Under ordinance of San Francisco providing for classes of indigent patients to be admitted to municipal hospital, sanction for admission of patients able to pay for their care had to be found in provisions of some ordinance of board of supervisors, and where there was no evidence of such ordinance court could not take judicial notice of such ordinance, if there was one, and the existence of such an ordinance could not be presumed from fact that administrative officials exercised powers predicated upon its existence.

5. Counties 🔑142

Collection of charges, under statutes, from patients who by themselves or through relatives are able to pay for institutional care furnished by county, is consonant with conduct of county hospital as governmental institution. Welfare and Institutions Code, §§ 2500–2615, 2576, 2600, 2603.

6. Counties 🔑223
Municipal corporations 🔑742(5)

In action by husband against city and county for damages for death of wife while patient in hospital, evidence was sufficient to establish that hospital was operated as a county institution in performing duty imposed by laws of state to provide for care of any expectant mother unable to pay for necessary care. Welfare and Institutions Code, § 204.

7. Counties 🔑146

Where hospital performed duty imposed by general laws of state to provide for care of any expectant mother who was unable to pay for her necessary care, county operated hospital in governmental capacity and was not liable for injury of patient caused by negligent act of employee. Welfare and Institutions Code, § 204.

8. Counties 🔑146

A county is not liable for acts of employees whom it appoints in exercise of sovereign power of state by requirements of public law, for public benefit, and for purpose from which county derives no benefit.

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* Subsequent opinion 236 P.2d 141.

9. Counties 🔑146

Doctrine of nonliability of a county for negligent injury of a county hospital patient has not been modified by Constitution or statute.

10. Municipal corporations 🔑732

A governmental agency does not incur liability for negligence by doing an act which is ultra vires.

11. Paupers 🔑43(1)

An expectant mother need not be a pauper to be entitled to benefits under statute providing that any expectant mother who is unable to pay for necessary care be admitted to county hospital and cost of her maintenance be paid by county of her residence. Welfare and Institutions Code, § 204.

12. Paupers 🔑43(2)

A patient in need of hospitalization, who cannot himself or through legally liable relatives pay charges of private institution, will be admitted to county hospital.

13. Paupers 🔑43(2)

The word "indigent", when used in connection with admissions to county hospitals under statute, includes a person who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support. Welfare and Institutions Code, §§ 200, 2500.

See publication Words and Phrases, for other judicial constructions and definitions of "Indigent".

14. Paupers 🔑43(1)

The expression "unable to pay for her necessary care" as used in statute providing that any expectant mother who is unable to pay for her necessary care shall be admitted to county hospital and cost of her maintenance shall be paid by the county of her residence, means a person who has insufficient means to pay for her maintenance in a private hospital after providing for those who legally claim her support. Welfare and Institutions Code, § 204.

See publication Words and Phrases, for other judicial constructions and definitions of "Unable to Pay for Her Necessary Care".

15. Counties 🔑223
Municipal corporations 🔑742(5)

In action by husband against city and county for damages for death of wife while a patient in county hospital, evidence sustained finding that wife was an expectant mother unable to pay for her necessary care within statute, and as such was admitted to hospital. Welfare and Institutions Code, § 204.

16. Administrative law and procedure 🔑755

Courts should let administrative boards and officers work out their problems with as little judicial interference as possible.

17. Administrative law and procedure 🔑500

Scope of judicial review is of limited character when attack upon administrative finding is collateral in nature.

18. Courts 🔑91(1)

It is not within province of intermediate appellate court, in view of unvarying line of decisions, to undertake re-examination of doctrine of governmental immunity, but it must accept settled law as it finds it.

Cecil F. Poole, Ulma A. Abels, San Francisco, for appellants.

Dion R. Holm, City Atty., City and County of San Francisco, George E. Baglin, Deputy City Atty., San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiffs appeal from a judgment entered in favor of defendant City and County of San Francisco notwithstanding the verdict rendered in favor of plaintiffs and against defendants Donald Walker and the City and County of San Francisco.

The complaint was filed June 24, 1947, by Willie S. L., Sandra L., and Walter L. Madison, the surviving husband and minor children of Irealous Madison, for damages for the death of Irealous, which occurred March 16, 1947, while she was a patient at the San Francisco Hospital, operated by respondent.

The complaint alleged and the answer (jointly filed by respondent and by defendants Monte Greer and Donald Walker) admitted that Irealous was admitted to the San Francisco Hospital and while there was delivered of a child and died. The complaint alleged and the answer did not deny that respondent is a municipal corporation; that Irealous developed a post partum hemorrhage; that defendant Greer and other employees of respondent, members of the medical staff of the hospital, acting in the course of their employment, examined and treated her and performed upon her an operation of transfusion of blood; that defendant Walker, employed as a technician in the blood bank and laboratory of the hospital, was in charge of and was authorized and directed to make the necessary and proper tests and samplings of blood incidental to and necessary in said operation; that defendant Greer, likewise, with full authorization, made tests and samplings of blood incidental to said operation; and that Irealous died.

At the trial, respondent and the other defendants stipulated that defendant "Donald Walker was an employee of the city and county, employed in the hospital, and also that the negligence of Donald Walker caused the death of the mother of the minor children and the wife of the adult plaintiff" and that Walker was then "acting in the course and scope of his employment."

These admissions and this stipulation left as issues, framed by the pleadings, the allegations of the complaint that respondent operated the hospital for profit in a municipal proprietary capacity; receives and cares for pay patients (other than emergency, indigent or other patients required to be admitted) in like manner as and in competition with private and other hospitals in the municipality; and received Irealous as a paying patient for hospitalization and delivery of a child.

At the conclusion of the trial, a motion for a directed verdict was made by respondent and denied by the court. The jury gave its verdict in favor of the plaintiffs and against defendant Walker and respondent, for damages in the sum of $25,000. Thereupon, respondent city and county moved for, and the court granted, judgment in favor of respondent notwithstanding the verdict.

The issue upon this appeal is whether or not there was sufficient evidence to submit to the jury on the question whether or not respondent operated the hospital in a proprietary capacity and in that capacity received Irealous as a paying patient.

Appellants base their claim that respondent is liable for the negligent act of its employee upon the theory that respondent, in its capacity of a municipal corporation, operates the hospital as a business enterprise in competition with private hospitals, and received and cared for Irealous as a paying patient. Respondent bases its claim of nonliability upon the theory that it operates the hospital in the capacity of a county, under mandate of state law in the performance of the state function of caring for the indigent sick and dependent poor (not as a business enterprise in competition with other hospitals), a governmental not a proprietary function, and that Irealous was admitted to and cared for at the hospital pursuant to that mandate, not as a paying patient.

We will consider, first, the testimony of Willie S. L. Madison, the adult appellant. He testified:

"On March 3, 1947, my wife and I went to the San Francisco Hospital to see if I could get her into the hospital. I went to the main door on Potrero Street—up the main ramp on the first level and walked half way down to the emergency entrance in the main door—that is called the social service office. I conversed with a lady there who was apparently in charge; I told her my purpose in coming; conversed with her about 45 minutes. I was talking to her concerning my wife going to the hospital. I asked, 'Could my wife go there; would my wife be permitted in the hospital,' and she said, 'Yes, but she will have to pay'; that was the first thing she told me, and I said 'All right.' She asked where I was working, and I told her Simmons Mattress Company, 295 Bay—I was employed there. She asked how much was I making, and I told her 'Approximately $50 a week, sometimes more and sometimes less.' She told me I would have to pay, that I would have to pay $69. I told her I would pay it. There was discussion with her as to when I would pay. She told me what the bill would be and I told her I would pay it, and then she asked me when I would pay it and I told her, 'As soon as I felt able.' She didn't ask me when that would be. There was further conversation as to the date when we were going to pay. I told her that I would pay, and that the doctor that I had for my wife owed me $50, and that I would give her that. I did not ask her if I could get free hospital or medical care for my wife. That was not my intention when I went there. They told me my wife would be there approximately seven days for this $69. At the time I was out there I did not have $69 in my pocket.

"No documents were produced to me at that time. I think this lady prepared some documents while this conversation was taking place. She was typing and asking questions of me during the time she was typing. I could see the typewriter. I think she typed as she asked me questions—she typed upon a yellow sheet of paper with carbon paper in between. She removed this paper from the machine and gave it to my wife to sign. I saw my wife sign it. This lady did not ask me to sign anything.

"After my wife signed this document in my presence, the lady told us to go to the clinic in the hospital. We went over to the clinic, did not return to the social service office following our visit to the clinic. At the clinic I was told to return there the following week. I took my wife out to the hospital the following Tuesday, right to the clinic. The lady in the clinic (not the same person who first talked to me) told me to bring my wife back to the clinic.

"I returned to the hospital March 16; took my wife back there for delivery of the baby. She was in labor at the time. I took her by automobile. We went in the emergency entrance, had no interview with any person at that time. I do not know what disposition was made of my wife at that time. I went with her to the elevator and put her in a wheel-chair. Then I went home. I went back afterwards. I talked to some nurse in the ward, asked her how my wife was going, and she said 'Fine,' and I could hear my wife talking and she told the nurse to tell me to take the child Sandra over to her sister's. That was about 5:30. After I talked with this nurse I had no other conversation on that day with any person at the hospital.

"The next time I saw my wife she was dead. I never saw her alive after that time. On the day following that, I had a conversation with a person at the hospital. It was some man. I called up and asked how was my wife, and the next words he said, my wife was dead, and then I hung up.

"When I first went to the hospital and inquired about maternal care for my wife, she had approximately three weeks to go. She had not been denied admission to any other hospital prior to going to the San Francisco Hospital. I had not tried to get her into any other place.

"I was not referred to the hospital by any physician. I had not made any attempt to have her admitted to any other hospital. I was talking to some friends of mine and they told me about this hospital and then I knew about it, and it was a large hospital, so I figured it was all right. Friends of mine had children that were born at the hospital and told me about the hospital. They did not tell me that certain people were able to obtain that medical attention free. I did not have that in mind at all when I went there. I intended to pay for my wife's medical attention. I had never attempted to get my wife in any other hospital. Prior to my wife's death her health had been good. She had not received hospitalization in San Francisco prior to the time she went there in March. She had not seen a doctor before except with reference to pregnancy. She had had no serious illness. She was not employed.

She kept her home, and took care of the older child. She had been kindly and affectionate, by disposition, to our child. I did not ask anyone before going to the hospital what office I had to go to concerning medical care for my wife. I arrived at the social service office because that is the only door I saw they had, that the office was set up in; so we went in there and started talking to the lady and she talked to us there.

"Prior to March, 1947, I had a doctor for my wife and was paying in advance for his services to deliver the baby; had paid him $50. My wife and I decided to go to a hospital, and the doctor agreed to refund the money to me. He agreed to that before I took her to the hospital.

"Other than the occasion on which I first went to the hospital, concerning which I have testified, I never had any conversation with any person with respect to my payment for hospitalization for my wife at the hospital. Nobody else ever mentioned to me about paying; that is, no one did so again. I never received a bill and never made an attempt to pay the $69. After my wife's death, I never received any kind of a bill from the hospital. I never paid the $69. I never saw and was never shown any of the papers which were being prepared in the social service department the first day I went there.

"I have been a resident of San Francisco ever since 1944. I was in the military service and was discharged June 6, 1946, and thereafter returned to San Francisco. I went to work for the Simmons Company August 4, 1946, and worked for them the balance of that year. I worked regularly during the first three months of 1947—still employed by the Simmons Company. I was working regularly, making approximately $50 more or less a week—my take-home pay. Following the death of my wife, I continue to work, and was still employed October 29, 1947, when my deposition was taken; and I am still employed (April, 1949).

"My wife had been a resident of San Francisco maybe a year at the time she was admitted to the hospital. She was first here in 1945. Her original home was Winfield, Louisiana. At the time of her death my wife was 24 years old. My child, Sandra, is now (April, 1949) three years old. My other child, Walter, who was born when my wife went to the hospital, is now two years old.

"After my wife died, my sister-in-law took care of the two children. She lives in San Francisco. I was giving my sister-in-law $10 a week in having her take care of the children, and then I gave her different things. The $10 was for my sister-in-law because she had to stay with them all the time; that was for minding my children. At present the children are in Winfield, Louisiana, in the care of my mother-in-law. My sister-in-law took the children to her. The reason was it was cheaper living down there and my mother-in-law could take care of them better. They were taken there about June, 1947. They have been there ever since. I am contributing to the support of my children.

"I paid the undertaker. I think the amount of the bill was about $300."

This testimony of the widowed father of the infants Sandra and Walter might seem to support implied findings of the jury that respondent operated its hospital as a business enterprise and received and cared for the wife and mother as a paying patient. However that might be if this were a private hospital, we are only at the threshold of the inquiry when concerned, as here, with a publicly owned institution. We must consider the legal sanctions which govern its conduct and the admission and treatment of patients. However great the urge may be to find respondent legally obligated to afford some measure of monetary relief to the members of this bereaved family for their tragic and incalculable loss admittedly caused by the negligent act of respondent's employee, a legal basis for such an obligation must first be found.

[1] Our search starts with an examination of the San Francisco charter and ordinances and regulations adopted under it, for respondent is a consolidated city and county organized and existing under a charter adopted pursuant to the provisions

of sections 8 and 8½ of article XI of the State Constitution. Stats. 1931, ch. 56 of Res., p. 2973. By section 2 of its charter respondent has invoked, and therefore enjoys the power, conferred by sections 6 and 8 of article XI of the Constitution, to "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided" in its charter, and "in respect to other matters" is "subject to and controlled by general laws." It thus has and performs the functions of a county and of a city. When acting in respect to a municipal affair it is free of state legislative control but when acting in respect to any other matter it is subject to and controlled by state general laws. The "functions performed in the particular case determine whether San Francisco is to be viewed as a city or a county." City and County of San Francisco v. Collins, 216 Cal. 187, 191, 13 P.2d 912, 914.

We find in the charter nothing which directly indicates whether respondent's hospital is a city or a county institution, nor whether it is governmental or proprietary in character. Jurisdiction over the hospital is distributed between respondent's board of supervisors and its director of public health. According to section 2 of the charter, "The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors." Section 9 similarly provides that "The powers of the city and county, except the powers reserved to the people or delegated to other officials, boards or commissions by this charter, shall be vested in the board of supervisors, and shall be exercised as provided in this charter." Section 2 further provides that "All functions of the city and county, and the powers and duties of officers and employees charged with the performance therefor, * * * as existing at the time this charter shall go into effect, shall continue to be the functions of such departments and offices and the powers and duties of officers and employees assigned thereto, except as in, or under authority of, this charter otherwise specifically provided." Section 61 provides that the functions, activities and affairs of the city and county placed under the chief administrative officer by the charter shall be allocated by him among certain departments, including the "Department of Public Health, which shall include the functions, institutions and personnel of the department of public health as existing at the time this charter shall go into effect * * *. Said department shall be administered by a director of health * * *. The director of public health shall have and continue the powers and duties of the health officer and the board of health, from and after twelve o'clock noon on the 8th day of January, 1932 * * *." By this reference to the former charter, the director of public health was given "the management and control of the city and county hospitals, almshouses, ambulance service, municipal hospitals, receiving hospitals, and of all matters pertaining to the preservation, promotion and protection of the lives * * * of the inhabitants of the city and county." Stats. 1899, ch. 2 of Res. art. X, § 3, p. 241, at p. 343. That gave the former department and in turn the present director quite extensive authority over respondent's hospital and its functions, subject, however, to the power which the charter of 1899 gave the board of supervisors "To establish, maintain and regulate, and change, discontinue and reestablish city and county * * * hospitals and almshouses." Stats. 1899, ch. 2 of Res., subd. 11 of § 1 of ch. II of art. II, p. 241, at p. 249. The conclusion is inescapable that the charter of 1899 gave the former department of public health powers that were merely administrative in character, subordinate to the legislative powers which that charter gave the board of supervisors. Accordingly, section 61 of the charter of 1931, when it transferred the powers of the old department to the new director, did not vest in the latter any power to legislate. It thereby created no exception to those provisions of sections 2 and 9 of the 1931 charter which vest respondent's legislative power in its board of supervisors.

[2] Moreover, the charter of 1899 was, in form, a grant of power to the city and

county. The powers granted were specifically enumerated. At that time the Constitution provided that charters, "except in municipal affairs, shall be subject to and controlled by general laws." Art. XI, § 6, as amended Nov. 3, 1896. The prevailing opinion then was that the charter must enumerate the home rule powers which a city or city and county desired to have. The 1914 amendments to sections 6 and 8 of article XI made it clear that the charter need only invoke the home rule privilege and then the city and county would have full power in "municipal affairs" (without enumeration), unlimited by state general laws, subject only to limitations expressed in the charter itself. See West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 523, 95 P.2d 138. The provisions of the former charter did not expressly give respondent's board of supervisors or its department of public health authority to put respondent into the hospital business in competition with private hospitals. Without the grant of such authority, expressly or by necessary implication, it is doubtful if respondent had power to operate a hospital other than in a governmental capacity, under the old charter as adopted in 1899. The Supreme Court, in Hyatt v. Williams, 1906, 148 Cal. 585, 84 P. 41, 42, applied such a rule of construction when interpreting the Stockton city charter of 1889, and concluded that the grant therein of power "To provide for and regulate * * * lighting and watering of the streets * * * and public places", and "To provide for * * * such lights * * * as are necessary for the convenient transaction of public business," and to "determine and declare what are public uses, and when the necessity exists of condemning lands therefor, and what are the lands it is necessary to condemn," did not grant power to maintain works and carry on the business of supplying the inhabitants of the city with light. 148 Cal. at page 587, 84 P. at page 42. The court observed that providing light for public places and supplying light to the inhabitants generally for their private use are separate and distinct purposes. "The terms of the express grant of the power to provide light for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant for furnishing light for private use to all the inhabitants of the city who may desire it, and no such intention can be imputed to the framers of the charter from the language there employed." 148 Cal. at pages 587–588, 84 P. at page 42. That reasoning is persuasive of the view that the grant of power, by the San Francisco Charter of 1899, to the board of supervisors to establish, maintain and regulate "city and county * * * hospitals and almshouses," and to the department of public health to manage and control "the city and county hospitals, almshouses, ambulance service, municipal hospitals, receiving hospitals," had reference solely to the conduct of such hospitals as governmental institutions and did not, expressly or by necessary implication, confer authority to establish or maintain any of them as a business enterprise for the private use of all of the inhabitants who might desire it.

[3] In 1925, the former charter of San Francisco was amended to give respondent's board of supervisors the power "To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter." Stats. 1925, ch. 10 of Res., p. 1159, adding subd. 44 to § 1, ch. II, art. II, at p. 1165. That amendment gave the board of supervisors power, on behalf of respondent as a city, to provide for the maintenance of a hospital as a business enterprise in competition with private hospitals, a power which that board still has by virtue of the provisions of sections 2 and 9 of the charter of 1931.

It follows that we must look to ordinances adopted by respondent's board of supervisors, not to regulations promulgated by its director of public health, in ascertaining the legal sanctions under which its hospital operates.

[4] The applicable provisions of ordinances adopted by the board of supervisors of respondent city and county are in evidence. By stipulation, portions of sections 150 and 151 of the Health Code of

San Francisco were read into evidence. Those portions of section 150 read as follows: "There shall be admitted to the San Francisco Hospital, including the Isolation Division and the Hassler Health Home, the following: (a) An indigent sick person of the City and County of San Francisco who possesses the required residence qualifications, upon application and after investigation and approval by the Director of Public Health." "(i) An expectant mother who is unable to pay for her care and the cost of her maintenance (and care shall be paid by and be a proper charge against the county of her residence); (j) An indigent sick or dependant poor person from another county which lacks the proper facilities for the caring of such patients (and care shall be paid by and be a proper charge against the county of which said person is a resident)." We find here three classes of patients: The indigent sick of the city and county, expectant mothers who are unable to pay, and the indigent sick or dependent poor of other counties that lack proper facilities for their care.[1]

These are classes of persons in respect to whom the state imposes upon respondent, as a county, the obligation of care. The text of subsection (a) of section 150 of the local code follows closely the text of section 200 of the Welfare and Institutions Code, which declares that the board of supervisors in each county "may provide for the care and maintenance of the indigent sick or dependent poor of the county," and the text of section 2500 of the state code which declares that "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, or by their own means, or by State hospitals or other State or private institutions." The text of subsection (i) of section 150 of the local code follows almost literally the text of section 204 of the state code, which declares that "In any county[2] where a county hospital has been established, any expectant mother who is unable to pay for her necessary care shall be admitted to the county hospital, and the cost of her maintenance and care shall be a proper charge against and shall be paid by the county of her residence." Subsection (j) of section 150, in turn, implements the sanction given by section 202 of the state code for reciprocal arrangements between counties for the care of the hospital eligibles of one county at the hospital of another county.

[5] The applicable provisions of section 151 of the local code provide for the fixing of "the proper and reasonable amounts"[3] to be charged to patients who by themselves or through relatives are "legally obligated and able to pay in whole or in part" for the "institutional care" furnished. These provisions implement the requirements of the state general laws that "All aid rendered by the county" to indi-

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[1] The suggestion has been made that the ordinance, in declaring that these three classes "shall be admitted," does not negative the admission of patients able to pay for their care. That is literally true but does not operate to sanction the admission of such patients.

As to this hospital, sanction therefor must be found, expressly or by necessary implication, in the provisions of some ordinance adopted by respondent's board of supervisors. There is no evidence herein of such an ordinance, and this court may not take judicial notice of such an ordinance, if there is one. Beard v. City & County of San Francisco, 79 Cal.App. 2d 753, 755, 180 P.2d 744.

Nor may the existence of such an ordinance be presumed from the fact that administrative officials have exercised powers (if they have) predicated upon its existence. See Haub v. Tuttle, 80 Cal.App.2d 561, 569, 251 P. 925, and Special Assembly Int. Com. v. Southard, 13 Cal.2d 497, 508–509, 90 P.2d 304.

[2] As used in the state code, "county" includes "city and county." Welf. & Inst. Code, § 14.

[3] These amounts are fixed each year by the board of supervisors (after computation by the director of public health and recommendation by the controller) based upon the per diem cost for each class of patients; i.e., total expenses divided by the total number of patient days.

gents under sections 2500–2615 of the Welfare and Institutions Code "shall be a charge against the spouse, parent and adult child of the recipient thereof and the county rendering aid shall be entitled to reimbursement therefor," Welf. & Inst. Code, § 2576, and that "If a person for the support of whom public moneys have been expended acquires property, the county shall have a claim against him to the amount of a reasonable charge for moneys so expended," Welf. & Inst. Code, § 2603, and the state policy that "so far as it is possible an applicant for public relief shall be required to apply his own property to his support." Welf. & Inst. Code, § 2600. The collection of such charges is consonant with the conduct of the county hospital as a governmental institution. "In their rules of admission they [the county board of supervisors] should have the power to provide for the payment for care by those not financially able to secure hospitalization in a private institution, the amount to be paid to be determined in its maximum by the cost to the county of hospitalization of each individual patient and charged to the patient on his ability to pay. In the administration of public funds the supervisors are acting as trustees and they should so administer those funds as to lighten the taxpayers' burden as much as possible." Goodall v. Brite, 11 Cal.App.2d 540, at page 551, 54 P.2d 510, 515,

Louis A. Moran, assistant business manager of respondent's health department, testified that the hospital is managed under the direction of that department and is organized and functions under the regulations of the Health Code of San Francisco; that the admission of people into the hospital is governed by that code; that the patients are classified according to the types of patients which section 150 of that code prescribes may be admitted; that there is no classification for admission of patients able to pay for their care except when a patient who might be able to pay is admitted on an emergency basis; and that the rules of the hospital as he understands them are to the effect that patients who are able to pay for hospitalization and care are not admissible, with the general exception that emergency patients may be able to pay for their care and may be billed for their care.

[6] The evidence demonstrates that this hospital is operated by respondent as a county (an agent of the state) in performing the duty imposed by the general laws of the state to provide for the care of the indigent sick and dependent poor and "any expectant mother who is unable to pay for her necessary care." As stated in City and County of San Francisco v. Collins, supra, 216 Cal. 187, at pages 191–192, 13 P.2d 912, 914, "The duty to relieve the indigent, established by state statute, is * * * a matter of statewide interest, in which the city and county of San Francisco is governed by the general law, and acts as a county—an agent of the state."

[7, 8] It follows that respondent operates this hospital in a governmental capacity and is not liable for the injury of a patient caused by the negligent acts of an employee of respondent. It is precisely the situation presented to our Supreme Court in 1862, in respect to the treatment and care of the indigent sick at the Yuba County hospital, when that court said that "a *quasi* corporation, like a county, is not liable for the acts of officers or employes which it appoints in the exercise of a portion of the sovereign power of the State, by the requirements of a public law, and simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit." Sherbourne v. Yuba County, 21 Cal. 113, at page 115.

This doctrine of nonliability of the state and its agencies for injuries caused by the negligence of an employee engaged in the discharge of a governmental function originated in the fiction that the king can do no wrong. "It may be said that the doctrine arose in former times from the practical necessity of enabling the state to exercise its governmental functions unhampered by the demands on the exchequer resulting from the carelessness or mistakes of its officers and agents in the discharge of their official duties. In the words of Story, Agency, 8th Ed., section 319, the government 'does not undertake to guarantee to any persons the fidelity of any of its officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' The doctrine has had widespread acceptance as a part of the American common law, and has been deemed to prevail except where it had been departed from by constitutional and statutory law, as interpreted and applied by the courts." People v. Superior Court, 29 Cal. 2d 754, at page 756, 178 P.2d 1, 2.

[9] The doctrine of nonliability of a county for the negligent injury of a county hospital patient has not been modified by constitution or by statute, and still prevails in this state. This is demonstrated by an unbroken line of judicial decisions. Goodall v. Brite, 1936, supra, 11 Cal.App.2d 540, 54 P.2d 510; Calkins v. Newton, 1939, 36 Cal.App.2d 262, 97 P.2d 523; Griffin v. County of Colusa, 1941, 44 Cal.App.2d 915, 113 P.2d 270; Latham v. Santa Clara County Hospital, 1951, 104 Cal.App.2d 336, 231 P.2d 513. In each of the four cases last cited a hearing was denied by the Supreme Court.

Nothing to the contrary is indicated by certain decisions, invoked by appellants, concerning respondent's hospital. In one of them, Bloom v. San Francisco, 64 Cal. 503, 3 P. 129, the Supreme Court affirmed a judgment that had been rendered against the city and county for damages caused by the city and county conveying refuse from its hospital, over plaintiff's land, in a defective trough, which burst and discharged its contents upon the land. In affirming the judgment, the court said: "We think the city and county of San Francisco had such proprietorship of the city and county hospital as rendered it liable for damages in the case as presented in the transcript." 64 Cal. at page 504, 3 P. at page 129. The word "proprietorship" as therein used had no reference to the proprietary as distinguished from the governmental function. The city's liability was predicated upon the maintenance of a nuisance by the city and a taking of private property for public use (not upon the theory of the responsibility of a proprietor for negligence of its employees), as this court indicated in Davie v. Board of Regents, etc., 66 Cal.App. 689, 693, at page 701, 227 P. 247.

In People ex rel. Lawlar v. Williamson, 135 Cal. 415, 67 P. 504, a quo warranto proceeding, the court found that the San Francisco Board of Health, then recently created by the charter adopted in 1899, legally exercised and had superseded (at least as to some functions and powers) the old local board of health, created by statute, which until the adoption of the charter had been in charge of San Francisco's hospitals and almshouses. The following remarks of the court in that case merit comment: "It is evident that the powers conferred upon and the duties required of this [new] board are strictly municipal in their character. All that is required of the board is peculiarly for the inhabitants of the city, and not directly for the benefit of any one else," and that "This board with its functions, being in its nature an 'affair' appropriate for a municipality, and being actually contained in the charter, is a 'municipal affair,' within any meaning heretofore given to the phrase 'municipal affair.'" 135 Cal. at page 417, 67 P. at page 504. The court also said, "The charter board certainly has some of the powers which the charter confers upon it, and if, to any extent, the Code sections creating the former board are inconsistent with the valid grant of power conferred by the charter, to that extent they are superseded by the charter." 135 Cal. at page 419, 67 P. at page 505. Justice McFarland specially concurred upon the ground "that it does not appear that the charter board of health is an illegal body, or is wrongfully usurping powers," adding that "The public health is not a 'municipal affair,' in the sense of excluding the jurisdiction of the state over the subject." 135 Cal. at page 420, 67 P. at page 506. Justices Harrison and Garoutte specially concurred upon similar grounds. It is clear that the Williamson case did not decide the question whether this hospital was operated as a proprietary enterprise or as a governmental facility. In a companion case, Weaver v. Reddy, 135 Cal. 430, 67 P. 683, the plaintiff claimed that the old statutory board of health had unlawfully removed him from the superintendency of the almshouse. But, after the commencement of the action, the 1899 charter took effect, and it created a new board of health, vesting in it the management of San Francisco's hospitals and almshouses, thereby divesting the old statutory board of such power of management. This rendered moot and academic the questions upon appeal in the Weaver case. In so holding, the court said: "That the management of hospitals and almshouses is a municipal matter, we think, requires no discussion," 135 Cal. at page 431, 67 P. at page 683, but by that remark could have meant only that provision for the management of local institutions, including hospitals, was appropriate in a charter adopted under authority of sections 8 and 8½ of article XI of the Constitution, not that it was a city as distinguished from a county function, nor, in either case, that it was a proprietary as distinguished from a governmental activity.

Beard v. City and County of San Francisco, supra, 79 Cal.App.2d 753, 180 P.2d 744, involved merely the issues upon demurrer to a complaint which alleged that plaintiff had placed his child in the city and county hospital as a paying patient, that the hospital was operated by the defendant in a proprietary capacity, and that because of negligent supervision the child fell from its crib and died. It was legally possible that defendant, pursuant to ordinances adopted under authority of the municipal affairs home rule provisions of its charter, was operating the hospital in a proprietary capacity. Because the court could not take judicial notice of such ordinances, if any, the complaint presented mixed questions of fact and law. The case had to go to trial, could not be decided upon demurrer. That, obviously, was not a holding that respondent's hospital is operated in a proprietary capacity.

[10] In this state of the case it is unnecessary to decide whether Irealous was able to pay for her care and, if so, whether respondent's employees admitted her to the hospital as a paying patient. For she was admissible only as "an expectant mother who is unable to pay for her care." If respondent's employees admitted her as a paying patient, able to pay, they acted outside the scope of their authority and there could ensue no legal responsibility upon the part of respondent for injuries caused by the negligent acts of its employees in the care of the patient. "A governmental agency does not incur liability for negligence by doing an act which is *ultra vires.*" Calkins v. Newton, supra, 36 Cal.App.2d 262, at page 268, 97 P.2d 523, 526. See, also, Latham v. Santa Clara County Hospital, supra, 104 Cal.App.2d 336, 231 P.2d 513, 515, and cases cited.

[11–14] We do not wish to give the impression that the evidence demonstrates that respondent's agents acted beyond the scope of their authority when they admitted Irealous as a patient. An expectant mother need not be a pauper to be "unable to pay for her care," within the meaning of that expression as used in the state and local codes. The policy of providing hospital care for the deserving needy was well expressed in Goodall v. Brite, supra, 11 Cal. App.2d 540, at page 549, 54 P.2d at page 515, in these words: "Under the principles of humanitarianism, and in the interest of a sound policy, we are compelled to hold that a patient in need of hospitalization, who cannot himself, or through legally liable relatives, pay the charges of a private institution, should be admitted to the county hospital because the care of such sick or injured promotes the public health and general welfare of the community in which he lives." The word "indigent," when used in connection with admissions to county hospitals, was defined by the court in the Goodall case as including a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." 11 Cal.App.2d at page 550, 54 P.2d at page 515. That, we believe, is the meaning of the expression "unable to pay for her necessary care" as used by the Legislature in section 204 of the Welfare and Institutions Code. The witness Moran testified that respondent's hospital is organized for the care of indigent patients; that the rate chargeable in March, 1947, to patients able to pay in whole or in part for their care at this hospital was $9.33,[4] which included the services of medical as well as other paid personnel; that according to the standards of admission, assuming a family of husband, wife and child, all in good health, and the husband a wage earner receiving a net income (after deductions) of $50 a week, the wife would not be able to pay for her care, would be eligible as a free patient. He stated that he took into consideration the fact that in 1947 the costs of living were very high. He added that if the wage earner had considerable money in the bank he might be able to pay. He further testified that, if, instead of $50, the wage earner were making $65 a week, with a family of three, presumably paying a moderate rent where he lived, he would be able to pay in part for the care, about two-thirds; if he were making $60 a week he would be able to pay about half of the cost of the care; if he were making $55 a week he probably would be able to pay none of the cost. The witness was assuming the prognosis of the patient favorable, the patient able to take care of her family when discharged, no unexpected expenses in the family end of it, that the wage earner had some assurance of continued employment, and that the children were reasonably healthy and well. This evidence indicates that in determining a person's ability to pay for hospital care, respondent takes into consideration the financial burden resting upon that person of "providing for those who legally claim his support." When a person applies for admission, he or she is interviewed by a social service worker. According to the witness Marie Heick, a social service worker at the hospital, a record is kept of every patient admitted, consisting of the family history, residence, financial status, employment of members of the family, past medical care, and financial eligibility for county care. Certain forms are filled out and signed by the applicant at the initial interview. From these forms the information is garnered that enables the department to make its investigation. An investigation is made in most cases; after the patient leaves, if not prior to entrance. If the need for hospitalization is immediate, there is not time to complete the investigation prior to entrance. The witness produced the social service record of Irealous Madison. It included four forms, each bearing the signature "Irealous Madison." One of them indicated that prior to admission to the hospital the patient made a statement that her husband had no funds other than $26 in the bank; that he was a disabled veteran and had applied for a pension; that he was a laborer; that he last worked one and one-half weeks prior to February 28, 1947, and had been employed one and one-half months at his present place of employment. Willie Madison testified that he heard questions asked and answers given by his wife, but did not hear her make those statements which appeared upon that form; did not remember if such questions were asked; that they were not asked of him at any time; that he had no money in the bank at that time and that he was steadily employed.

[15-17] It appears, therefore, that there was substantial evidence to support an administrative determination that Irealous was an expectant mother "unable to pay for her necessary care," and as such was admitted to the county hospital. It is a serious question if on that evidence it would be legally proper for a court or a jury to substitute its judgment for that of the county administrative officials in whom the law has vested the duty and responsibility of deciding whether Irealous was an eligible applicant. " 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible.' " Spaulding v. Philbrick, 42 Cal.App.2d 58, 61, 108 P.2d 59, 61, quoting from Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869. The scope of judicial review is of a limited character when the attack upon the administrative finding is collateral in nature. Bank of America v. Mundo, 37 Cal.2d 1, 229 P.2d 345, 347. However, as we have observed, that question is not presented for decision upon this appeal,

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[4] There was evidence that at one private hospital in the city and county the minimum daily rate per patient was somewhat in excess of $15.

for under the law respondent is not liable to appellants for the negligence of its employee, Walker, irrespective of whether the hospital officials acted within or without the scope of their authority in admitting Irealous as a patient.

This is a harsh rule of law which deprives a person of recourse against a county for injuries caused by the negligence of county employees entrusted with his treatment and care as a patient. The doctrine of governmental immunity stems, as we have observed, from the ancient fiction that the king can do no wrong. Appellant invokes a trenchant criticism of that doctrine, voiced by the Supreme Court of New Mexico in Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480, at page 482: "It is asserted by some law writers and decisions that there has been a growing demand from society in general that the governmental agencies or subdivisions should not be immune from tort liability.

"The writer of the Annotation, 'Rule of municipal immunity from liability for acts in performance of governmental functions as applicable in case of personal injury or death as result of a nuisance', in 75 A.L.R. page 1196, says: 'The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong", should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.'

"A criticism of the reasons assigned in support of the doctrine so much under attack will be found in an article in Brooklyn Law Review, April 1932, entitled: 'Should the Liability of Municipalities in Tort be Extended to Include Injury and Damage Caused in the Negligent Performance of a Governmental Function?'

"In an annotation 'Municipal immunity from liability for torts', in 120 A.L.R. 1376, it is stated that the doctrine of immunity rests upon three grounds: First, the technical rule that the sovereign is immune from suit; second, the ancient idea that it is better that the individual should suffer an injury than that the public should suffer an inconvenience; and third, that liability would tend to retard the agents of the City in the performance of their duties for fear of suit being brought against the municipality. The writer then proceeds with what to many would seem a plausible condemnation of each of these grounds of support of the ancient and rigorous doctrine."

In an article entitled "Municipal Tort Liability in Operation," 54 Harvard Law Review, pages 437–462, cited by appellants herein, the authors state that "Legal scholars * * * have long since made it plain that sovereign immunity has no proper place in the life of a municipal corporation." P. 438. "[T]he governmental-proprietary rule often produces legalistic distinctions that have only remote relationship to the fundamental considerations of municipal tort responsibility." P. 443. "There is little reason to doubt that the genuine interest of the public would be well served by abrogation of the long-accepted immunity rule. It is equally clear that neither effective administration nor general respect for the law can be had under a system so obviously eclectic and unfair in its operation." P. 460. The authors recommend that "the present hit-and-miss application of partial tort liability be immediately replaced with a rule of complete tort liability" and that "recovery in tort actions against the municipality be confined to actual monetary damages." P. 461.

[18] While it is true that the trend of judicial decisions and legislative action is to confine, not enlarge—to restrict, not extend—this doctrine of governmental im-

munity, see People v. Superior Court, supra, 29 Cal.2d 754, at 756–762, 178 P.2d 1, it is not within the province of this, an intermediate court, in view of the unvarying line of decisions from 1862 to date, to undertake a re-examination of that doctrine and its application to a county in the operation of a hospital pursuant to the mandate of the general laws of the state. As said in Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, supra, at page 340, 231 P.2d 513, 515, 516: "Much as we may deplore a rule of law which deprives the indigent, who are least able to bear the loss, along with the wealthy, if they are admitted to a county hospital as patients, of recourse against the county for tortious injuries therein received, an intermediate appellate court must accept the settled law as it finds it."

The judgment appealed from is affirmed.

PETERS, Presiding Justice.

We concur. We do so solely because the prior cases of the Supreme Court, and of the District Courts of Appeal in which hearings have been denied, have held that a county is not liable for the tortious acts of its agents in the operation of a county hospital. As an intermediate appellate court we are bound by those prior decisions, even if we do not agree with them.

The whole doctrine of governmental immunity for tort needs reappraisal. It has, of course, been greatly limited by statute. In the related field of liability of charities for tort the Supreme Court, a few years ago, reappraised the law, overruled prior decisions, and imposed liability. A similar reappraisal in the field of governmental immunity is sadly needed. With the multitude of activities of government today, city, county, state and federal, it is logically unsound to draw hairline distinctions between proprietary and governmental functions, and to impose or refuse to impose liability accordingly. To argue that a county can only operate a hospital for indigents in the performance of a governmental function, and that if it takes in pay patients and acts in a proprietary capacity its acts are *ultra vires* and therefore no liability is imposed, is technical, unrealistic and unjustified. But that is what the prior cases have held.

Here admittedly, the city's employees negligently killed this woman. A hospital employee negligently furnished the wrong kind of blood. Had the hospital employee negligently operated an automobile in the course or scope of his employment, or negligently used hospital property, liability would exist under some circumstances under the Public Liability Act, Gen. Laws, Act 5619, § 2, imposing liability on counties for injuries resulting, among other things, from the defective condition of public "works and property" where certain conditions exist. In the instant case the evidence shows that the patient was a pay patient. Yet no liability exists because this is a county hospital performing a "governmental" function, and if it was acting in a proprietary capacity its acts were *ultra vires* and not binding on the counties. Of course, the doctrine of *ultra vires* has long been abolished as to private corporations and has largely outgrown its usefulness as to municipal corporations.

The doctrine of nonliability of government for tort is largely predicated, as the main opinion points out, on the old common law legal fiction that the king could do no wrong. However logical such doctrine may have been when the courts were, in a realistic sense, the king's courts, and however practical the doctrine may have been when government was limited in its activities and revenues, under modern conditions the original reasons for the rule no longer exist. When the reason for the rule is gone, the rule should be abrogated. Blind following of antiquated and outgrown precedent should not be countenanced.

If relief is to be secured from the technical and outmoded rules now applicable to the subject of liability of government for the operation of hospitals, such relief must be secured from the Supreme Court or the Legislature, and not from an intermediate court that is bound by prior decisions.

BRAY, J., concurs.

Hearing denied; CARTER, J., dissenting.

For dissenting opinion of CARTER, J., see 236 P.2d 141.

106 Cal.App.2d 265

PROULX et al. v. DE MOTI et al.

Civ. 18121.

District Court of Appeal, Second District, Division 1, California.

Aug. 23, 1951.

Blaise B. Proulx and another sued Louise Catherine De Moti and others for personal injuries sustained in an automobile accident. From an order of the Superior Court of Los Angeles County, William B. McKesson, J., granting plaintiffs' motion to vacate a judgment of dismissal on the ground that it was the result of inadvertence and excusable neglect, named defendant appealed. The District Court of Appeal, White, P. J., held that the question of plaintiffs' attorney's excusable neglect in failing to have plaintiffs present in court and ready to proceed with the trial at the time set therefor was addressed almost entirely to the trial court's discretion, so as to preclude disturbance of its ruling by the appellate court.

Order affirmed.

1. Appeal and error 🔑957(1)

The burden of showing trial court's abuse of discretion in granting plaintiffs' motion to set aside judgment of dismissal on ground of inadvertence and excusable neglect is on defendant appealing from such order. Code Civ.Proc. § 473.

2. Appeal and error 🔑962

Whether plaintiffs' attorney's neglect to have plaintiffs present in court and ready to proceed with trial at time set therefor was excusable was question addressed primarily and almost entirely to trial court's discretion under circumstances shown by record. Code Civ.Proc. § 473.

3. Dismissal and nonsuit 🔑81(1)

In consideration of application to vacate judgment of dismissal on ground of inadvertence and excusable neglect, law favors such action as will result in trial on merits. Code Civ.Proc. § 473.

4. Appeal and error 🔑962
Dismissal and nonsuit 🔑81(1)

An application to vacate judgment of dismissal on ground of inadvertence and excusable neglect is addressed to sound discretion of trial court, whose ruling will not be interfered with by appellate tribunal, in absence of clear showing of abuse of such discretion. Code Civ.Proc. § 473.

5. Dismissal and nonsuit 🔑81(2)

The power vested in trial courts to vacate judgments of dismissal on ground of inadvertence and excusable neglect should be freely and liberally exercised to end that cases shall be disposed of according to their substantial merits, rather than on mere technical matters of procedure. Code Civ.Proc. § 473.

6. Dismissal and nonsuit 🔑81(7)

The point that no affidavit of merits was filed on behalf of one of two plaintiffs afforded no ground for reversal of trial court's order granting plaintiffs' motion to vacate judgment of dismissal on ground of inadvertence and excusable neglect where duly verified complaint was filed on behalf of both plaintiffs. Code Civ.Proc. § 473.

7. Dismissal and nonsuit 🔑81(7)

The absence of points and authorities in support of motion to vacate judgment of dismissal on ground of inadvertence and excusable neglect does not warrant reversal of order granting motion as Superior Court rule merely provides that absence of such points and authorities may be construed by court as rendering motion unmeritorious. Code Civ.Proc. § 473; Rules of Superior Court, Rule 3(a).

8. Appeal and error 🔑935(2)

On appeal from order granting plaintiffs' motion to vacate judgment of dismissal on ground of inadvertence and excusable neglect in failing to have plaintiffs present in court and ready to proceed with trial at time set therefor appellant's contentions that plaintiffs' proper remedy was appeal from judgment and that motion presented no new issue because plaintiffs' attorney's affidavit showed that facts concerning plaintiffs' absence were known to him at time of dismissal cannot be sustained, as it must be assumed that trial court concluded that facts were not fully brought out before court in Master Calendar Department when order of dismissal was made. Code Civ.Proc. § 473.

◆

Benjamin D. Brown, Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

Plaintiffs commenced this action against defendants for damages for personal injuries allegedly sustained in an automobile accident. The cause was set for trial on January 3, 1949, and was thereafter continued or reset for trial some seven times, finally coming on for trial on April 17, 1950, at 9:15 a. m., in Department 1 of the superior court. Upon this last-mentioned occasion defendant's attorney was present, but plaintiffs' attorney was absent. After the calling of the calendar was completed, defendant's attorney directed the attention of the court to the fact that this case was not called, and the court stated that the matter had been continued to 1:45 p. m. of the same day. When, about 1:30 p. m., plaintiffs' attorney appeared in court, he noticed that his clients were not present. The attorney then communicated with his secretary, and after inquiry on her part was informed that the clients had returned to their home in Van Nuys, some distance from the court room. Plaintiffs being unprepared to proceed with the trial, the court granted defendant's motion for dismissal.

Subsequently plaintiffs moved the court, pursuant to section 473 of the Code of Civil Procedure, to vacate and set aside the judgment of dismissal upon the ground that such judgment was the result of inadvertence and excusable neglect. From the order granting such motion, defendant Louise Catherine De Moti (the only defendant who appeared in the action) prosecutes this appeal.

Appellant recognizes the well established policy of the law to have legal controversies tried upon their merits, and that unless it can be determined as a matter of law that the trial court abused its discretion in setting aside a judgment such as the one here under consideration, the court on appeal will not reverse the trial court's action. Appellant, however, urges that in the instant case the affidavit of respondents' attorney in support of the motion was insufficient; that the motion was improperly granted because it was not supported by points and authorities as required by the rules of the superior court; and that the plaintiffs' proper remedy was by appeal from the judgment.

The supporting affidavit of plaintiffs' attorney shows that the cause had been continued on two occasions due to substitution of attorneys for defendant and illness of the latter's attorney, and that "the matter was put over a few times more because of the crowded condition of the calendar." Finally, when the cause was set for trial on April 17, 1950, at 9:15 a. m., it is averred that plaintiffs' counsel "was engaged in a criminal jury trial in Division 5 which started Thursday, April 13th and continued until noon of Monday, April 17, 1950; that affiant was occupied in trial on Friday, April 14, 1950, until 5:00 p. m. on the trial of a jury case and when affiant then tried to call Attorney Brown to advise him of the situation, the latter's office did not respond to the call.

"That before court opened April 17, 1950, affiant went to Department 1 and advised the clerk that he was engaged in trial in Division 5 and that he requested the matter be called for 1:30 p. m. That affiant further requested that the clerk make the announcement of such fact so that plaintiffs would be so apprised. That the plaintiffs, to affiant's best knowledge and information, were present and evidently misunderstood the situation, and did not return to the court, but proceeded home to Van Nuys.

"That at 1:30 p. m., affiant appeared in Dept. 1 and failed to see his clients, whereupon he telephoned his office. That the secretary phoned plaintiffs and ascertained that they were in Van Nuys. That affiant informed Attorney Brown of the situation, but he insisted upon going on, whereupon the court ordered a dismissal of the complaint. That the injuries of the plaintiffs and the damages sustained were serious in nature and they should be given their day in court in order to try the case upon its merits."

Defendant's attorney in his counter-affidavit, contradicted plaintiffs' counsel in some respects as to who had requested previous continuances, and with reference to the events on the date of the dismissal stated as follows:

"That on April 17, 1950, the date set for trial of this action, affiant was present in court at 9:15 a. m., the time set therefor, with said defendant. That during the call of the calendar the case was skipped by Presiding Judge Kincaid, and that thereafter affiant called the attention of the court to the fact that the court had overlooked this action and that the court then advised affiant that the case had been put over until 1:45 p. m. of said day; that this was the only information of any sort that affiant had that the matter was not to proceed to trial that morning or that it was to be postponed in any way. That affiant had never received any information from plaintiffs or their attorney at any time advising him of the fact that it would be necessary to postpone the trial. That affiant did not see in the court room of Department 1 or at any place on the 8th floor of the Hall of Records at any time after 9:10 a. m. of said day the plaintiffs, and that plaintiffs, therefore, were not present in the court room during the call of the calendar, and that the clerk did not make any announcement that the matter was to be called at 1:30 p. m. That at 1:45 p. m. said Herbert Dounay made a motion to Department 1 to have the action continued on the grounds that he was unprepared to proceed to trial and indicated to the court that he had never opposed any motion made by affiant to continue the case, and that affiant advised the court that said Herbert Dounay had on behalf of the plaintiffs opposed such motions in the past, and that the court thereupon stated that it would entertain a motion to dismiss the case, and that thereupon affiant on behalf of defendant so moved the court and a dismissal thereupon ordered.

"That it does not appear in the affidavit of said Herbert Dounay that he knows in any way why the plaintiffs were not present and ready to proceed to trial on April 17, 1950."

[1–5] Counsel for appellant, as we have seen, concedes that in the absence of a clear showing of abuse of discretion, an appellate court will not disturb the ruling of the trial court in a case of this character. It must be conceded also that the burden of showing such abuse of discretion is on the appellant. Stub v. Harrison, 35 Cal.App.2d 685, 690, 96 P.2d 979. No such showing has been made herein. The record as above set forth clearly presents a situation in which, as heretofore pointed out, under well settled and long established rules, exemplified by innumerable decisions, the order appealed from may not be disturbed. The action or inaction of plaintiffs' attorney, criticized by appellant as constituting non-excusable neglect, must be considered in the light of the entire circumstances shown by the record. Whether the neglect was, in the circumstances, excusable, was a question addressed primarily, and indeed, almost entirely, to the discretion of the court below. Moreover, in the consideration of an application for relief under section 473 of the Code of Civil Procedure, the law favors such action as will result in a trial on the merits. The following quotation from Consolidated Mortgage Co. v. Roberts, 94 Cal.App.2d 895, 899, 212 P.2d 28, 30, in our view completely disposes of the contentions of appellant: "The application for relief herein, having been made under the provisions of Section 473 of the Code of Civil Procedure, was addressed to the sound discretion of the trial court, and its ruling will not be interfered with by an appellate tribunal in the absence of a clear showing of abuse of such discretion. McNeil v. Blumenthal, 11 Cal.2d 566, 567, 81 P.2d 566. As was said in Armstrong v. Armstrong, 81 Cal. App.2d 316, 319, 183 P.2d 901, 904, '"In the exercise of discretion by the trial court * * * under the provisions of section 473 of the Code of Civil Procedure, two propositions of law seem to be definitely settled. *First, that the power vested in* *trial courts * * * should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure, and secondly, that * * * the proper decision * * * rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion."* Again, it is said in Hecq v. Conner, 203 Cal. 504, 509, 265 P. 180, 183, that "It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. * * * 'Any doubt that may exist should be resolved in favor of the application, *to the end of securing a trial upon the merits.'* Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353."'" (Emphasis added.) See, also, Garcia v. Garcia, 105 Cal.App.2d 289, 233 P.2d 23.

[6, 7] The point that no affidavit of merits was filed on behalf of plaintiff Dorothy Proulx affords no ground of reversal, as the record discloses that a complaint, duly verified, was filed on behalf of both plaintiffs. Nor does the absence of points and authorities in support of the motion for relief, under Rule 3(a) of Rules of the Superior Court, warrant a reversal of the order, as the rule merely provides that absence of such points and authorities may be construed by the court that the motion is unmeritorious.

[8] Finally, it is contended that the proper remedy of the plaintiffs was by appeal from the judgment; that the affidavit of plaintiffs' attorney shows that the facts concerning the absence of plaintiffs were known to him at the time of the dismissal; that "the same were stated at that time"; and therefore the motion to vacate did not present any new issue to the court. The contention may not be sustained. It must be assumed that the trial court concluded upon the record before it that the facts surrounding the misunderstanding of the plaintiffs and their failure to be present were not fully brought out before the court in the Master Calendar Department when the order of dismissal was made. Further, the issues of whether the neglect or misunderstanding was excusable were not presented by affidavit to the judge presiding in the Master Calendar Department. In the circumstances there can be no question but that plaintiffs properly sought relief under the provisions of section 473 of the Code of Civil Procedure.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

106 Cal.App.2d 194

SHELTON v. VANCE et al.

VANCE v. SHELTON.

Civ. 18187, 18188.

District Court of Appeal, Second District,
Division 3, California.
Aug. 20, 1951.

Theodore U. Shelton brought action against his sister, Virginia May Vance, and another, for partition of certain realty and personalty, and Virginia May Vance brought quiet title action against Theodore U. Shelton. The cases were consolidated for trial. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgments for Virginia May Vance and Theodore U. Shelton appealed from both judgments. The District Court of Appeal, Vallée, J., held that decree in distribution of estate of Blanche Shelton which distributed the property in question, did not conclusively establish title in Blanche Shelton, and the question of title was not res judicata in these actions, and that when a party admits allegations of the other party, the court cannot make a finding contrary to the allegations.

Judgment quieting title affirmed; judgment in partition action affirmed in part and reversed in part with directions.

1. Joint tenancy 🔑5
Tenancy in common 🔑3

Where sister conveyed her interest in property, held in joint tenancy with brother and sister, to the sister, grantee was then tenant in common with brother as to a one-third interest, and joint tenant with brother in two-thirds interest.

2. Tenancy in common ⟾7

Where one tenant in common acquired the interest of the only other tenant in common, she became owner of entire fee.

3. Deeds ⟾179

The return of unrecorded deed did not operate to reconvey title. Civ.Code, § 1058.

4. Executors and administrators ⟾315(5, 6)

Decree of distribution distributes such title as deceased had and is conclusive as to rights of heirs, legatees or devisees, in so far as they claim in such capacities, but such decree does not determine that deceased had title to property distributed, and is not binding upon third person who claims interest adverse to that of deceased.

5. Executors and administrators ⟾315(6)

A decree of distribution is not conclusive as against a party whether he be heir, devisee, or legatee under will, where his individual property was included among assets of estate and was distributed by decree.

6. Executors and administrators ⟾315(6)

Where sister returned unrecorded deed to decedent, title did not pass and decree which distributed the property to sister and brother did not establish title in decedent, and was not res judicata in subsequent actions between brother and sister wherein brother sought partition and sister sought to have title quieted in her.

7. Trial ⟾388(4), 396(7)

When allegations in complaint are admitted by answer, finding thereon is unnecessary and finding contrary thereto is error.

8. Partition ⟾62

In action by brother against sister for partition wherein answer admitted co-ownership of personal property, court could not make a contrary finding.

◆

Feinfeld & Feinfeld and J. L. Feinfeld, Los Angeles, for appellant.

Deryl D. Shumway, Martin C. Colvin, Huntington Park, for respondent.

VALLÉE, Justice.

These are appeals from judgments in two actions. They were consolidated for trial below and are submitted here on one set of briefs. They involve a parcel of realty which is improved with a furnished rooming house. Number 18187 also involves the furniture and furnishings in the rooming house.

Theodore Shelton brought 18187 for partition of the realty and the furniture and furnishings, and for an accounting of rents from the rooming house.

Virginia Vance brought 18188 to quiet title to the realty.

The judgment in 18187 was that Theodore take nothing by his complaint. Judgment in 18188 quieted title to the realty in Virginia. Theodore appealed from both judgments.

Theodore and Virginia are brother and sister. They had a sister Blanche, now deceased. On August 20, 1938, Theodore, Virginia and Blanche acquired title to the realty as joint tenants. On October 12, 1945, Blanche signed, acknowledged, and delivered a deed conveying her interest in the realty to Virginia. This deed was not recorded. It was absolute on its face. In February or March, 1947, Virginia returned this deed to Blanche. On August 19, 1947, Theodore conveyed his interest in the realty to William Vance, who conveyed it to Virginia.

Blanche died on January 22, 1948. A one-third interest in the realty was inventoried as a part of her estate, and the decree of distribution purported to distribute it to Theodore and Virginia.

The court found and decreed that Virginia owns the realty in fee and that Theodore has no interest therein. Theodore's theory seems to be that the return by Virginia to Blanche of the deed theretofore delivered to Virginia by Blanche, in some fashion reconveyed a one-third interest in the property to Blanche, and that by reason of the decree of distribution in the estate of Blanche a one-sixth interest in the realty is vested in him. His claims as to the realty are untenable.

[1, 2] The deed from Blanche to Virginia severed the joint tenancy as between the interest acquired by Virginia from Blanche and the interests held by Virginia and Theodore in joint tenancy. Virginia was then a tenant in common as to a one-third interest, and a two-thirds interest was held by her and Theodore in joint tenancy. Reiss v. Reiss, 45 Cal.App.2d 740, 747, 114 P.2d 718; McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, Anno. 129 A.L.R. 816. Where "one of three or more joint tenants conveys his interest to a third person, the latter then becomes a tenant in common, instead of a joint tenant, with the other, although such others remain joint tenants as between themselves." Hammond v. McArthur, 30 Cal.2d 512, 516, 183 P.2d 1, 3; In re Estate of Galletto, 75 Cal.App.2d 580, 585–588, 171 P.2d 152. When Theodore conveyed his interest to William Vance a joint tenancy no longer existed. Virginia, through her original holding of a one-third interest and by the conveyance from Blanche of a one-third interest, was the owner of two-thirds interest as a tenant in common with William Vance. Thereafter Virginia acquired the interest of William Vance and thus became the owner of the entire fee in the property.

[3] The return of the deed by Virginia to Blanche did not have the effect of reconveying a one-third interest in the property to Blanche. It did not operate to reconvey title. Title could only be conveyed from Virginia to Blanche by a conveyance in writing. Civil Code, section 1058 provides: "Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title." See Sylvester v. Kirkpatrick, 79 Cal.App.2d 443, 450, 180 P.2d 36; Wachner v. Richardson, 14 Cal.App.2d 422, 428, 58 P.2d 714; Cranmer v. Porter, 41 Cal. 462, 466.

[4–6] The decree of distribution in the estate of Blanche did not have the effect of establishing title to a one-third interest in Blanche at the date of her death, nor did Theodore acquire any interest therein by reason of the decree of distribution. While a decree of distribution is conclusive as to the rights of heirs, legatees, or devisees, insofar as they claim in such capacities, it does not determine that the deceased had any title to property distributed; nor does it bind third persons who claim an interest adverse to that of the intestate or testator. It merely determines the succession or testamentary disposition of such title as the decedent may have had. Rockey v. Vieux, 179 Cal. 681, 682, 178 P. 712; Archer v. Harvey, 164 Cal. 274, 278, 128 P. 410; Cooley v. Miller & Lux, 156 Cal. 510, 513–519, 105 P. 981. A decree of distribution distributes only such title as the deceased had at the time of his death. Pometti v. Laraia, 134 Cal.App. 545, 549, 25 P.2d 857. It does not have the effect of conclusiveness as against a party whether he be an heir or a devisee or legatee under a will where his individual property has been included among the assets of the estate and has been distributed by the decree. Shaw v. Palmer, 65 App. 441, 446, 224 P. 106. Blanche did not, at the date of her death, have any interest in the property. Theodore did not therefore acquire any interest therein by the decree of distribution.

[7, 8] The complaint in 18187 is in three counts: count one is for partition of the realty; count two is for partition of the furniture and furnishings of the rooming house; count three is for an accounting of the rents from the rooming house. In count two Theodore alleged that he and Virginia are the owners of "the furniture and furnishings, bedding, linens, etc." in the rooming house, and that each has an undivided one-half interest therein. In her answer Virginia admitted these allegations. Notwithstanding the admissions the court found that these allegations of count two are untrue. The finding was error. When allegations in a complaint are admitted by the answer, a finding thereon is unnecessary and a finding contrary thereto is error. Lifton v. Harshman, 80 Cal.App.2d 422, 431–432, 182 P.2d 222.

The judgment in 18188 (Superior Court No. 558074) is affirmed. The judgment in

18187 (Superior Court No. 557195) is affirmed insofar as it adjudged that plaintiff (Theodore Shelton) take nothing as to counts one and three of his complaint. The judgment in 18187, insofar as it denies the plaintiff any relief under count two of the complaint, is reversed with directions to take such proceedings as may be necessary to effect a partition of the personal property described therein. The parties will bear their own costs on appeal.

SHINN, P. J., and WOOD, J., concur.

STANG et ux. v. CITY OF MILL VALLEY et al.

Civ. 14568.

District Court of Appeal, First District,
Division 1, California.

Aug. 21, 1951.

Hearing Granted Oct. 18, 1951.*

P. A. Stang and Iva Stang sued the City of Mill Valley, and Robert Baumberger and Leslie Armager, for damages suffered when their house and personal property were partially destroyed by fire because of alleged clogged condition of fire hydrant and water lines. The Superior Court, County of Marin, Edward I. Butler, J., sustained general and special demurrers to complaint and entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that fire mains and hydrants were public works or property, and complaint stated cause of action under Public Liability Act.

Reversed.

1. Municipal corporations 🔑**739(2)**

Fire-fighting is governmental function, although supplying of water may be proprietary in nature.

2. Municipal corporations 🔑**724, 745½**

A municipality or its officers is not liable in tort for failure to discharge a duty arising from a governmental function, in absence of statute.

3. Municipal corporations 🔑**723**

Governmental immunity from tort liability may be waived by statute.

4. Municipal corporations 🔑**739(2)**

Fire mains and hydrants are "public works" or "public property" within meaning of 1923 statute which provided for municipal liability for injuries resulting from dangerous or defective condition of public streets, highways, works and property, etc. Gen.Laws, Act 5619, § 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Property" and "Public Works".

5. Municipal corporations 🔑**723**
Schools and school districts 🔑**89**

Liability of municipalities and school districts under Public Liability Act is not limited to those cases wherein injured party was using some type of city property that was defective. Gen.Laws, Act 5619, § 2.

6. Municipal corporations 🔑**857**

Under Public Liability Act, a complaint which alleges facts showing dangerous condition of public property, actual knowledge of condition by persons having authority to remedy condition, lapse of reasonable time after knowledge within which to remedy condition or take such action as might be reasonably necessary to protect against such condition, failure to remedy condition, that condition was proximate cause of damage, and presentation of verified claim within 90 days, is not vulnerable to general demurrer. Gen. Laws, Act 5619, § 2.

7. Municipal corporations 🔑**742(4)**

Complaint which alleged negligence of city in not remedying clogged fire hydrants and water lines thereto within reasonable time after knowledge of condition by proper authorities and resulting injury when plaintiffs' dwelling was destroyed by fire, stated cause of action, in view of Public Liability Act, which waived governmental immunity from certain tort liability. Gen.Laws, Act 5619, § 2.

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* Subsequent opinion 240 P.2d 980.

8. Municipal corporations ⚿742(4)

Complaint which alleged that plaintiffs' house was destroyed by fire as a result of clogged fire hydrant and water line, and that city manager and fire chief had notice of said condition and had duty and authority to remedy it but failed to do so within reasonable time after notice although public funds were available for such purpose, and that plaintiffs were without fault, stated cause of action under statute providing for liability of governmental officers in certain cases. Government Code, § 1953.

9. Officers ⚿116

Under statute providing for liability of public officers in certain cases, recovery is not limited to cases wherein plaintiff was injured while using public property. Government Code, § 1953.

10. Municipal corporations ⚿857

Where injury from defective government property does not arise out of use of such property by plaintiff, plaintiff, in actions against city officials, must negative his own contributory negligence. Government Code, § 1953.

◆

Charles Reagh, San Francisco, for appellants.

Thomas C. Nelson, City Atty. of Mill Valley, San Rafael, for respondents.

PETERS, Presiding Justice.

From a judgment for defendants entered upon the sustaining of general and special demurrers with leave to amend (plaintiffs having declined to amend), plaintiffs prosecute this appeal.

The complaint alleges that plaintiffs, husband and wife, own certain described real and personal property located in Mill Valley; that for about one year prior to August 8, 1946, all of the defendants—the city, its city manager and fire chief—knew that the water lines leading to the fire hydrant adjacent to the property of plaintiffs, and the fire hydrant itself, were clogged with refuse and unusable, so that it was impossible to get sufficient water through such hydrant to extinguish fires; that it was the duty of defendants, and city funds were available, to remedy that situation; that defendants nevertheless negligently and improperly failed to repair and to maintain the equipment in usable order; that on August 8, 1946, without fault of plaintiffs, a small fire started on the roof of plaintiffs' premises; that the fire department of Mill Valley was called and fire-fighting equipment arrived in time, had water been available through the defective mains and hydrant, to have extinguished the fire before it would have caused damage to exceed $25; that no other source of water was available, nor was the fire department equipped with chemical apparatus sufficient to put out a minor fire; that defendants all knew the nature of the equipment possessed by the fire department, and also knew of the purpose of the water mains and fire hydrant; that because of the inability of the fire department to secure water from the water mains and hydrant, the fire spread and caused damage to the house and personal property of plaintiffs totalling $9,563.50; that this damage was the direct and proximate result of the failure of the defendants to discharge their duties and to remedy the described defective condition of the public works and property; that such failure caused a highly dangerous condition which was likely to and did cause the damage described; that a claim for said damage was duly and properly filed. Baumberger, the city manager, and Armager, the fire chief, were joined as defendants, it being specifically alleged that each of them had control of the fire-fighting apparatus, and had authority, and were charged with the duty of maintaining fire-fighting equipment in a fair and usable condition.

In our opinion, that complaint states a good cause of action against all defendants.

[1-3] There is little doubt that fire-fighting is a governmental function, although the supplying of water may be proprietary in nature. There is also no doubt, under existing law, that, in the absence of statute, a municipality or its officers are not liable in tort for failure to

discharge a duty arising from a governmental function. Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108; Howard v. City and County of San Francisco, 51 Cal. 52; see cases collected 18 Cal.Jur. p. 1094, § 345. That rule applies to cases where houses are destroyed by fire because pipes and hydrants are clogged, where there is no statute imposing liability. 163 A.L.R. 348. By statute, of course, there can be a waiver of this governmental immunity. The question here presented is whether the statute involved encompasses a waiver of the tort described in the complaint.

The only statute applicable to this problem, so far as the city is concerned, is section 2 of the Stats. of 1923, p. 675, Chap. 328, Deering's Gen.Laws, Vol. 2, Act 5619. It provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

This section was repealed in 1949, Stats. of 1949, Chap. 81, at p. 327, and substantially re-enacted as Government Code sections 53050 and 53051. The fire here involved having occurred in 1946, the 1923 statute is applicable.

[4, 5] The complaint charges that the city, with full knowledge of the defective condition, and with city money available to remedy the defects, allowed the mains and fire hydrant involved to become so choked with refuse that water was not available to put out the fire, and that as a proximate result thereof plaintiffs' property was damaged. Certainly the fire mains and hydrant are public "works" or "property" within the meaning of the 1923 statute. The defendants seem to argue that liability under that statute is imposed only when the injured party is *using* some type of city property that is defective, and which he had a legal right to use, such as using public streets, highways, bridges, or school grounds or other similar property. There is no such limitation on the operation of the statute.[1] As long as it is alleged that the injuries proximately were caused by the defective maintenance or operation of public works or property under the conditions set forth in the statute, a good cause of action has been pleaded.

[6] The District Court of Appeal of the Second Appellate District, Division

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[1] While most of the cases under the 1923 statute involve injuries received while the plaintiff was using public streets, bridges or school grounds, there are many cases where the plaintiff was injured as a proximate result of defective city works not in "use" by the plaintiff. A few of these cases follow: In Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768, the city negligently allowed fire to spread from a city dump. It was held that liability existed under the 1923 statute, although a judgment for plaintiff was reversed because of an error in an instruction. In Durante v. City of Oakland, 19 Cal.App.2d 543, 65 P.2d 1326, the city used defective sewer pipes, resulting in flooding plaintiff's property. A recovery by plaintiff was affirmed. In Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779, it was held that an action existed under the 1923 statute for damages for negligently maintaining draining facilities—see, also, Bacigalupi v. Bagshaw, 87 Cal.App.2d 48, 196 P.2d 66, and Edward Brown & Sons v. City & Co. of S. F., 36 Cal.2d 272, 223 P.2d 231. In Bodholdt v. Garrett, 122 Cal. App. 568, 10 P.2d 533, plaintiff alleged that he was injured because of a defective spring in a city truck, resulting in the truck colliding with another vehicle. It was held that liability would exist under such circumstances, but the case was reversed because of failure of proof. Many other cases could be cited.

Three, in a well-reasoned opinion written by Justice Vallée has recently reviewed, at some length, the legal principles applicable to pleading a cause of action under the 1923 statute. Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132, hearing denied by the Supreme Court. In that case the city operated a rubbish disposal dump within the city. Plaintiff owned nearby improved land. A fire spread from the dump to plaintiff's land and destroyed most of the improvements. After filing a claim he brought an action under the 1923 statute. The trial court sustained a demurrer without leave to amend and entered judgment accordingly. This was reversed. The court reviewed many of the authorities that discuss the essentials of a cause of action under the 1923 statute, reviewed the allegations of plaintiff's complaint, and then summarized its views as follows, 230 P.2d 138: "The complaint contains factual allegations of all the elements essential to a cause of action under the Public Liability Act: (1) facts showing a dangerous condition of public property; (2) actual knowledge of the dangerous condition by persons having authority to remedy the condition; (3) the lapse of a reasonable time after knowledge within which to remedy the condition, or to take such action as might be reasonably necessary to protect the public against the dangerous condition; (4) failure to remedy the dangerous condition; (5) the dangerous condition was a proximate cause of the damage; and (6) presentation of a verified claim within ninety days. [Citing cases.] The complaint met the requirements of the statute, and was not vulnerable to a general demurrer."

[7] The present complaint meets all of these requirements.

Defendants cite cases holding that a city cannot successfully maintain an action against a private water company for damages to city property caused by the failure of the private water company to maintain water pressure in fire hydrants pursuant to its contract with the city, Ukiah City v. Ukiah Water & Imp. Co., 142 Cal. 173, 75 P. 773, 64 L.R.A. 231, or holding that a private citizen cannot recover against a private water company for damage caused by a fire where the private company fails to maintain the water system properly. Luning M. P. Co. v. East Bay W. Co., 70 Cal. App. 94, 232 P. 721. Neither of these cases involved liability under the 1923 statute. For that reason, they are not in point. Cases from other jurisdictions, cited by defendants, either involve statutes different from ours, or state a much more limited rule than exists in this state. In our opinion, the principles stated in the Osborn case demonstrate that the present complaint states a cause of action against the city.

[8] The complaint also states a good cause of action against the city manager and fire chief. The complaint alleges that the injury sustained was the proximate result of the defective condition of public works or property; that these two officials had notice of the defective condition; that they had the authority and it was their duty to remedy the defective condition; that public funds were available to remedy the condition; that within a reasonable time after receiving notice they failed to remedy the condition; and that plaintiffs were without fault. Such allegations are sufficient to charge those officials with liability.

Section 1953 of the Government Code reads as follows:

"No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear:

"(a) The injury sustained was the direct and proximate result of such defective or dangerous condition.

"(b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.

"(c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.

"(d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.

"(e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

[9, 10] Defendants argue that under subdivision "e" of the statute, liability is only imposed where the plaintiff is injured while "using" public property. That is not the law. The only effect of subdivision "e" in this type of case, where the injury does not arise out of use by the plaintiff, is that plaintiff, in actions against city officials, must negative his own contributory negligence. Moore v. Burton, 75 Cal.App. 395, 242 P. 902; Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083. The complaint here meets that test, and complies with all of the other requirements of the section.

The judgment appealed from is reversed.

BRAY, J., and AGEE, Justice pro tem., concur.

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106 Cal.App.2d 68

PARMALEE v. BARTOLOMEI.

Civ. 7945.

District Court of Appeal, Third District, California.

Aug. 14, 1951.

Action by Warren O. Parmalee against Albert R. Bartolomei for damages resulting from the collision of defendant's truck with a truck owned by plaintiff. The Superior Court, Mendocino County, Lilburn Gibson, J., gave judgment in favor of the plaintiff and denied defendant's motion for a new trial, and the defendant appealed. The District Court of Appeal, Schottky, J., pro tem., held that the evidence was sufficient to sustain the trial court's findings that the collision was proximately caused by the defendant's negligence, plaintiff was not guilty of contributory negligence, and the reasonable value of the loss of the use of plaintiff's truck was $50 per day.

Judgment affirmed, and appeal from order denying motion for new trial, dismissed.

1. Negligence 🔑121(1), 136(14)

Disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such violation which can be rebutted by evidence of justification or excuse. Vehicle Code, § 527.

2. Automobiles 🔑244(10, 36, 42)

In action for damages resulting from collision of two trucks which met on hill, evidence sustained finding that collision was proximately caused by defendant's negligent operation and that plaintiff was not negligent.

3. Negligence 🔑136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence existed.

4. Damages 🔑139

In action for damages to truck, evidence sustained finding that reasonable value of loss of use of plaintiff's log hauling truck was $50 per day for 26 days.

5. Damages 🔑113

Owner's recovery for being deprived of use of a damaged vehicle is generally determined with reference to period of time reasonably required for making the repairs.

6. Damages 🔑6

Where defendant did not attempt to bring out items of cost of operation of plaintiff's truck to establish amount of plaintiff's damage by reason of collision with defendant's truck, fact that some items may not have been clearly brought out in evidence did not prejudice defendant.

7. Evidence 🔑507

For services of a commonplace or nontechnical character, trial judge can call on his own general knowledge of value.

Mannon & Brazier, Ukiah, for appellant.

Preston & Falk, Tom Cleland, Ukiah, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff in an action for damages resulting from the collision of two trucks, and from the order denying defendant's motion for a new trial.

Plaintiff in his complaint alleged that the collision was caused by defendant's negligence in operating his truck and that plaintiff had been damaged in the sum of $1,814.84 for damages done to his truck, and the further sum of $1300.00 for loss of use of the truck. Defendant's answer denied any negligence on his part and also set up the defense of contributory negligence on the part of plaintiff.

Following a trial by the court without a jury the court found that defendant so negligently operated his truck that it collided with plaintiff's truck; that plaintiff was damaged in the sum of $3,376. Upon motion for a new trial the court, in denying the motion, modified the findings and judgment by reducing the amount awarded for damages to the truck from $2,076 to $1,814.84 (the amount alleged in the complaint), so the amount of the judgment, as finally entered and as appealed from, is the sum of $3,114.84.

[1] Appellant first contends that respondent was guilty of contributory negligence as a matter of law, and asserts that the road in question was thirteen feet in width at the point of impact; that respondent was driving down hill and appellant driving up hill, and that under Section 527 of the Vehicle Code respondent was required to yield the right of way to appellant, which appellant claims he did not do. Even if it be assumed that the statute in question was violated by respondent, yet, as stated by our Supreme Court in the very recent case of Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1, at page 2: "It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse."

And in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, at page 588, 177 P.2d 279, at page 283, the court said:

"And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. [Citing cases.]

"However, in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation. The rule has been aptly stated in Jolley v. Clemens, 28 Cal.App.2d 55, 67, 82 P.2d 51, 58, where it was said (quoting from 1 Shearman & Redfield on Negligence, § 13): '"* * * violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive * * *"' Continuing, the court said: 'But unless and until justification or excuse for such conduct appear * * * the general rule applies and it must be treated as negligence per se.' To the same effect is Gallichotte v. California Mut. [Building & Loan] Ass'n, 4 Cal.App.2d 503, 505, 41 P.2d 349, 350, where it was stated: 'Violation of an ordinance is negligence per se. In Alechoff v. Los Angeles Gas & Electric Corp., 84 Cal.App. 33, 39, 257 P. 569, 571, it is said: "It is an axiomatic truth, that every person while violating an express statute is a wrongdoer, and as such is ex necessitate negligent in the eye of the law." An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. Mora v. Favilla, 186 Cal. 199, 202, 199 P. 17; Rath v. Bankston, 101 Cal.App. 274, 281, 281 P. 1081.' However, the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.' [Citing cases.]"

The record fully supports the factual situation set forth in the opinion of the trial court as follows:

"On the 7th day of June, 1949, the parties hereto were engaged in hauling logs over the old Sherwood Road, leading from Sherwood Valley to California State Highway 101. At the particular time in question plaintiff was coming down the hill with his truck loaded with logs and defendant was going up the hill after a load of logs. A collision between the two trucks ensued, resulting in considerable damage to plaintiff's truck.

"The road was not a paved road nor was it a wide road. The evidence presented shows that it had a rather hard surface with small loose rocks on top of it. When plaintiff saw defendant the former brought his truck to a stop or practically so within 40 feet. Plaintiff says he saw defendant 200 yards away. The testimony of the defendant is that the view of the plaintiff must have been obstructed by a bank so that he could not see that far, in fact not nearly that far. Be that as it may, these men had both been engaged in hauling logs over that road for some time and on that particular day in question each knew that other trucks were on the road and each should have been keeping a sharp lookout for trucks approaching from the other direction if they were to use ordinary care. It seems to me that the plaintiff was using due and proper care, and I can see no negligence on his part.

"I find myself unable to be impressed by the thought that plaintiff was coming down that hill loaded with ten ton of logs or more at 25 miles an hour. Such would have been suicide in my opinion, and the fact that he brought his truck practically to a stop as quickly as he did indicates no excessive speed. He was keeping a sharp lookout. He saw the defendant as soon as the latter came into view. He also observed that the defendant was not looking where he was going but was looking off down across the highway at a house trailer parked along the side thereof. He put on all the brakes he had and tried his best to stop. Defendant, on the other hand, was looking across at the trailer when he should have been looking at the road, in which latter event he would have seen plaintiff quicker than he did and would have had a better opportunity to bring his truck to a stop before he did.

"The foregoing statement is substantiated by practically uncontradicted evidence in the case. Added to this is the testimony of the plaintiff that after the collision the defendant said he was looking over at the house trailer, and if he hadn't been, he would have seen plaintiff and could have stopped in order to avoid the collision.

"Two passers by, who were at the scene of the collision immediately after it happened and heard the conversation between these parties have fully corroborated the plaintiff's testimony in that regard. The defendant has not denied it.

"Therefore, the Court must assume that such testimony is correct. The Court is consequently forced to the conclusion that the defendant was not at the time using ordinary care in the operation of his truck and that the lack of ordinary care was the proximate cause of the damages sustained by plaintiff's truck, and plaintiff is therefore entitled to recover against the defendant."

[2, 3] We believe that the finding of the trial court that the collision was proximately caused by the negligence of appellant and that respondent was not careless or negligent finds substantial support in the record. These were matters for the trial court to determine from all of the evidence. For, as stated in Anthony v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, at page 829: "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such

negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

[4] Appellant next contends that there is no evidence to support the court's finding as to the reasonable value of the loss of use of the truck. This contention is without merit. The following summary of the evidence on this issue set forth in the opinion of the trial court finds ample support in the record: "The truck was not repaired by plaintiff, but had it been it would have taken 30 days to get it fixed. He traded it in on a new truck and was unable to get his new truck on the road until about July 10. Plaintiff's testimony that it would have taken 30 days to get it fixed is not too clear, but again giving the defendant the benefit of the doubt I assume that what plaintiff meant was that if he had had it fixed he could have had it out again by July 7. Between June 7 and July 7 there were four Sundays on which days plaintiff did not haul logs, and consequently those four days should be deducted from the 30 days, which leaves 26 days. Neither did plaintiff establish too clearly the rental value of the truck nor what his net earnings with it could be. The gross was estimated all the way from $80.00 to $110.00 per day, but quite a few expenses had to come out of that and the Court is not informed as to just what all of those expenses were. Very conservatively, however, the Court is justified in concluding that the net value of the use of that truck was $50.00 per day, and 26 days at $50.00 per day is $1,300.00."

[5] As stated in Valencia v. Shell Oil Co., 23 Cal.2d 840, at page 844, 147 P.2d 558, at page 560: "An owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs."

[6, 7] The evidence was sufficient to show that the rental value of the truck was in excess of the $50 per day allowed by the court. If there were some items of cost of operation that were not clearly brought out in the evidence no prejudice resulted to appellant therefrom. Appellant could have easily brought out these items if he had deemed it important. Furthermore, as stated in Johnson v. Snyder, 99 Cal.App.2d 86, at page 90, 221 P.2d 164, at page 167: "for services of a common-place or non-technical character the trial judge can call on his own general knowledge of their value. Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755, and cases cited." No other points raised required discussion.

In view of the foregoing the judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

ADAMS, P. J., and PEEK, J., concur.

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105 Cal.App.2d 808

DAKE et al. v. SMITH et al.

Civ. 18058.

District Court of Appeal, Second District,
Division 1, California.
Aug. 2, 1951.

Burton S. Dake, Jr., and another sued R. L. P. Smith for specific performance of a contract to purchase real estate, payment of a brokerage fee into court, and rental for the property pending the court's decision and following plaintiff's notice of rescission of the contract. Defendant filed a cross-complaint against Charles B. Hopper and another, doing business as Charles B. Hopper Associates, and another, for rescission of the contract and recovery of defendant's cash deposit. From an order of the Superior Court of Los Angeles County, Kurtz Kauffman, J., sustaining cross-defendants' demur-

rer to defendant's third amended cross-complaint without leave to amend, and from the judgment following, defendant and cross-complainant appealed. The District Court of Appeal, Doran, J., held that the third amended cross-complaint stated a cause of action.

Judgment and order reversed.

1. Appeal and error ⚷917(1)

On appeal from order sustaining demurrer to defendant's third amended cross-complaint, allegations thereof must be accepted as true for purpose of determining sole issue.

2. Brokers ⚷106

In action for specific performance of contract to purchase realty, defendant's third amended cross-complaint, alleging that cross-defendant brokers, representing plaintiff vendors, falsely represented that realty was immediately contiguous to unimproved and unrestricted hill country, where cross-complainant could ride his horse without having to approach land over paved streets or restricted private property, in accordance with cross-complainant's statement to brokers of his requirements and needs, stated cause of action as against demurrer on ground that it showed on its face that cross-complainant did not and could not properly rely on alleged misrepresentations or mistake as to whether there were houses and fences on contiguous land.

3. Pleading ⚷214(1)

Fact questions may not be settled by demurrer to cross-complaint as not stating facts sufficient to constitute cause of action.

4. Trial ⚷375

View of premises by trial judge would be unwarranted in connection with ruling on demurrer to cross-complaint alleging brokers' misrepresentations of character of land contiguous to land sold to cross-complainant.

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W. Cloyd Snyder, Louis T. Fletcher, South Pasadena, for appellant.

Gibson, Dunn & Crutcher, Los Angeles, Frank L. Mallory, Los Angeles, of counsel, for respondents.

DORAN, Justice.

This is an appeal from the order sustaining cross-defendants' demurrer to cross-complainant's third amended cross-complaint without leave to amend and from the judgment that followed.

The action is the result of a transaction for the purchase and sale of real estate. As recited in appellant's brief, "This is an action by Plaintiffs, sellers of certain real estate:

"(a) To compel specific performance of a purported purchase agreement for real estate (for the sum of $45,000.00);

"(b) To require the payment of $4,500.00 brokerage fee into Court by the bank holding same;

"(c) For $50.00 per month rental for the property pending the Court's decision, and following Plaintiff's Notice of Rescission.

"Defendant and Cross-Complainant R. L. P. Smith served a Notice of Rescission upon the Plaintiff before the action was commenced, which fact is alleged in the Third Amended Cross-Complaint.

"Defendant R. L. P. Smith answered and filed a Cross-Complaint against the brokers doing business as Charles B. Hopper Associates, and against the Security-First National Bank for rescission to recover the deposit of $4,500.00 cash made by Defendant and Cross-Complainant. This Cross-Complaint was amended three times, and it is the Third Amended Cross-Complaint which is before the Court on appeal.

"Cross-Defendants Charles B. Hopper Associates demurred specifically to both causes of action in the Third Amended Cross-Complaint on the ground that neither cause of action set forth facts sufficient to constitute a cause of action, and upon the ground of uncertainty. The trial court sustained the Demurrer without leave to amend."

Briefly, it appears from the cross-complaint that the Charles B. Hopper Associates represented the seller in the transaction. The cross-complaint alleges, as correctly recited in appellant's brief, that Smith visited the seller's broker and stated, "That he wanted to buy a place that was immediately contiguous to unimproved and unrestricted terrain where he could ride his horse; that he wanted to buy a place that was immediately contiguous to unimproved and unrestricted terrain approachable without having to ride over paved streets or restricted private property; that he wanted unimproved and unrestricted hill country where there would be no interference or *restrictions* by fences or *private estates*." The cross-complaint further alleges that in reply to Smith's statement, "That Defendants had exactly what this Cross-Complainant wanted; that it was made to order for Cross-Complainant's use; that it complied with all of Cross-Complainant's requirements as this Cross-Complainant had stated his requirements and described his needs to the said R. V. Crowe (the broker) which are particularly set forth in Paragraph VI hereof." The cross-complaint further alleges that appellant then drove to the area where the property described by the broker was located and it appeared from the highway, "That the said contiguous land appeared from its exposure toward said highway to be extensive, wild, and unimproved and unrestricted terrain suitable for horseback riding, and that said contiguous land then and there appeared to satisfy and comply with all of Cross-Complainant's said requirements as described to said brokers by this Cross-Complainant, and as set forth in Paragraph VI hereof.

"That said contiguous land was covered with trees and wild shrubbery. That as viewed by this Cross-Complainant from the highway as aforesaid, Cross-Complainant did not and could not see any houses or other buildings or improvements upon said contiguous land. That thereupon this Cross-Complainant went to the office of the said Charles B. Hopper Associates and signed the purported 'Purchase Agreement'. It is further alleged that appellant relied upon the statements of the broker, but "That shortly thereafter this Cross-Complainant returned to said premises and walked over the said contiguous land, portions thereof being concealed from the highway by the contours of the land and by trees and shrubbery, and that this Cross-Complainant thereupon discovered and learned for the first time that behind said trees and concealed behind the said contours of the land were numerous private estates and property and improvements, none of which could be observed or seen from said highway, and learned that all of said contiguous land was privately owned land, restricted and not available for passage nor for use for horseback riding."

It will be seen from the foregoing that the purchaser was more interested in the character of the "contiguous land" than the property sold, which was about 1½ acres. And the cause of action is based upon the alleged misrepresentations as to the contiguous land, not the land purchased.

[1-4] It is respondents' contention that "The third amended Cross-Complaint failed to state a cause of action because it showed on its face that appellant did not rely and could not properly have relied on any alleged misrepresentations or mistakes as to whether or not there were houses and fences on the contiguous property". Respondent cites 16 California cases in connection with the argument relating to the above contention. All of these cited cases are appeals from the judgment following a trial. There can be no controversy as to such phases of the within action at this time. The appeal herein is from an order sustaining a demurrer and it is well settled that for the purpose of determining the sole issue in such circumstances, the allegations of the complaint must be accepted as true. Carruth v. Fritch, 36 Cal.2d 426, 224 P.2d 702; Schaefer v. Kerber, Cal.App., 1951, 234 P.2d 109. There can be no question that appellant's complaint states a cause of action and if at the trial the facts are established as alleged and appellant prevails, the evidence would, under the law, support the judgment. Such questions of fact may not be settled by demurrer. Indeed the evidence may include a "view of the premises" by the trial judge which definitely would be unwarranted in connection with the ruling on a demurrer.

The judgment and order are reversed.

WHITE, P. J., and DRAPEAU, J., concur.

KNELL et al. v. MORRIS et al.

Civ. 18157.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1951.

Rehearing Denied Sept. 6, 1951.

Hearing Granted Oct. 18, 1951.*

Max Knell and others, doing business under the firm name and style of Broadway Luggage Shop, a copartnership, brought an action against Ray Morris, doing business under the firm name and style of Blumve Company, and San Spellman and Max Marin, individually and doing business under the firm name and style of Marinello Salon of Beauty Culture and Mac Mar, Inc., for damages to property caused by water from a leaking heater. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered a minute order granting motion of defendants for a nonsuit and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that the doctrine of res ipsa loquitur was applicable as against defendants.

Reversed.

1. Negligence ⚿136(9)

On defendants' motion for nonsuit in action for damages, negligence must be inferred if it is reasonably possible to do so.

2. Negligence ⚿121(2)

In order for doctrine of res ipsa loquitur to be applicable, accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality within exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff.

3. Negligence ⚿121(3)

The flooding of a floor by water escaping from an upper floor through ceiling is an accident that does not ordinarily occur in absence of someone's negligence, and if it is shown to have been caused by an agency or an instrumentality within exclusive control of defendant and was not due to any voluntary action or contribution on part of plaintiff, an inference that defendant was negligent arises.

4. Negligence ⚿121(3)

In action for damages resulting from water which leaked from a heater located in store on floor of building above plaintiffs' store, doctrine of res ipsa loquitur could be invoked against owner of upper store, as against contention that heater was not in exclusive control of such owner but was under joint control of such owner and of defendant who had installed heater and whose employee had repaired heater on evening preceding morning when such damage was discovered.

5. Negligence ⚿121(2)

The number or relationship of defendants alone does not determine whether doctrine of res ipsa loquitur applies.

6. Negligence ⚿55

Generally, an independent contractor is liable for injuries caused by his own negligence in performance of his work.

7. Negligence ⚿55

Generally, after work done by an independent contractor is completed and accepted by owner, independent contractor is not liable to a third person for damages suffered by reason of condition of the work even though he was negligent in carrying out contract, but independent contractor is liable if work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided contractor knows or should know of dangerous situation created by him, and owner does not know of dangerous condition or defect and would not discover it by reasonable inspection.

8. Negligence ⚿121(3)

Where independent contractor undertook to repair leaking water heater in store and had control of heater while repair work was being performed, and heater leaked that night after repairman left, and caused damage in plaintiff's store on floor below, doctrine of res ipsa loquitur was applicable against independent contractor.

9. Negligence ⚿25

Owner of store had duty to exercise ordinary care to keep water heater in a reasonably safe condition so that water

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* Subsequent opinion 247 P.2d 352.

would not escape and cause injury to property of occupants of floor below, and such duty was not limited to conditions actually known to be dangerous, but extended also to conditions which might have been found dangerous by exercise of reasonable care.

10. Master and servant 🔑330(1)
Negligence 🔑121(3)

Where independent contractor undertook to repair leaking water heater in store and heater leaked during night after repairman left and caused damage in plaintiff's store on floor below, fact that plaintiff was unable to specifically identify actively negligent persons as between independent contractor and owner of upper store did not deprive plaintiff of right to invoke doctrine of res ipsa loquitur.

11. Master and servant 🔑316(1)

Ordinarily one who engages an independent contractor to make repairs is not liable for negligence of independent contractor while engaged in making repairs and while in control of instrumentality causing injuries.

12. Master and servant 🔑330(1)
Negligence 🔑121(3)

Where independent contractor undertook to repair leaking water heater in store and heater leaked during night after repairman left and caused damage in plaintiff's store on floor below, fact that plaintiff had knowledge equal to knowledge of defendant independent contractor and owner of upper store as to fact that damage was caused by leaking heater did not bar application of doctrine of res ipsa loquitur, it being equal knowledge of cause of injury that would bar application of such doctrine.

Victor Ford Collins and Arnold M. Cannan, Los Angeles, for appellants.

Desser, Rau, Christensen & Hoffman and Wm. Christensen, all of Los Angeles, for respondent Mac Mar, Inc.

DeForrest Home, Los Angeles, for respondent Morris.

VALLÉE, Justice.

Appeal by plaintiffs from a minute order granting the motion of defendants for a nonsuit in an action for damages to property caused by water from a leaking heater.

Stated in the light most favorable to plaintiffs, indulging in all reasonable inferences in their favor, and disregarding all conflicting and contradictory evidence, the evidence is summarized as follows:

Plaintiffs owned and operated a retail luggage business on the mezzanine, ground floor, and basement at 756 South Broadway in Los Angeles. Defendant Mac Mar, Inc., owned and operated the Marinello Salon and Beauty Culture establishment on the floor immediately above. Defendant Morris, a master plumber, was engaged in the plumbing business in Los Angeles.

Mac Mar maintained a cast-iron water heater on the second floor. The heater was an old one which had been installed by Morris for Mac Mar on February 22, 1948. On April 28, 1948, about 5:00 p. m., Spellman, an officer of Mac Mar, heard a slight hissing noise coming from the heater, saw that it was leaking, turned the water off, and telephoned Morris to come and repair it. Spellman then left the place. Morris sent Rule, one of his employees, to repair the heater. Rule told Morris the next day that he had repaired it by using a preparation to seal holes and cracks, and that when he finished, he turned the water on.

The next morning, about 7:00 o'clock, an employee of Mac Mar who opened the establishment, found the heater leaking and called the fire department. The ceilings of the mezzanine and ground floor were coming down due to the weight of water. The rugs on the ground floor were soaking wet and considerable luggage had been damaged. About 9:30 a. m. Morris examined the heater; several sections were cracked; the cracks were from one to four inches long; he took the heater out and installed a new one. It may be inferred reasonably that the heater was worn out.

Plaintiffs invoke the doctrine of res ipsa loquitur against defendants Morris and Mac Mar, and say that the inference of negligence which arises on application of the doctrine required a denial of the motions for nonsuit. They also maintain that aside from the application of the doctrine the evidence was sufficient to warrant an inference that Morris was negligent. Morris says there was no evidence that he was negligent and that the doctrine is not applicable to him. Mac Mar says the doctrine is not applicable to it because plaintiffs "proved that it [the heater] was under the joint control of defendant Macmar, Inc. and defendant Morris."

[1] We are of the opinion that the court erred in granting the motions for nonsuit. On such motion the law compels that negligence be inferred if it is reasonably possible to do so. Williamson v. Pacific Greyhound Lines, 78 Cal.App.2d 482, 485, 177 P.2d 977.

[2–4] The latest decision of the Supreme Court stating the conditions of the doctrine of res ipsa loquitur is Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574, 577. In that opinion, penned by Mr. Justice Schauer, the following was quoted from Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258, with approval: " 'The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (Prosser, Torts, p. 295.)' " Ordinarily where injuries are caused by water escaping from an upper floor and the necessary conditions of the doctrine are present, an inference of negligence arises. The flooding of a lower floor by water escaping from an upper floor through the ceiling is an accident that does not ordinarily occur in the absence of someone's negligence, and if it is shown to have been caused by an agency or an instrumentality within the exclusive control of the defendant and was not due to any voluntary action or contribution on the part of the plaintiff, an inference that the defendant was negligent arises. Schon v. James, La.App., 28 So.2d 531, 533; Washington v. Ravel, Tex.Civ.App., 14 S.W.2d 367, 368; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 171, 79 A.L.R. 40; Ornstein & Rice Neckwear Co. v. Hirshfield Skirt Co., 198 Mo.App. 140, 199 S.W. 453, 455–457; Kahn v. Triest-Rosenberg Cap. Co., 139 Cal. 340, 342, 73 P. 164; cf. Trouser Corporation v. Goodman & Theise, 3 Cir., 153 F.2d 284. It is manifest that the condition that the accident be of a kind which ordinarily does not occur in the absence of someone's negligence was met by plaintiffs' evidence; as was the condition that the accident was not due to any voluntary action or contribution on the part of plaintiff.

Dean Prosser comments that the statement that the plaintiff must prove the agency or instrumentality which caused the accident was under the defendant's exclusive control is misleading. He says: "There are a great many situations in which the defendant's responsibility is apparent even though the 'instrumentality' is in the control of another. This is, of course, obvious where the other is the defendant's agent,[1] or the defendant is otherwise responsible for his conduct,[2] or where the two are engaged in a joint enterprise so that each is responsible for what is done by the other.[3] It is equally clear where the defendant is under a duty which he cannot delegate, as in the case of the obligation of the owner of premises to the public,[4] or that of a contractor to the employees of a subcontract-

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[1] "Weddle v. Loges (1942) 52 Cal.App.2d 115, 125 P.2d 914 (towed automobile hit a tree)."

[2] "Price v. McDonald (1935) 7 Cal.App.2d 77, 45 P.2d 425 (car owner and driver)."

[3] "Koskela v. Albion Lumber Co. (1914) 25 Cal.App. 12, 142 P. 851 (stevedore injured when wire cable on loading apparatus gave way. 'It was also necessary that both parties should assist in the operation of the appliances, and they were jointly operated by and for the joint benefit of both defendants).' "

[4] "Du Val v. Boos Bros. Cafeteria Co. (1919) 45 Cal.App. 377, 187 P. 767. Cf. Windas v. Galston & Sutton Theatres (1939) 35 Cal.App.2d 533, 96 P.2d 170 (fall of plaster from theatre ceiling; contract of owner to repair does not relieve lessee of duty to public invited to enter); Pandjiris v. Oliver Cadillac Co. (1936) 339 Mo. 711, 98 S.W.2d 969 (fall

or,[5] or the responsibility of a surgeon for the nurse who counts the sponges,[6] or the obligation of one who supplies a chattel to inspect it even where he acquires it from someone else.[7] There are other cases, however, in which it is clear that 'control' is simply the wrong word. The plaintiff who is riding a horse is in exclusive control of it; but when the saddle slips off, the inference is still that it was the fault of the defendant who put it on.[8] The man operating a handcar is in control of it; but when the handle breaks, the conclusion is that only the defendant who supplied the handcar was negligent.[9] The plaintiff's possession and exclusive control of a loaf of bread does not prevent the inference that the glass inside of it came from the defendant's bakery;[10] and when a bottle explodes in the purchaser's hands, we may still infer, when all other probable causes are eliminated, that it was due to the negligence of the bottling company.[11]" (Prosser, Res Ipsa Loquitur in California; 37 Cal.L.Rev. 183, 199–200.)

In Raber v. Tumin, supra, 36 Cal.2d 654, 226 P.2d 574, an invitee in a store showroom was struck on the head by a falling ladder. It was held that exclusive control of the ladder by Tumin and his employee was sufficiently shown to warrant application of the doctrine of res ipsa loquitur by evidence that Tumin entered into possession of the premises four hours before the accident and his employee had commenced work therein about three days before; and that from such evidence it could be inferred that both Tumin and his employee knew, or by the exercise of reasonable care could have discovered, the floor was slippery and that the ladder was standing upright thereon. The court declared, 36 Cal.2d at page 660, 226 P.2d at page 577: "The fact that plaintiff is by the very circumstances under which he was injured unable to specifically indentify, as between master and servant, the actively negligent person does not deprive him of the aid of the doctrine of res ipsa loquitur. (See Ybarra v. Spangard (1944), supra, 25 Cal.2d 486, 490, 154 P.2d 687 [162 A.L.R. 1258]; Cavero v. Franklin, etc., Benevolent Soc. (1950) [ante], 36 Cal.2d pp. 301, 311, 223 P.2d 471.)"

In Biondini v. Amship Corp., 81 Cal. App.2d 751, 185 P.2d 94, Amship had a contract to repair a ship. Harbor Ship had a subcontract from Amship to remove the debris from the ship. Fletcher had a subcontract from Harbor Ship to carry the debris away. In removing debris from the ship the driver of Fletcher's truck fell through a scaffold constructed by Amship. In holding the doctrine of res ipsa loquitur applicable to both Amship and Harbor Ship, the court said, 81 Cal.App.2d at page 767, 185 P.2d at page 104: "Harbor Ship argues that the doctrine is not applicable to it because the scaffold was not within its 'exclusive' management and control.

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of brick from window during 'open house' held by defendant, responsible to public for conduct of its guests); Smith v. Claude Neon Lights (1933) 110 N.J.L. 326, 164 A. 423 (fall of sign from building)."

[5] "Biondini v. Amship Corp. (1947) 81 Cal.App.2d 751, 185 P.2d 94. Cf. Van Horn v. Pacific Refining & Roofing Co. (1915) 27 Cal.App. 105, 148 P. 951 (possibility that cap of steam pipe on defendant's premises might have been loosened by stranger)."

[6] "Ales v. Ryan (1936) 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace (1935) 8 Cal.App.2d 429, 47 P.2d 470. Cf. * * * Ybarra v. Spangard, supra, * * * [25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258].

[7] "Gross v. Fox Ritz Theatre Corp. (1936) 12 Cal.App.2d 255, 55 P.2d 227; Hebert v. Byron Jackson Iron Works (1918) 39 Cal.App. 209, 178 P. 850."

[8] "Rafter v. Dubrock's Riding Academy (1946) 75 Cal.App.2d 621, 171 P.2d 459."

[9] "Metz v. Southern Pacific Co. (1942) 51 Cal.App.2d 260, 124 P.2d 670; Ronconi v. Northwestern Pacific R. Co. (1917) 35 Cal.App. 560, 170 P. 635."

[10] "Dryden v. Continental Baking Co. (1938) 11 Cal.2d 33, 77 P.2d 333. Cf. Liggett & Myers Tobacco Co. v. De Lape (9 Cir.1940) 109 F.2d 598 (cigarette flared up)."

[11] "Gordon v. Aztec Brewing Co., [33 Cal. 2d 514, 203 P.2d 522]; Escola v. Coca-Cola Bottling Co., [24 Cal.2d 453, 150 P. 2d 436]; Hoffing v. Coca-Cola Bottling Co., [87 Cal.App.2d 371, 197 P.2d 56]."

The law does not prohibit the application of the doctrine against two or more defendants where there is joint control. Price v. McDonald, 7 Cal.App.2d 77, 45 P. 2d 425; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. It was for the jury to say whether either or both of these defendants had 'control' of the scaffold, and if it should find that either or both had such control it should be instructed that the doctrine under discussion is applicable to that defendant or defendants."

[5] The number or relationship of the defendants alone does not determine whether the doctrine of res ipsa loquitur applies. Ybarra v. Spangard, 25 Cal.2d 486, 491, 154 P.2d 687, 162 A.L.R. 1258.

The case against defendant Morris

[6, 7] Morris was an independent contractor. He was engaged to produce a certain result by means and in a manner of his choosing. He was left to produce the desired result in his own way. Mac Mar had no right of control as to the means or manner of performance of his work. Anderson v. Badger, 84 Cal.App.2d 736, 741, 191 P.2d 768. As a general rule, an independent contractor is liable for injuries caused by his own negligence in the performance of his work. In Johnston v. Long, 56 Cal.App.2d 834, at page 837, 133 P.2d 409, at page 410, this court stated: "The general rule with respect to the liability of an independent contractor for damages to third persons caused by defective construction is that, after his work is completed and accepted by the owner, he is not liable to a third person for damages suffered by reason of the condition of the work even though he was negligent in carrying out the contract. 45 C. J., Negligence, § 320, p. 884; Kolburn v. P. J. Walker Co., 1940, 38 Cal.App.2d 545, 550, 101 P.2d 747. An exception to the general rule is that the contractor is liable if the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided the contractor knows, or should know, of the dangerous situation created by him, and the owner does not know of the dangerous condition or defect and would not discover it by reasonable inspection. 45 C. J., Negligence, § 320, p. 884; Stultz v. Benson Lumber Co., 1936, 6 Cal.2d 688, 59 P.2d 100." See, also, Hall v. Barber Door Co., 218 Cal. 412, 419, 23 P.2d 279.

The following inferences may reasonably be drawn from the evidence: that if Morris had exercised ordinary care the heater would not have leaked during the night immediately following his attempt to repair it; that the work had not been turned over to Mac Mar after it was done and that Mac Mar had not accepted it; that the work was so negligently done as to be imminently dangerous to third persons and that Morris knew, or should have known, that fact, and that Mac Mar did not know of the dangerous or defective condition, and would not have discovered it by reasonable inspection.

[8] The doctrine of res ipsa loquitur was applicable against Morris. He undertook to repair the heater. He had control during the time the work was being performed. Whether he had exclusive control was a question of fact. He was in a position to have disturbed the heater, to have induced the cracks, and to have caused the accident. It is a reasonable and logical inference from the evidence that if Morris had used due care and taken proper precautions in repairing the heater, it would not have leaked with the result that followed. The heater was in control of Morris for the purpose for which he was on Mac Mar's premises. The accident was such as in the ordinary course of things does not happen if those who are doing the work use reasonable care. Unexplained, the facts warrant an inference of negligence.

The case against defendant Mac Mar

[9] It was the duty of defendant Mac Mar to exercise ordinary care to keep the heater in a reasonably safe condition so that water should not be permitted to escape and cause injury to the property of the occupants of the floor below. This duty was not limited to conditions actually known to be dangerous, but extended also to conditions which might have been found

dangerous by the exercise of reasonable care. Raber v. Tumin, 36 Cal.2d 654, 658, 226 P.2d 574; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 171, 79 A.L.R. 40; 65 C.J.S., Negligence, § 84, page 592.

[10, 11] The fact that plaintiffs are unable, as between the owner and the independent contractor, to "specifically identify" the "actively negligent persons," should not deprive them of the application of the doctrine of res ipsa loquitur. Raber v. Tumin, supra, 36 Cal.2d 654, 660, 226 P.2d 574; Biondini v. Amship Corp., supra, 81 Cal.App.2d 751, 767, 185 P.2d 94; Cavero v. Franklin etc. Benevolent Soc., 36 Cal.2d 301, 311, 223 P.2d 471; Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; Price v. McDonald, 7 Cal.App.2d 77, 45 P.2d 425. Ordinarily, one who engages in independent contractor to make repairs is not liable for the negligence of the latter while engaged in making the repairs and while in control of the instrumentality causing the injuries. Bennett v. Truebody, 66 Cal. 509, 6 P. 329; Hedge v. Williams, 131 Cal. 455, 63 P. 721, 64 P. 106; Louthan v. Hewes, 138 Cal. 116, 118, 70 P. 1065; Johnson v. Helbing, 6 Cal.App. 424, 92 P. 360; Biddlecomb v. Haydon, 4 Cal.App.2d 361, 365, 40 P.2d 873; Barrabee v. Crescenta Mutual Water Co., 88 Cal.App.2d 192, 196, 198 P.2d 558. The fact that Mac Mar engaged and independent contractor to make repairs does not, under the facts here, relieve Mac Mar of responsibility for its negligence. Concededly, the heater was within the control of Mac Mar prior to the time the independent contractor was engaged to repair it. It may have been in such condition that it was beyond repair. Whether Mac Mar knew, or by the exercise of ordinary care should have known, of such condition, if it existed, and whether, under such circumstances, it exercised ordinary care in merely engaging an independent contractor to repair it, are questions of fact. It may reasonably be inferred from the evidence that the leakage which caused the injury occurred either during the time the repairs were being made or thereafter. If it occurred thereafter it may be inferred reasonably that it took place at a time when Mac Mar was in exclusive control. The accident occurred either while the heater was in the control of the independent contractor, or in the control of Mac Mar, or in the control of both of them. It was for the trier of fact to say whether either or both had control. It was error to determine the question on motion for nonsuit without explanation from the defendants.

[12] The argument that the doctrine is inapplicable because, so it is said, plaintiffs know as much about the cause of the injury—the fact that the heater leaked—as defendants do, is fallacious. Plaintiffs know that their property was damaged because the heater leaked, but they have no way of knowing how or why the heater leaked. It is not the plaintiffs' equal knowledge of the fact of injury that bars the application of the doctrine of res ipsa loquitur, but equal knowledge with defendants of the cause of the injury.

The evidence and the reasonable inferences therefrom present issues of fact which must be resolved by findings and a judgment rather than by an order of nonsuit.

Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873, and Peters v. Pioneer Laundry Co., 32 Cal.App.2d 494, 90 P.2d 146, relied on by Mac Mar, are not in point on their facts. In those cases the accident happened at a time when the agency was within the exclusive control of an independent contractor, and the evidence of the plaintiff showed that it was brought about by his act and not by the act of the defendant owner.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

106 Cal.App.2d 333

MOUNTAIN v. WHEATLEY.

FOSS v. WHEATLEY.

Civ. 14682.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1951.

Actions by Jimmie Mountain and Elizabeth Foss against Robert Neil Wheatley to recover for injuries sustained while riding as guests in defendant's automobile. The actions were consolidated for trial. The Superior Court, San Mateo County, Edmund Scott, J., entered judgment upon a verdict for defendant in each case and plaintiffs appealed. The District Court of Appeal, Wood, J., held that instructions as to automobile guest's duty to exercise ordinary care for his own safety and the circumstances under which contributory negligence would preclude recovery were adequate without incorporating therein the formula that where action is based upon allegedly wilful misconduct of host, contributory negligence of guest is not a defense unless it contributes to and becomes part of and inducing cause of host's misconduct.

Judgments affirmed.

1. Trial ⚷295(7)

Where trial court instructed jury that where action for injuries sustained by guest in defendant's automobile was based on allegedly wilful misconduct of host, contributory negligence of guest was not a defense, unless it contributed to and became part of and the inducing cause of allegedly wilful misconduct of host, failure to incorporate such principle in instructions as to automobile guest's duty to exercise ordinary care for his own safety and circumstances under which contributory negligence would preclude recovery was not error. Civ.Code, § 1714.

2. Negligence ⚷105

One who voluntarily and knowingly manifests his assent to dangerous conduct or creation or maintenance of a dangerous condition and voluntarily exposes himself to such danger, or one who knows, or in the exercise of ordinary care should know that a danger exists in conduct or condition of another or in condition, use or operation of property, and voluntarily places himself or remains within the area of danger, assumes the risk and under "assumption of risk" doctrine may not recover for damages caused him without intention as a result of such dangerous condition or conduct.

See publication Words and Phrases, for other judicial constructions and definitions of "Assumption of Risk".

3. Automobiles ⚷224(1)

An automobile guest who assents to wilful misconduct of driver so as to show a voluntary assumption of the risk may not recover for injuries resulting from such misconduct, the assent of guest in such respects being shown by a knowing concurrence in wilfulness of driver's conduct and the hazard created by such conduct.

4. Automobiles ⚷224(5, 8)

Where automobile guests, knowing at time of ride that it is perilous and having sufficient experience and understanding to appreciate the dangerous character of driver's conduct, lend their approval to such conduct without protesting regarding operation of automobile or leaving it when they have a reasonable opportunity to do so, if a person of ordinary prudence in their position would have alighted from and refused to resume passage in automobile, under "assumption of risk" doctrine, such guests may not recover for injuries resulting from such misconduct of driver.

5. Automobiles ⚷246(36)

Instructions defining assumption of risk and advising jury as to the circumstances which would show that automobile guests had assumed the risk and hence could not recover for injuries resulting from alleged misconduct of host were sufficient without incorporating therein of formula instruction that assumption of risk by guest must be under such circumstances that it contributes to, and becomes a part of and the inducing cause of host's wilful misconduct in order to bar recovery.

6. Appeal and error ⚷216(1)

Appellants should not be permitted to complain after trial and on appeal of failure to give a formula instruction which they did not request.

7. Trial ⚿260(8)

Failure to read plaintiffs' formula instruction on contributory negligence in response to jury's request for further instructions in regard to wilful misconduct and assumption of risk in action for injuries sustained by guests in defendant's automobile was not error, particularly where omission was not called to trial court's attention at the time.

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J. Adrian Palmquist, Stanley C. Smallwood, Oakland, for appellants.

Partridge & O'Connell, San Francisco, for respondent.

FRED B. WOOD, Justice.

Each of the plaintiffs, in two separate actions against Robert Neil Wheatley, consolidated for the purpose of trial, appeals from the judgment entered upon a verdict for the defendant. They are actions to recover damages for personal injuries sustained by the respective plaintiffs while riding as guests of the defendant, in his automobile, driven by him at the time of the accident.

Each action is predicated upon the alleged wilful misconduct of the defendant as the proximate cause of the injuries. In each, the defendant denied the material allegations of the complaint and interposed the defenses of contributory negligence and assumption of risk.

Appellants claim that certain instructions given the jury upon the subjects of contributory negligence and assumption of risk were prejudicially erroneous. They do not challenge the propriety of giving proper instructions on those subjects, nor do they contend that the evidence was insufficient to support the verdicts.

Two instructions on contributory negligence, appellants claim were "erroneous in that neither of them includes any mention of any necessity that the conduct of the guest must contribute to, and become a part and inducing cause of the wilful misconduct of the host driver, before the conduct of the guest will bar his recovery." These instructions, given at the request of respondent, read as follows:

"The rider in a vehicle being driven by another has the duty to exercise ordinary care for her or his own safety. Due care generally requires of the rider that he or she, having reasonable opportunity to do so, protest against obvious negligence of the driver and have the manner of operation changed to a safe manner. Failing to have the manner of operation changed to a safe manner, due care generally requires a rider to leave the automobile if he or she has reasonable opportunity to do so, and if a person in the exercise of ordinary care would leave the car under the circumstances."

"You are instructed that if you find from the evidence that in the exercise of ordinary care an ordinarily prudent person, having a reasonable opportunity to leave the vehicle in question, would have left the same and refused to resume passage in it, and you further find that the plaintiffs in this case did not do so, and that they failed thereby to exercise ordinary care for their own safety, then you are instructed that you must find a verdict in favor of the defendant and against such plaintiffs."

By these instructions, the trial court advised the jury of the circumstances, in this case, under which the rule of law expressed in section 1714 of the Civil Code, as interpreted by the courts, would apply. In support of their criticism of these instructions, appellants rely upon the following statement which appears in Schneider v. Brecht, 6 Cal.App.2d 379, at pages 383–384, 44 P.2d 662, at page 664: "While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a part of and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had." That statement was made to formulate and express a "principle" of law. The court was not writing an instruction, nor was it considering an instruction that had been given by the trial court. There is no necessary inference of a requirement that an instruction embody the very words used in stating the principle. The court did have before it findings of the trial court, 6 Cal.App.2d pages 381–383, 44 P.2d page 662, deemed sufficient by the reviewing court, which stated that during a period of some hours prior to the accident the parties had been drinking alcoholic liquors together, at various places which they visited; that at the last place visited defendant (the host driver) was under the influence of intoxicating liquor to such an extent as to prevent her from exercising the care which she otherwise would have exercised; that plaintiff was "fully aware of said intoxicated condition * * * and * * * knew that if she [plaintiff] entered said automobile while the said defendant was in such intoxicated condition, with the defendant operating the same, she would be guilty of negligence and carelessness in so doing, and then knew that in said intoxicated condition defendant would not listen to, or heed any request plaintiff might thereafter make; that notwithstanding said knowledge on said plaintiff's part, she did so enter said automobile, and said defendant proceeded to drive and operate the same in said intoxicated condition"; that defendant then drove at an excessive speed, raced with another vehicle, swerved from side to side, and with knowledge of the probable result tried to cut in ahead of a vehicle, causing the collision; "that the intoxication of the defendant was the proximate cause of the accident"; and that appellant's injuries "were proximately caused by her own carelessness and negligence in so entering the said automobile with knowledge then and there of the facts hereinbefore found." Here were stated the circumstances which made the defense of contributory negligence available in such a case. In appraising those circumstances, the court expressed the formula which appellant herein invokes. The court did not say, nor do we believe it intended the inference to be drawn, that a trial judge must instruct the jury in the words of the formula, whether in lieu of or in addition to giving them a statement of the circumstances, appropriate to the facts in evidence, under which the defense of contributory negligence is available.

That the court in the Schneider case had no thought of requiring that a jury instruction be couched in the very words of this formula, is further indicated by a statement which that court made in the later case of Johnson v. Marquis, 93 Cal.App.2d 341, 209 P.2d 63. It held that the uniting in one count of allegations that the guest plaintiff's injuries were caused by the intoxication and by the wilful misconduct of the defendant did not preclude the defendant from pleading the defense of contributory negligence to either or both of those charges. The court observed that defendant did plead that defense, and said: "Certainly, if plaintiffs had furnished the liquor which caused the appellant to become intoxicated, and voluntarily rode with her, knowing that she was dangerously intoxicated, they might be precluded from recovering damages. Likewise, if they observed the reckless manner in which she was operating the car, and had the opportunity of preventing such conduct, or of stopping the car and refusing to ride with her, and failed to do so, they might also be prevented from recovering damages. That is exactly what this court said in the Schneider case, supra, with respect to pleading and relying upon contributory negligence as a defense to alleged wilful misconduct." 93 Cal.App.2d at page 346, 209 P.2d at page 66. The court then quoted the statement of principle (invoked by appellants herein) which it formulated in the Schneider case. In view of the court's declaration that those two statements were "exactly" the same, there can be little doubt that in its opinion a statement of the circumstances under which the defense of contributory negligence is available is the equivalent of a statement of the principle expressed as a formula.

It is of interest to note that in Amidon v. Hebert, 93 Cal.App.2d 225, 208 P.2d 733, a guest case, an instruction on contributory negligence had been given in the very words of this formula. Defendant, appealing, "argued that this is a formula instruction and that it fails to cover proximate cause, burden of proof, and assumption of risk" 93 Cal.App.2d at page 227, 208 P.2d at page 734. The court found that the other elements were thoroughly and repeatedly covered in other instructions, including several in which wilful misconduct was fully defined. "Five instructions followed the instructions on misconduct, of which three were requested by the defendant, covering contributory negligence and assumption of risk and the circumstances under which these matters, or either of them, would be a defense to the charge of wilful misconduct. The challenged instruction was the last of these five" 93 Cal.App.2d at page 228, 208 P.2d at page 735. It seemed clear to the court that the challenged "instruction was intended as a part of those covering the defenses thus relied on, and that it was not intended as an instruction covering all elements in the case" 93 Cal.App.2d at page 228, 208 P.2d at page 735. The court concluded that, with all the elements covered by other instructions (including, we infer, the circumstances under which contributory negligence would be a defense to the charge of wilful misconduct), "It could not reasonably be supposed that it was misled by the instruction complained of, that it misunderstood the issue submitted to it, or that any omission in this instruction contributed to or affected the verdict" 93 Cal.App.2d at page 228, 208 P.2d at page 735. We do not derive from that decision a holding that if a trial court properly instructs the jury upon all elements in the case, including the circumstances under which the defense of contributory negligence would be available, this formula instruction on contributory negligence must also be given.

[1] In the instant case, the trial court did (at appellants' request, with modifications which they do not question) instruct the jury in terms of that formula, as follows: "A guest's contributory negligence, if any, is for the jury to determine, but where the complaint is based upon a charge of wilful misconduct, the guest's contributory negligence, if any, is not a defense, in actions against the host driver unless it is of such a character that it contributes to, and really becomes part of, and the inducing cause of, the host driver's wilful misconduct if any." (Plaintiffs' Instruction No. 16, as modified.) Appellants urge that the formula which this instruction expresses should have been incorporated in the very text of the two instructions, above discussed, which they question. We do not so view it. Those instructions were adequate without the formula. Moreover, the jury had the formula before it and was properly "cautioned not to select a single instruction or a portion of an instruction alone, but to consider all of the instructions in determining any issue in the case."

[2–4] *Two instructions on assumption of risk,* appellants assert were "erroneous for the same reason [absence of the formula] that the instructions on contributory negligence are erroneous, but with the difference that they were accompanied by no general instruction by which it might be claimed that the effect of the error was mitigated or cured." Those instructions, given at the request of respondent, read as follows:

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you: One is said to assume a risk when he or she freely, voluntarily and knowingly manifests his or her assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself or herself to that danger, or when he or she knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself or herself, or remains, within the area of danger. One who thus assumed a risk is not entitled to recover for damage caused him or her without intention and which resulted from the dangerous condition or conduct to which he or she thus exposed himself or herself." (Defendant's Instruction No. 17.)

"When a guest assents to the wilful misconduct of the driver of a vehicle so as to show a voluntary assumption of the risk, he or she is barred from recovering for injuries. The assent of the guest in such respects may be shown by a knowing concurrence by such guests in the wilfulness of the conduct of the driver and a knowing concurrence of the hazard created by such conduct. The plaintiffs in this case may not recover if you find that they knew at the time of the ride that it was perilous (if in fact you find it to have been perilous) and they had sufficient experience and understanding to appreciate the dangerous character of the conduct of the driver (if in fact you find it to have been dangerous conduct), and the guests nevertheless, with this knowledge and appreciation, lent their approval to the conduct of the driver. One of the facts to be considered by you is whether with such knowledge the plaintiffs protested to the driver regarding the operation of the automobile. If you find they had such knowledge, a further fact for you to consider as to whether plaintiffs assumed the risk of riding in the automobile, is whether or not they had a reasonable opportunity to leave the car before the accident, and whether or not a person of ordinary prudence in their position would have alighted from the vehicle and refused to resume passage in it." (Defendant's Instruction No. 18, as modified.)

[5, 6] By these instructions the court appropriately advised the jury the circumstances which, if found to exist, would show that plaintiffs assumed the risk, and would bar recovery. We do not deem it necessary additionally to advise a jury in terms of the formula (no more so than when appropriate instructions are given on the subject of contributory negligence), assuming but not deciding that the assumption of risk by a guest must be under such circumstances that it contributes to, becomes a part of, and the inducing cause of the host driver's wilful misconduct. It is sufficient, as in the instant case, to advise the jury of the circumstances, appropriate to the issues and the evidence, under which that risk may have been assumed by the plaintiff. In addition, we note that appellants did not request the trial court to give any instruction (with or without the formula) on the subject of assumption of risk, except the following, which the court did give: "A guest has a right to assume, until the contrary reasonably appears, that the host driver will drive in a prudent manner and take necessary precautions to safeguard the life and person of his guests." (Plaintiffs' Instruction No. 17, as modified.) It does not become appellants to complain, after the trial and upon appeal, of a failure to give a formula instruction which they had not requested.

We have read the entire charge to the jury and are of the opinion the jury was fully and fairly instructed upon all essential issues in the case.

[7] Appellants make one further claim of error. The jury, after retiring to deliberate, returned to the courtroom and requested further instruction in regard to wilful misconduct and assumption of risk. The court then read all of the instructions previously given on wilful misconduct, and defendant's instruction 17 and plaintiffs' instruction 17 on assumption of risk, above quoted. Appellants now complain because the court did not then also read their formula instruction on contributory negligence, number 16, above quoted. That was not an instruction on assumption of risk; no formula instruction on that subject was necessary, as we have observed; appellants requested no such instruction on that subject; and they did not bring to the trial court's attention the omission of which they now complain. We find no error in the omission of plaintiffs' instruction number 16 upon that occasion.

The judgments appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

106 Cal.App.2d 254

SANTMAN et al. v. SMITH.

Civ. 18137.

District Court of Appeal, Second District,
Division 1, California.

Aug. 22, 1951.

Rehearing Denied Sept. 11, 1951.

Hearing Denied Oct. 18, 1951.

Action by Carol Jean Santman, and another, against Parker Clarke Smith and others for personal injuries sustained by the named plaintiff as automobile guest when automobile of the named defendant struck tow truck on highway. The Superior Court, Los Angeles County, Clarence Hanson, J., rendered judgment for plaintiffs against the named defendant and the named defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain finding that the named defendant was guilty of wilful misconduct in operation of automobile and that such misconduct caused automobile guest's injuries.

Judgment affirmed.

1. Automobiles 🔑244(20)

In action for personal injuries sustained by guest when automobile struck tow truck on highway, evidence of erratic driving, excessive speed, refusal to slow down or let guest get out, that red lights on tow truck were visible to others, and that motorist drove directly into tow truck without applying brakes, sustained recovery on ground of wilful misconduct.

2. Automobiles 🔑181(1)

A motorist is guilty of "wilful misconduct" if he intentionally does an act with wanton and reckless disregard of its possible results and without regard for safety of passengers being carried.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

3. Automobiles 🔑181(1, 7)

Whether automobile driver has been guilty of wilful misconduct entailing liability for injury to a guest, depends upon peculiar facts of the particular case, and although excessive speed alone does not necessarily amount to such misconduct, it is an important element to be considered with other circumstances.

4. Automobiles 🔑244(56)

In action for personal injuries sustained by guest when automobile struck tow truck on highway, evidence was sufficient to sustain finding that guest reasonably could not by act or word have avoided injuries.

5. Trial 🔑295(1)

Instructions to a jury must be considered as an entirety, and the merits of one instruction cannot be fairly appraised by lifting instruction from the context.

James V. Brewer, Los Angeles, for appellant.

Delvy T. Walton, Henry G. Bodkin, Los Angeles, for respondents.

DORAN, Justice.

The present action was instituted by the respondents to recover damages for personal injuries to Carol Santman arising out of an automobile accident on Coast Highway No. 101 near Newport Beach, California, when Miss Santman was a guest in the automobile of the appellant Parker Clarke Smith. Wilful misconduct and intoxication were charged against the defendant Smith. Negligent operation of a tow truck, with which the Smith car collided, was charged against the owner and driver of the tow car, McCartney and Allen by name.

A jury returned a verdict of $15,000 in favor of plaintiff Carol Santman, and $720 in favor of Miss Santman's father, but found in favor of the defendants McCartney and Allen. There were special findings to the effect that the defendant was guilty of wilful misconduct but not guilty of intoxication. The present appeal is from that portion of the judgment "based upon the special findings * * * that the said defendant * * * was guilty of wilful misconduct in his driving * * *, that plaintiff was aware of such wilful misconduct and that she did not have an opportunity to avoid it." It is contended that wilful misconduct was not proven; that the trial court erred in instructions given and refused, and that the court's comments on the evidence were improper.

It appears from the record that a group of boys from Claremont Men's College had taken their girl friends to a beach party at Corona del Mar on the evening of October 8, 1948. The respondent Carol Santman was invited by the appellant, and in company with two other couples, arrived at the beach about 8:00 P.M. in appellant's new Ford car. The three boys had purchased beer and whiskey, and according to some of the testimony appellant, during the evening, had consumed from fifteen to seventeen cans of beer and a considerable portion of a fifth of bourbon. Smith, however, claimed to have had only two or three cans of beer, and two drinks of whiskey, the last drink of whiskey being taken just previous to starting home about 10:30 P.M. Just before the accident, appellant while driving, had a can of beer in one hand.

There is a conflict of testimony as to the effect of appellant's drinking. Appellant, claiming there was no intoxication, nevertheless testified in reference to the influence of liquor, that "I had felt in communication with the general party spirit prior to that, probably an hour prior to leaving the party. * * * at 9:30 I had probably with what was going on around us I probably was feeling pretty good", and "not from smelling the people's breaths".

There is evidence that respondent Carol Santman and the other young lady who occupied appellant's car on the return trip were worried because of appellant's condition; he had staggered on the sand and appeared to be intoxicated; and wished to have the other boy in the party, Robert Blakey, drive home. This angered the appellant who said, "It is all right. I am not drunk. Let me alone. I am not drunk. * * * See, I am standing up. I am not drunk". Robert Blakey said that "Mr. Smith was all right, that he could drink and hold his liquor". With this assurance the girls got in the car. Blakey, admitting to partial intoxication, had had the same amount of liquor as had the appellant.

The first part of the route "was so winding that he couldn't have gotten up any speed there", but upon arriving at Highway 101 appellant started driving fast, increasing the speed from about 50 to 75 miles per hour according to Miss Santman who was watching the speedometer. The two girls asked appellant to slow down, and Miss Santman asked permission to get out of the car. Appellant said, "No, I am all right", and "didn't even slow down", or stop at any time between that point and the accident. Appellant's driving was described as lacking coordination.

Shortly thereafter, Miss Santman saw two blinking red lights on the tow car at the side of the road and screamed, "Smitty, stop, look out". Appellant, according to Miss Santman, "seemed to be paralyzed, he didn't say or do anything, he just held the wheel straight and at the very last second he swerved the car throwing the full force on my side of the car".

The right front of appellant's Ford then collided with the left rear of the tow truck, the latter having just pulled a Chevrolet out of the sand at the side of the road. After the accident the truck had its left wheel about a foot onto the concrete slab. The two blinking red lights on the tow truck were visible for a considerable distance and were seen by the driver of another car which was following the appellant's car. The blinking lights were also seen by the two girls and were not directly in front but towards the right side of the road. The weather was clear, the highway was dry, and there was no interfering traffic.

Appellant's statements made shortly after the accident are worth noting. The record discloses such statements to the effect that appellant did not see the tow truck or the red lights and didn't know "how he happened to hit it"; that appellant saw some lights but thought they were airplane beacons or lights on an oil derrick; that "he believed the tow truck was backing up on the highway * * * at the rate of about 20 miles an hour." All other witnesses testified that the truck was standing still at the side of the highway when hit.

Smith further stated that "he didn't put on the brakes because he was going so fast he was afraid he would turn over". Appellant asked the truck driver "where the red lights were and why the truck was on the highway", whereupon the driver pointed out the lights and stated that the lights had been burning all the time. The driver smelled "a whiff" of liquor on appellant's breath; Smith was also "pretty belligerent".

There was evidence that appellant's car hit the parked tow truck weighing some 7,000 pounds, with such force as to drive the tow truck forward about one truck length, badly damaging both the truck and the disabled Chevrolet which the tow truck was assisting. The impact of the collision threw Miss Santman's head through the windshield causing severe bodily injury. Approximately 100 sutures were required to sew up respondent's face and neck, and permanent scars will be left.

[1, 2] Consideration of the evidence above mentioned, and of other items of proof contained in the record, leaves no doubt that, whatever conflict of evidence may be present, there is substantial evidence in support of the verdict and judgment. Without regard for appellant's condition induced by drinking which the jury found did not amount to intoxication, there was evidence of erratic driving, of excessive speed (70–75 miles per hour) and refusal to slow down upon the passengers' request or to let respondent out. There was evidence that, notwithstanding the blinking red lights clearly visible to others, appellant drove directly into the tow truck, and did not apply the brakes. From such evidence the jury concluded that the appellant driver was guilty of wilful misconduct, defined in Hastings v. Serleto, 61 Cal.App.2d 672, 682, 143 P.2d 956, 960, as being present "if he intentionally does an act with wanton and reckless disregard of its possible result" and without regard for the safety of the passengers being carried.

[3] Whether or not the driver of an automobile has been guilty of wilful misconduct entailing liability for injury to a guest, depends, obviously, upon the peculiar facts of the particular case. While it is doubtless true, as appellant states, that speed alone does not necessarily amount to wilful misconduct, it is also true that excessive speed is an important element to be considered by the jury along with the other surrounding circumstances in arriving at a decision of this question of fact.

The present case, although in no manner identical as to facts, is not fundamentally different from Anderson v. Newkirch, 1950, 101 Cal.App.2d 171, 225 P.2d 247, 251, where defendant drove the car at a high rate of speed into the rear end of an automobile which, having a flat tire, had stopped on a bridge and in the outside lane. Affirming a judgment in favor of plaintiff, a guest, the reviewing court held that it was "not a case in which it may be said as a matter of law that the injury resulted, or that it did not result, from wilful misconduct of the driver", but was "more like that of Wright v. Sellers, 25 Cal.App. 2d 603, 78 P.2d 209, in which the court found the evidence sufficient to support the implied finding of wilful misconduct".

[4] The jury's special finding that Carol Santman was "in a situation where she reasonably could (not) by act or word have avoided the injury which befell her", was likewise supported by substantial evidence. There was evidence of Miss Santman's efforts to have someone else drive the car because of appellant's condition, of further efforts to have appellant slow up and stop, and of appellant's refusal of such requests which were answered by increased speed. Miss Santman had no other way of getting home.

Cases cited by appellant in which the injured passenger indulged in a drinking carousel are, of course, inapplicable since in the present case it is not contended that the respondent was under the influence of liquor. There was evidence that Miss Santman did not drink on the evening in question. Other cases mentioned in appellant's brief are concerned with factual situations entirely different from those here involved.

Appellant's contention that the trial court improperly commented upon the evidence is without merit. The jury was instructed that "such comment not only is not binding upon you, but it is your right and duty to decide for yourself the disputed questions of fact in this case". No prejudicial error was committed in reference thereto.

Complaint is also made in reference to instructions given and refused. It is appellant's position that a certain instruction as to negligence although "not wrong as far as it goes", is "not complete in the form given", and implies that "any conduct greater than a lack of ordinary care is wilful misconduct". Appellant also avers that "the court gave instructions, in legalistic language which we think no juror in the land would really understand, defining wilful misconduct".

[5] An examination of the instructions given and refused, and of the charge as a whole, fails to reveal any prejudicial error warranting a reversal. It is fundamental that instructions to a jury must be considered as an entirety, and that the merits of one instruction cannot be fairly appraised by lifting it from the context. The instructions were, of necessity, couched in "legalistic" terms, and various phases of the issues involved were necessarily treated in separate instructions. Criticism in this respect is without merit. The record discloses substantial evidence in support of the verdict and judgment, and no reversible error is apparent.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; EDMONDS, J., dissenting.

106 Cal.App.2d 358

KINGSLEY et al. v. CARROLL et al.

Civ. 3896.

District Court of Appeal, Fourth District, California.

Aug. 29, 1951.

Frieda Carroll Kingsley, and another, as administrators of the estate of Minnie P. Alguire, deceased, brought action against George M. Carroll, and another, to compel transfer and reconveyance of certain personal and real property which decedent had transferred and conveyed to defendant by a deed absolute in form. The Superior Court, Riverside County, O. K. Morton, J., entered judgment for defendants except as to one parcel, and defendants appealed. The Court of Appeal, Mussell, J., held, inter alia, that evidence did not support finding of trial court that defendant held the property in trust for decedent.

Reversed.

1. Appeal and error 🔑770(1)

Where respondents did not file brief, and record showed no excuse for failure to do so, court accepted statement of facts which appeared in appellants' opening brief. Rules on Appeal, rule 17(b).

2. Deeds 🔑17(1)

Services rendered by nephew, over period of 14 years, in caring for aunt's orange groves, and maintenance and repair of aunt's buildings, and investment of nephew's money in equipment, and gift of $500 to apply on mortgage, constituted sufficient consideration for conveyance of property to nephew.

3. Deeds 🔑208(1)

In action by administrators to compel nephew of decedent to reconvey property, finding of trial court that decedent did not intend to part with title when she delivered deed to nephew was not supported by evidence.

4. Trusts 🔑103(2)

Where grantor was of sound mind when she delivered deed, absolute in form, to nephew, without an express trust agreement, trust by operation of law did not arise in absence of fraud, undue influence, or abuse of confidential relationship.

5. Trusts 🔑103(1)

Mere proof of confidential relationship between grantor and grantee is not sufficient to establish a trust of property conveyed by deed absolute in form.

6. Trusts 🔑109

A conveyance by deed, absolute in terms, may be shown by oral testimony to have been made in trust, but evidence must be clear, satisfactory and convincing, and trust must have been created at time of execution of deed, unless deed was executed pursuant to previous trust agreement.

7. Trusts ⚷17(3)

The statute of frauds forbids creation of trust in real property by verbal declaration of owner.

8. Evidence ⚷271(15)

Declaration of grantor after conveyance cannot defeat the effect of a deed, absolute in terms.

9. Trusts ⚷110

In action by administrators against nephew to compel reconveyance of property which decedent had conveyed to nephew by deed absolute in form, statements allegedly made by nephew, which fact nephew denied, after conveyance that decedent owned the property in question were insufficient to support finding that decedent conveyed property in trust.

◆

Shaw & Roberts and Leo A. Deegan, Riverside, for appellants.

No appearance, for respondents.

MUSSELL, Justice.

This action was brought to compel the defendants to convey and transfer to plaintiffs, as administratrices, certain real and personal property situated in Riverside and Orange counties. The Riverside real property, consisting of 3 lots, is described in the complaint as parcels 1, 2 and 3. These lots and the personal property in the buildings thereon are not involved in this appeal. The real property described in the complaint as parcel 4 was situated at East Newport in Orange County and was referred to in the testimony as the "beach place" or "cottage". This property was conveyed to defendants, as joint tenants, by Minnie Alguire, by deed dated May 5, 1943. The deed was prepared by one Joseph Long of Security Title Insurance and Guaranty Company, acknowledged by him on May 18, 1943, and delivered to defendant George Carroll, who recorded it on July 1, 1943.

On November 10, 1933, the real property described as parcels 1, 2 and 3 was conveyed to defendant George Carroll by three deeds, executed and delivered by Minnie P. Alguire. On the same date she executed four bills of sale, by which she transferred to Carroll the furniture, furnishings and fixtures in the four buildings located upon this property. Mrs. Alguire died on May 17, 1944, and the present action was filed April 27, 1945.

The complaint sets forth five causes of action and contains allegations that Mrs. Alguire never made any valid delivery of the deeds to parcels 1, 2, 3 and 4 or of the bills of sale; that she never intended to part with her title to the property and that on May 10, 1944, defendants surreptitiously took said deeds and bills of sale from Mrs. Alguire and caused them to be recorded; that from January 1932 to May 14, 1944, defendant George Carroll was Mrs. Alguire's agent, partner and confidential adviser; that he abused his confidential relationship and unduly influenced Mrs. Alguire to make and execute the deeds and bills of sale in his favor; that from January 1933 to May 17, 1944, Mrs. Alguire was unable to transact any business without the guidance and suggestions of defendant George Carroll; that from May 1 to May 17, 1944, she was incompetent; that defendants gave no consideration for the deeds and bills of sale and that defendants have appropriated the personal property described in the bills of sale to their own use. The relief sought is a decree that defendants hold all of said real and personal property as trustees for the use and benefit of the estate of the decedent; that defendants be required to convey and transfer all of said property to plaintiffs and that an accounting be had.

The trial court found that defendants did not surreptitiously take any of the deeds from the possession of Mrs. Alguire; that the deeds were recorded with her knowledge, consent and at her special instance and request; that a confidential relationship did exist between Mrs. Alguire and defendant George Carroll; that defendant George Carroll did not take any undue advantage of or unduly influence

Mrs. Alguire to execute the deeds or bills of sale or any of them; that the deeds and bills of sale were not held by defendants in trust except as to the deed conveying parcel four; that Mrs. Alguire was not sick in mind and body as alleged in the complaint, but she was at all times fully competent and of sound mind, fully understood the nature of her property, her natural obligations to her relatives, and was thoroughly capable of transacting her business; that there was adequate consideration for all transfers of real and personal property made by Mrs. Alguire except as to the property described in parcel 4.

The specific findings as to parcel 4 were that on May 5, 1943, Minnie Alguire executed and delivered a deed to defendants describing parcel 4 and that the deed was recorded July 1, 1943; that Mrs. Alguire did not intend to part with her title to parcel 4; that she executed and delivered the deed thereto solely for the purpose of enabling the grantees to refinance said property for her use and benefit and that the deed to said property was held by defendants in trust for Mrs. Alguire.

The trial court gave judgment, in effect quieting title in defendant George Carroll to all of the real property described as parcels 1, 2 and 3, and the personal property covered by the bills of sale and that portion of the judgment has become final. We are here concerned only with the portion thereof affecting parcel 4. The court held that plaintiffs were entitled to said parcel 4 and ordered defendants to execute and deliver a deed thereto to plaintiffs.

The question presented is whether the findings and judgment as to the Orange county real property are supported by substantial evidence. We conclude that this question must be answered in the negative.

[1] Respondents have not filed a brief herein and no showing of excuse for the failure so to do appears in the record. We may therefore accept the statement of facts appearing in appellants' opening brief. Rules on Appeal, Rule 17, Subd. (b).

[2] It appears from the record that Mrs. Alguire acquired all of the real and personal property described in the complaint after the death of her husband in 1930. In 1933 she conveyed all her property except the Orange county place to her nephew, defendant George Carroll. From 1930 until his aunt's death in 1944, Carroll performed many services for her in connection with her orange groves. He did pruning, irrigating and tractor work and invested his money in tractors, spray rigs, cultivators and other equipment. In addition to the grove work, he spent considerable time in the maintenance and repair of the buildings on the decedent's property. The sole compensation received by Carroll for these services and equipment purchased was the conveyances to him of the property here involved. He testified that at the time the deeds and bills of sale to the Riverside property were delivered to him, Mrs. Alguire said "George, here are the deeds to all my property. Here are the bills of sale that will cover all the contents of all my buildings. This is yours in part payment for the labor you have done for me, and that I know you will do for me the rest of my life." The services rendered not only furnished adequate consideration for the 1933 transfers, as the court found, but also for the conveyance to Carroll and his wife of the "beach property". In this connection, the evidence shows that Carroll gave Mrs. Alguire $500 to apply on the trust deed and note on the beach property and after the deed was delivered to him, he borrowed $1,800 with which he satisfied the entire balance due. Under such circumstances there was sufficient consideration for the transfer of parcel 4. Holtze v. Holtze, 2 Cal.2d 566, 568, 42 P.2d 323.

[3, 4] The finding that Mrs. Alguire did not intend to part with title to parcel 4 is without evidentiary support. The record shows that in 1940 Mrs. Alguire negotiated a loan on parcel 4 in the sum of $2,000, and executed a trust deed thereon to one McDowell; that in July, 1943, she offered parcel 4 to her niece, Mrs. Winsler, and suggested that a deed be made out to be held by her until after Mrs. Alguire's death. This offer was not accepted by Mrs. Winsler; that early in 1943 Mrs. Alguire stated to defendant George Car-

roll that she had offered the property to Mrs. Winsler; that the offer was rejected and that it would be up to George Carroll to take the property or she would turn it over to Mr. McDowell for the mortgage he held on the place. The deed to Carroll of this property was absolute in form and no written conditions or declaration of trust appear therein. There is no evidence in the record of any request by Mrs. Alguire that this property was to be held in trust and no evidence of any express trust arrangement or agreement. There was no testimony that the defendants agreed to refinance the property or hold it in trust. The evidence was that Mrs. Alguire intended to let the property go to Mr. McDowell if the defendants did not take it. There is no finding of fraud, undue influence, abuse of confidential relationship or other conduct on the part of defendants from which an involuntary trust or trust by operation of law would arise. The court found that the defendants did not take any undue advantage or unduly influenced Mrs. Alguire to execute the deeds or bills of sale or any of them and that she was at all times of sound mind and fully competent. Under the circumstances shown by the record, no trust by operation of law was established. Sheehan v. Sullivan, 126 Cal. 189, 192, 193, 194, 58 P. 543.

[5–8] The court found that a relationship of trust and confidence existed between Mrs. Alguire and defendant George Carroll and this finding is supported by the evidence. However, mere proof of a confidential relationship between grantor and grantee is not sufficient to establish a trust. As was said in Sherman v. Sandell, 106 Cal. 373, 374–375, 39 P. 797, 798, "It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may, nevertheless, be shown that the lands are held by the grantee in trust, and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of such previous agreement. An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto. The statute of frauds forbids the creation of a trust in real property by simple verbal declarations of its owner, and a grantor cannot by any subsequent declarations defeat the effect of his deed. It is also well established that the evidence which will authorize a court to find that a conveyance of lands which is absolute in terms was in reality made upon a trust must be clear, satisfactory, and convincing; that the parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. Mahoney v. Bostwick, 96 Cal. [53] 58, 30 P. 1020 [31 Am.St.Rep. 175]; Ensign v. Ensign, 120 N.Y. [655] 656, 24 N.E. 942."

[9] Evidence was introduced by plaintiffs as to asserted statements made by George Carroll to the effect that Mrs. Alguire owned the beach property after conveying it to Carroll in 1943. Carroll denied making any such statements and if we assume that they were made, they are not sufficient to support a finding that Mrs. Alguire conveyed the property in trust.

The portion of the judgment appealed from is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.